

ANIMAL LAW CASE BOOK

Sophie Riley (ed)



The case book is dedicated to all our non-human evolutionary companions – those with whom we share the earth.

ANIMAL LAW CASE BOOK

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PREFACE

The idea for this book began from the learning experiences of students enrolled in a subject, “Animal Law and Policy” (Animal Law), at the University of Technology Sydney (UTS). The topic of animal law is comparatively new in Australia and this is reflected in the fact that no animal law case book is in publication for the Australian jurisdiction. In 2013, Sophie Riley and Geoffry Holland, the teachers of Animal Law, received a Vice-Chancellors Learning and Teaching Grant to compile a series of animal law case notes written by UTS students. In 2014, Sophie Riley was successful in winning a Voiceless Grant to enable the case notes to be edited and compiled into a book.

The initial Vice-Chancellors Learning and Teaching Grant project was informed by the UTS Model of Learning and Teaching, which consists of three core elements: practice-oriented education; education that is situated in a “global workplace”; and, learning that is motivated by research and/or inquiry. This model is also consistent with the law faculty graduate attributes including those that target practice-oriented learning and public service

The students were each asked to prepare three case notes. The case notes were to be written in a standardised format setting out the facts of the case, the issues, the decision, and also a brief reflection on the significance of the case. In order to target the development of communication skills, the students were also asked to write the case notes so that they would be understood by, and be useful to, lawyers and non-lawyers alike. The aim was to prepare a resource that would be freely available to all who have an interest in animal law.

From a pedagogical perspective, the preparation of the case book was a practical learning exercise designed not only to sharpen the students’ communication skills, but also, to encourage the students to think critically about animal law in a broader context. The latter was managed by the inclusion of a short reflection on the significance of each case. In addition, by taking part in this project, the students are making a practical contribution to the discipline of animal law, as well as engaging in the transfer of legal knowledge to the wider community. It is intended that the case book will be updated regularly.

As already noted, the project received support from a Vice-Chancellors Learning and Teaching Grant and a Voiceless Grant. However, this book would not have been possible without the help of many others, including:

- Geoffry Holland, one of the teachers in the Animal Law subject. Due to his other commitments he was not able to participate in the editing process for this edition, but will be available for subsequent editions.
- The NSW Young Lawyers Animal Law Committee for help with editing and providing suggestions for improvements on the structure of the book. In particular, Rebekah Lam, a member of the Committee, was instrumental in garnering support for the project.
- Emmanuel Giuffre, the legal counsel of Voiceless, the animal protection institute, for help with editing and making suggestions for improvements on the structure of the book.

- Frank Riley for help with editing, proof reading and providing a lay person's perspective on the intelligibility of the case notes.
- Ashleigh Best, a student at UTS for her assistance in single-handedly undertaking the enormous job of the final editing of this case book. Her attention to detail and dedication to the task was unprecedented.

The use of word “animal” in this book refers to nonhuman animals.

Finally, although the case notes have gone through a rigorous editing process, it is still likely that the book contains errors and omissions. It would be appreciated if readers could notify Sophie Riley of these, together with suggestions for improvement: Sophie.riley@uts.edu.au

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CHAPTER 1

DEFINING AN ANIMAL

The notion of what amounts to an “animal” in law is fraught with complexities. Legislation intended to prevent cruelty to animals may exclude certain species, or may otherwise be unclear as to what species are covered. In New South Wales for example, s 4 of the Prevention of Cruelty to Animals Act 1979 (NSW) defines an “animal” to include birds, fish, reptiles, mammals and amphibians; yet only includes crustaceans, such as lobsters, where they are being prepared or offered for retail sale. In essence, the law considers crustaceans as “animals” when they are being kept or prepared as food. This allows authorities to regulate matters such as conditions in holding tanks and preparation techniques, to ensure that crustaceans are humanely killed before cooking.

The two American cases in this Chapter, *Knox v Massachusetts Society for the Prevention of Cruelty to Animals* and *Lock v Falkenstine*, respectively explore whether anti-cruelty legislation targeting “animals” should extend to fish and gamecocks. In the Australian case of *Attorney-General (SA) v Bray*, the High Court of Australia had to determine whether stray animals could be included within the term, “domestic animal”. This was an important point as precedent already permitted a person to create a valid charitable trust for the care of domestic animals. If stray animals were not included within this term, the trust would not be valid, and stray or homeless animals would effectively be excluded from the benefit of such arrangements.

1.1 *Lock v Falkenstine* [1963] OK CR 32 380 P.2d 278 (Okla, Ct. Crim. App. 1963)

Prepared by Mansum Margaret Wong

Court

Oklahoma Court of Criminal Appeals

Facts

Lock and others, the appellants, appealed the decision of a lower court to proceed to trial against them for gamecock fighting and sought a stay of proceedings.

Title 21, O.S.A. & 1682 (Oklahoma Statutes Annotated) (‘the Act’) stated that “Every person who maliciously, or for any bet, stake, or reward, instigates or encourages any fight between animals, or instigates or encourages any animal to attack, bite, wound or worry another, is guilty of a misdemeanor.” The Attorney-General opposed the appeal, arguing that as gamecocks were animals they were covered by the Act.

Issue

- Whether gamecocks were classified as animals for the purpose of the Act

Decision and Reasons for the Decision

The stay of proceedings was granted.

The Court held:

biologically speaking, every living creature is presumed to be of the animal species... [and]... before the science of Biology was in existence, a distinction was made between living creatures in the Holy Scripture, and often referred to as beast of the field, fish of the sea, and fowls of the air.

The Court observed, however, that the matter depended on an interpretation of the relevant legislation. In *State v Stockton* (1958) 85 Ariz. 153, 333 P.2d 735, the Supreme Court of Arizona held that birds and fowls came within the definition of “animals” under Arizona law, rendering cockfighting illegal. However in *Ernst v Collins* (1956) 81 Ariz. 178, 302 P.2d 941, the Court was not able to conclude that the intention of the legislature was to include a gamecock as an animal, or to make it a criminal offence to conduct a cockfight.

In this case, the Court considered it relevant to determine whether a person with “ordinary intelligence” would consider a gamecock an animal. The Court also noted that an ordinary man might not analyse the issue in the same way as a judge or a scientist and that furthermore the person might have difficulty understanding the prohibitions under the Act. The Court held that it was not its role to interpret the law so as to create a list of animals, as the law does not seek to define animals in general, rather it stipulates certain species which come within the ambit of its provisions. The Court refrained from attempting to explain why the Act did not include a definition of “animal”.

Significance of the Case

This case exemplifies the limits of judicial intervention in animal protection. It also highlights the tendency of society’s attitude towards animals to change over time. In both these respects the case may be contrasted with the decision in *Knox v Massachusetts Society for the Prevention of Cruelty to Animals (et al)* (1981) Appeals Court of Massachusetts Plymouth 1981 12 Mass App Ct 407 425 NE 2D 393 that is discussed below in this chapter. The judge in *Lock v Falkenstine* was not prepared to find that the purpose of the legislation should give substance to the meaning of statutory terms. In essence, the Court found this to be a policy matter which would be more appropriately addressed by Parliament than the Judiciary. It is telling that in 1982, some two decades after this decision, the Oklahoma legislature added the words “with the exception of dogs” after “between animals” in the Act. This demonstrates that law-makers intended to include all animals, except dogs, within the ambit of the legislation. Significantly, in 2002, the Oklahoma legislature expressly banned cockfighting.

1.2 *Attorney-General (SA) v Bray (1964) 111CLR 402*

Prepared by Michael Croft

Court

High Court of Australia

Facts

The will of a testatrix directed her trustee (which was a trustee company):

1. To purchase and equip a home for the maintenance and care of, or otherwise for mercifully and kindly dealing with homeless, stray and unwanted animals; and
2. To invest the balance of her estate and apply the income for the permanent upkeep of the home.

The will also empowered the trustee to postpone execution of the trusts for as long as was necessary to accumulate sufficient funds to carry out the wishes of the testatrix. In addition, the will allowed the trustee to postpone realisation of the estate for as long as the trustee thought fit.

The trustee applied to the Supreme Court of South Australia to determine whether the trusts were valid and practicable. A charitable trust is a trust made for a purpose, as opposed to a trust made for nominated beneficiaries. In order for a charitable trust to be valid the court must find that was created for “charitable” purposes. Precedent already existed that permitted a person to create a valid charitable trust for the care of domestic animals. The issue in this case was whether this concept could extend to stray animals. If not, the trust under consideration would not be valid, and stray or homeless animals would effectively be excluded from the benefit of such arrangements. The Attorney-General and Bray, who represented the testatrix’s next of kin, were joined as defendants. Napier CJ ordered an inquiry regarding the trust’s practicability. The result of the investigation was that there were insufficient funds to carry out the trusts. The Court held that although the trusts were valid, they had failed, and ordered that the funds must be distributed according to the rules of intestacy.

The Attorney-General appealed to the Full Court, seeking an order that the funds be applied cy-pres. The doctrine of cy-pres would have allowed the Court to carry out the wishes of the testatrix as near as possible to the intention expressed in the will, even though literal compliance with the will may not have been possible. Bray cross-appealed, seeking a declaration that the trusts were invalid. If the trusts were invalid, the estate would go to the next of kin. The appeal was dismissed, and a further appeal was made to the High Court.

Issues

- Whether the trusts were valid charitable trusts
- Whether the trusts were practicable

- Whether the powers to postpone execution and realisation of the trusts rendered them invalid

Decision and Reasons for the Decision

The High Court held that the trusts were both valid and practicable, and that the powers to postpone execution and realisation did not render them invalid.

Whether the trusts were valid charitable trusts

The Court unanimously interpreted the words “homeless, stray and unwanted” animals as referring to domestic animals, that is, “such animals as are commonly kept and cared for in and about human habitations”. It was noted that English authority dictated that the care and protection of such animals is a valid charitable purpose. Kitto J (with whom Taylor and Menzies JJ agreed) cited the reasoning of Swinfen Eady LJ in *In re Wedgwood* [1915] 1 Ch 113, which was approved by the House of Lords in *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31: “A gift for the benefit and protection of animals tends to promote and encourage kindness towards them, to discourage cruelty, and to ameliorate the condition of the brute creation, and thus to stimulate humane and generous sentiments in man towards the lower animals, and by these means promote feelings of humanity and morality generally, repress brutality, and thus elevate the human race”. Thus, assuming practicability, the trusts were considered valid charitable trusts.

Whether the trusts were practicable

The Court recognised the test of practicability as encompassing a determination of whether, at the time of the testatrix’s death, it was either practicable to carry her intention into effect, or there was any reasonable prospect that it would be practicable to do so at any future time. On application, the Court held that it could not be demonstrated that the trusts were impracticable. Their practicability had been explored insufficiently, and the inquiry was based on erroneous assumptions. Dixon CJ construed the trust as regarding the establishment of the home as essential, therefore precluding the possibility of a cy-pres application without such a home. Kitto J, noting the absence of particularity as to the specifics of the intended home, recognised the force of the argument that the home was merely a potential means for serving the general charitable purpose. However, both he and Windeyer J ultimately considered it unnecessary to determine whether the establishment of a home was essential.

Whether the powers to postpone execution and realisation of the trusts rendered them invalid

The Court unanimously held that as the fund was given to charity immediately, the powers to postpone execution and realisation did not offend the rule against perpetuities. The rule against perpetuities limits a person’s ability to control their property forever after their death. Kitto J stated that the powers expressed in the will did not postpone the allocation of the estate to the charitable purpose; rather the powers were relevant to the acts that the trustee was under a duty to perform. Further, Windeyer J noted that the powers did not impose a condition precedent to the trust taking effect.

Significance of the Case

The significance of this case for animal law purposes lies in its examination of what defines “domestic animals”, and its affirmation that a trust for the care and protection of such animals can be a valid charitable trust. This last point is noteworthy because the general rule is that an express trust must be created either in favour of human beneficiaries, or for recognised charitable purposes. The reasoning of the High Court is also instructive because it reinforces the need for care and detail in drafting trusts involving animals. This is particularly important with respect to trusts intended to be created in favour of a specific animal, as might occur with companion animals. Where it cannot be established that the trust has been created for a purpose, the trust will be declared invalid. See also *Attorney General (NSW) v Donnelly* (1958) 98 CLR 538, 579.

1.3 *Knox v Massachusetts Society for the Prevention of Cruelty to Animals (et al)* (1981) Appeals Court of Massachusetts Plymouth 1981 12 Mass App Ct 407 425 NE 2D 393

Prepared by Brittany Kenaly

Court

Appeals Court of Massachusetts, Plymouth County

Facts

Knox, the appellant, ran a concession booth at a fairground. A “concession booth” is a stand or kiosk. Knox awarded live goldfish in plastic bags containing water as prizes in a game. MSPCA, the respondent, had argued that this conduct was contrary to s 80F of the Crimes Against Chastity, Morality, Decency and Good Order (‘the Order’). That section provided that: “No person shall offer or give away any live animal as a prize or an award in a game, contest or tournament involving skill or chance.” The word “animal” was not defined in the statute; however, it was initially held to include a goldfish, Knox was thus prevented from offering the goldfish as prizes.

Knox sought a court order to temporarily restrain enforcement of the provision against him. He was successful in this, which enabled him to continue to offer the goldfish as prizes. The MSPCA counterclaimed, seeking a declaration that the statute prohibited the offending conduct.

Issues

- Whether goldfish were classified as animals for the purposes of the Order
- Whether Knox was in breach of the Order

Decision and Reasons for the Decision

The appeal was dismissed.

Whether goldfish were classified as animals for the purposes of the Order

The Court found that goldfish were included in the term “animal” as the word commonly referred to “all irrational beings” (*Commonwealth v Turner*, 145 Mass. 296, 300 (1887)).

Whether Knox was in breach of the Order

With respect to whether or not the actions of Knox breached the legislation, the Court noted that the interpretation of the relevant provision depended on its objective and the mischief the legislators were trying to avert. As the provision was “designed to protect animals subject to possible neglect by prize winners” the Knox’s conduct was found to be a violation of the provision.

The Court held that animal ownership carries responsibilities and that giving an animal as a prize does not take these responsibilities into account, especially when care instructions are not provided. In this case, Knox had no regard to whether the recipients of the goldfish could care for the animals and adequately meet their needs. The Court emphasised that “These statutes are directed against acts which may be thought to have a tendency to dull humanitarian feelings and to corrupt the morals of those who observe or have knowledge of those acts” (*Commonwealth v Higgins*, 277 Mass. 191, 194 (1931)).

Significance of the Case

The case offers valuable guidance in construing the word “animal”. The Court examined the purpose of the legislation to determine that “animal” can include a goldfish, despite the legislative silence on the definition of this term. In addition, the Court held that “ownership” of an animal imposes obligations to provide appropriate care for that animal.

CHAPTER 2

ANIMALS AS PROPERTY

To many who argue in favour of animal rights, the fact that animals are categorised as “property” represents one of the major stumbling blocks to improving their treatment. An alternative to animal rights is the welfare paradigm that seeks to balance human and animal interests by preventing unnecessary suffering to animals. This is a utilitarian approach that is underscored by the variety of uses that humans have for animals, such as for food, clothing, entertainment, research and companionship. Arguably, this predisposes human interests to take precedence over animal suffering.

This Chapter of the casebook provides examples of how the law regards animals as “property”. The consequences of this paradigm are further explored in subsequent Chapters that deal with legal disputes from the areas of family law, contracts and torts.

2.1 *Stephens v State* (1888) 65 Miss 329

Prepared by Paul Khodor

Court

Supreme Court of Mississippi

Facts

Several hogs trespassed onto the property of Stephens, the appellant. Stephens attempted to remove the hogs, but was unsuccessful. As a result he shot and killed four of the hogs, two of whom were the property of his neighbour. Stephens was charged with a breach of the Miss. Code Chapter 77 s 2918 (Rev. ed. 1880) (‘the Code’) which provided: “Any one who shall cruelly beat, abuse, starve, torture or purposely injure any horse, ox, or other animal, belonging to himself or another, shall be punished...”

Issues

- Whether Stephens, by shooting the trespassing hogs, breached s 2918 of the Code

Decision and Reasons for the Decision

At the original trial Stephens was found guilty. He appealed and on appeal the conviction was quashed and the decision of the trial judge overturned. The Supreme Court of Mississippi held that the key to determining guilt under the relevant section was to inquire into the motive of the action. Accordingly, the accused could not be convicted unless he had acted with a spirit of cruelty, or to inflict unnecessary pain or suffering on the animals. The presiding judge, Justice Arnold, outlined that the statute was intended to protect animals from cruelty. It was found that the legal test for determining whether the action was criminal hinged on the defendant’s “motive” which must have been “actuated by a spirit of cruelty”. His Honour found that as Stephens’ motive for the shooting was the protection of his crops, he had not violated the statute.

Justice Arnold also noted that the property status of the hogs was not relevant for the purpose of indictment under the Code (a criminal offence). Thus, liability, if any, for trespass arising out of the killing of the hogs could only be pursued by their owner in a civil suit, where ownership of the hogs, and their status as property would have been critical to the success of a suit.

Justice Arnold also discussed the value of laws which seek protection of “dumb brutes”. By observing that the “common law recognised no rights in animals and punished no cruelty to them, except in so far as it affected the rights of individuals to such property” he expressed a deep admiration for statutes that remedy this defect “in the spirit of... Divine law”. He continued by suggesting that the dominion of man over animals creates “moral trust”, vesting humans with the responsibility to treat vulnerable animals justly.

Significance of the Case

The case demonstrates how the law frequently recognises animal interests only insofar as they are consistent with human interests. The Court indicated that it was gratuitous cruelty, committed without reason and with vicious intent that would be unlawful; this being conduct commonly destructive to human morality and animal welfare. However, as Stephens had inflicted cruelty upon the animals to protect his property, a conflict arose between human economic interests and animal interests, with human interests prevailing. Despite Justice Arnold’s discussion of the obligation upon humans to prevent harm to animals, the law’s subordination of animal interests to economic concerns dilutes the ability of anti-cruelty law to deliver this protection.

2.2 *Elder Smith Goldsbrough Mort Ltd v McBride* [1976] 2 NSWLR 631

Prepared by Ashleigh Best

Court

Supreme Court of New South Wales

Facts

The vendors reared cattle studs, selling them both privately and at auction. At the 1970 Royal Easter Show, they displayed a bull named Midgeon Supreme. Elder Smith the plaintiff and auctioneer employed by the vendors, informed McBride, the ultimate purchaser and defendant, that he believed Midgeon Supreme to be the best bull at the show. On the 24 March 1970, McBride purchased Midgeon Supreme for \$21,000. The contract for sale included an exclusion clause: it stated that the bulls, having been made available for inspection, would be purchased with all faults, and the vendors would not be liable in this respect.

The circumstances surrounding the purchase made it clear that Elder Smith and the vendors intended to sell a stud bull, that the bull would be used for breeding and that McBride purchased the bull with the intention of using it for breeding. On 15 April 1970, the bull serviced three cows, but failed to impregnate any of them. The following month,

a veterinary surgeon assessed the bull's semen, discovering that it was of poor quality. Another veterinary surgeon was consulted and noted that the bull had suffered severe testicular degeneration since April or May 1970 and that it was likely to be permanently sterile.

The catalogue contained an exclusion clause that stated that as the bulls had been made available for inspection, they were to be purchased with any defects. The exclusion clause operated to prevent the vendors from being liable for any faults in the bulls they sold which had been inspected by purchasers.

Elder Smith brought an action against McBride to recover the amount to which he was entitled from the sale of the bull. McBride then brought third party proceedings against the vendors, seeking indemnity in the form of compensation for any losses to be incurred from Elder Smith's claim.

Issues

- Whether Elder Smith was entitled to claim the purchase price of the bull in accordance with the contract. This was to be decided in light of McBride's arguments that: McBride did not receive the value in the bull provided for in the contract; Elder Smith was negligent in advising McBride that the bull was suitable for the purposes of reproduction; and that the unsuitability of the bull for such purposes amounted to a breach of contract
- Whether the sale of an infertile bull to McBride amounted to a breach of contract between McBride and the vendors
- Whether the exclusion clause included in the contract prevented the vendors from being liable for the defect

Decision and Reasons for the Decision

The Court held that Elder Smith was entitled to assume the Bull's fertility.

However, Sheppard J also held that as a matter of fact, based on the evidence, the bull was infertile at the time of sale and the purchaser had bought a "breeding bull".

Whether the plaintiff was entitled to claim the purchase price of the bull

With respect to the first issue, Sheppard J found that Elder Smith was entitled to assume the Bull's fertility and to treat him as a breeding bull.

Whether the sale of an infertile bull to the defendant amounted to a breach of contract

With respect to the second issue, Sheppard J held that the vendors had breached the contract. Sheppard J established that each of the parties intended to contract for a "stud breeding bull." The fact that any inspection of the bull would not have exposed its infertility, combined with the circumstances which suggested that the bulls for sale were suitable for breeding purposes, satisfied Sheppard J that the bull had been sold by the description that he was a breeding bull. Therefore, by the operation of s 18 of the Sale of

Goods Act 1923 (NSW), the contract contained an implied condition that the goods would correspond with their description, and as such, delivery of a sterile bull rather than a breeding bull amounted to a breach of this condition.

The effect of the exclusion clause

In relation to the third issue, Sheppard J interpreted the exclusion clause contained in the catalogue so as to release the vendors from liability only in respect of faults which could be detected upon inspection. As the bull's infertility could not be detected on a visual inspection, the vendors remained in breach of contract. Sheppard J consequently ordered that McBride was entitled to receive the sum paid for the bull as a breeding bull, less his actual value for the purposes of slaughter; the award of damages amounted to \$20,500.

Significance of the Case

This case provides another example of how the law considers animals to be items of personal property. Consumer protection legislation, such as the Sale of Goods Act 1923 (NSW), accordingly applies to transactions involving animals. In this way, the case also demonstrates the law's recognition that animals can be valued in monetary terms. Such value may be determined by the animals' innate capabilities, or by the income they are able to generate.

Additionally, the case highlights the breadth of rights attaching to animal ownership. Although the bull was bought for breeding purposes, it was permissible for him to be sent to slaughter.

2.3 Saltoon v Lake and Others [1978] 1 NSWLR 52

Prepared by Vuu-Cindy Dang

Court

Supreme Court of New South Wales

Facts

Saltoon, the plaintiff and respondent, lent \$20 000 to Scali, which was secured by a mortgage over four horses, one being Mighty Khan. The security agreement was contained in a deed dated the 5th August 1975. In this, Scali assigned Mighty Khan to Saltoon subject to the condition that he or she would be reassigned to Scali upon the repayment of the principle sum and interest, as well as the fulfilment of all covenants, conditions and agreements provided for by the deed. The deed stipulated that the mortgagor, being Scali, would assume responsibility for the care of the horse.

At the time of the mortgage agreement, Mighty Khan was being trained by Lake, a defendant and appellant. While a letter was supposed to be sent to Lake to notify him of the mortgage over the horse, this was never received. The judge at first instance accepted that before proceedings commenced, the defendants were unaware of the mortgage.

After several transactions which took place between the conclusion of the mortgage agreement and the proceedings being initiated, the first, second and third defendants had acquired Scali's interest in Mighty Khan. The fourth defendant, being Lake, had possession of the horse.

Scali then went bankrupt.

Issues

- Whether the failure to register the deed as a stock mortgage rendered it void by virtue of s 13 of the Liens on Crops and Wool and Stock Mortgages Act 1898 (NSW)
- Whether the deed of mortgage was invalid as an unregistered bill of sale under s 5(1) of the Bills of Sale Act 1898 (NSW)
- Whether Saltoon's conduct was such that the defendants' interests should take priority over his
- Whether s 26(1) of the Sale of Goods Act 1923 (NSW) applied

Decision and Reasons for Decision

The Court dismissed the appeal.

Failure to register the deed as a stock mortgage

The first submission was that as the deed was not registered as a stock mortgage, it was void in accordance with s 13 of the Liens on Crops and Wool and Stock Mortgages Act 1898 (NSW). The Court determined that the purpose of the Act was to facilitate the mortgage of stock, and also eliminating invalidity caused by mortgagor bankruptcy and fraud. Based on the interpretation of the legislation, the Court rejected the submission that a failure to register the stock mortgage wholly invalidated it.

Effect of the mortgage

The second submission was that s 5(1) of the Bills of Sale Act 1898 (NSW) rendered the plaintiff's mortgage void upon Scali's bankruptcy. It was accepted that the unregistered stock mortgage was a bill of sale. However, the Court held that s 5(1) operated to invalidate an unregistered bill of sale where necessary to facilitate the Official Receiver's recovery of property in the event of bankruptcy. It did not result in the comprehensive invalidity of the bill of sale. As such, the second submission failed.

Whether others should take priority

The third submission was that the conduct of Saltoon was such that the Court should give priority to the interests of the first, second, and third defendants over him. It was claimed that Saltoon had participated in a fraud; however, the Court held that this had not been established with evidence. It was also found that Saltoon's failure to take possession of the certificate of registration with the Australian Jockey Club upon acquiring the

mortgage did not disentitle him of the benefit of his security.
Application of the Sale of Goods Act 1923 (NSW)

The Court held that equitable rules relating to mortgage priorities operate independently of s 26(1) of the Sale of Goods Act 1923 (NSW). While the defendants could have made a claim based on this section in an attempt to establish their title to the horse, they did not argue this.

Significance of the Case

This case affirms the property status of animals under Australian law. It demonstrates how the law's characterisation of animals in this way allows them to be used for an array of purposes, including as security for a mortgage agreement.

2.4 Desanctis v Pritchard 803 A. 2d 230, PA Super 221 (2002)

Prepared by Jennifer Hird

Court

Superior Court of Pennsylvania

Facts

Desanctis, the appellant and the former husband of Pritchard, the respondent, sought injunctive relief with regard to a dog, named Barney, acquired during their marriage. In August 2000, a month prior to their divorce, Desanctis and Pritchard entered into an apparent settlement providing for the care of Barney. The agreement stated that Pritchard was to have full custody of Barney, whilst Desanctis had visitation rights. The agreement was not incorporated into the divorce decree.

In March 2001, Pritchard moved house and Desanctis was no longer able to visit Barney. In May 2001, Desanctis filed a complaint in equity requesting the trial court to:

- 1) Grant injunctive relief to require "shared custody" of Barney;
- 2) Declare the respondent in breach of the agreement;
- 3) Amend the agreement to provide for "shared custody"; and,
- 4) Award reasonable legal costs.

In June 2001, the respondent filed preliminary objections to the complaint.

The trial judge, Mahon J, dismissed the appellant's complaint finding that the terms of the agreement were clear and unambiguous. The respondent held exclusive ownership of Barney and his social schedule. Desanctis appealed to the Superior Court of Pennsylvania.

Issues

- Whether the trial judge erred in disregarding s 3105 of Title 23 ('the Code') and improperly concluding that ss 3503 and 3504 of that Code terminated Desanctis' rights regarding Barney

Decision and Reasons for the Decision

On appeal, Montemuro J affirmed the trial judge's order and dismissed the appeal.

Under Pennsylvania law the legal status of a dog is “personal property” (*Price v Brown* 545 Pa. 216, 680 A.2d 1149, 1153 n.3 (1996)). Accordingly, Desanctis' request for “shared custody” of Barney was contrary to the intention of s 3105 of the Code, under which the action was bought. That section allowed for enforcement of an agreement between the parties as if it were an order of the Court, unless the agreement provided otherwise. The court held that those parts of the parties' agreement that attempted to create custodial or visitation rights over personal property were void. Instead, the Court found that the parties' agreement effectively acknowledged that Barney belonged exclusively to Pritchard.

One issue before the appellate Court was whether the trial judge could have exercised discretion to enforce the agreement, as this was permitted pursuant to s 3105. Montemuro J emphasised that the trial Judge was correct in not exercising discretion, as the terms of the agreement relating to custodial or visitation rights were void. In affirming the decision of the trial court, Montemuro J relied on ss 3503 and 3504 of the Code that deal with property rights following a divorce, as well as Barney's classification as property under Pennsylvanian law.

Significance of the Case

This case highlights the way in which the property status of animals is relevant across a range of legal areas, including family law. The fact that the parties had attempted to arrange shared custody of Barney suggests that they had an emotional relationship with him, illustrating the unsuitability of the law's conceptualisation of Barney as property.

2.5 *Nakhuda v Story Book Farm Primate Sanctuary* [2013] ONSC 5761 (13 September 2013)

Prepared by Ashleigh Best

Court

Ontario Superior Court of Justice

Facts

Nakhuda, the plaintiff, who was a lawyer and resident of Toronto, purchased an illegally-imported monkey from an exotic animal supplier for \$5000. A bylaw of the City of Toronto Municipal Code prohibited a monkey from being kept within the city. On the day in question, Nakhuda's monkey accompanied her to a shopping centre and remained in Nakhuda's car locked inside a crate. While Nakhuda was away from the car, the monkey escaped and entered the shopping centre. The monkey was collected by Toronto Animal

Services (TAS). When Nakhuda arrived at TAS to reclaim the monkey, she signed a form which provided for the transfer of ownership of the monkey to the City of Toronto.

Tests were performed to ensure that the monkey was not infected with any diseases, particularly Hepatitis B. The monkey was then adopted by Story Book Farm Primate Sanctuary, the defendant.

Issues

- Whether Nakhuda was the owner of the monkey given his status as a wild animal and the fact that she had lost possession of him
- Whether Nakhuda had surrendered ownership by signing the form at TAS

Decision and Reasons for Decision

Whether Nakhuda was the owner of the monkey

Vallee J found that, in accordance with common law principles relating to the ownership of wild animals, Nakhuda lost ownership of the monkey when she lost custody of him. The monkey was therefore held to be the property of Story Book Farm Primate Sanctuary and the action by Nakhuda to recover the monkey was dismissed.

First, Vallee J noted that as “the monkey is... a piece of property”, property law should be applied to determine the ownership of the monkey. Second, her Honour referred to the common law principles relating to the ownership of wild animals as recognised in *Campbell v Hedley* (1917) 37 DLR 289. According to this case, wild animals are “wild by nature because of habit, mode of life or natural instinct, are incapable of being completely domesticated and require the exercise of art, force or skill to keep them in subjection.” The phrase “wild animal” thus refers to “the nature of an animal, rather than how it is treated”. In light of the inability of the species to become house-trained, Vallee J was satisfied that the monkey was a wild animal. As “wild animals are owned only while they are possessed”, Nakhuda ceased to be the monkey’s owner as soon as he escaped her custody.

Vallee J noted that if an owner could demonstrate that a wild animal has a habit of returning home, this fact could provide an owner with “a greater ownership interest in the animal once it had escaped”. However, in this case, there was no evidence to suggest that the monkey had such a habit, as he had never previously escaped Nakhuda’s possession. Moreover, as the monkey had not been stolen, the doctrine of immediate pursuit, which would prioritise an owner’s rights in the animal over the possessory rights of a thief, did not apply.

Vallee J found that as the Canadian environment could not support the natural habitat of the monkey, there was no requirement in these circumstances that the monkey “regain its natural liberty” before ownership was lost. Her Honour also found that the contents of the Toronto bylaw were different from common law principles relating to ownership of wild animals. As such, it was not necessary that the bylaw applied to the exclusion of the common law, instead both could operate.

Although Vallee J conclusively decided that Nakhuda lost ownership when she lost possession of the monkey in accordance with the common law principles, her Honour also responded to the other arguments raised.

Vallee J rejected Nakhuda's submission that the monkey was a gift. Her Honour found that although the exotic animal supplier was prepared to refund Nakhuda after she was dispossessed of the monkey, the original payment had still been made.

Whether Nakhuda surrendered ownership by signing the TAS form

Vallee J dismissed Nakhuda's submission that she was unduly influenced when signing the form. It was held that Nakhuda did understand that signing the TAS form had the effect of transferring ownership of the monkey to the City of Toronto. This was particularly the case, given Nakhuda's her legal training. Her Honour also affirmed that TAS was entitled to detain the monkey in accordance with the "protective custody provisions" within the bylaw, regardless of whether or not the form was signed by Nakhuda.

Significance of the Case

This case illustrates how the law provides for the ownership of animals as items of personal property. It also demonstrates the inflexibility which flows from the property status of animals; although Nakhuda only lost custody of the monkey for a brief period of time, this was sufficient to prevent her recovery of the monkey permanently. The law's focus upon the monkey's species rather than his circumstances in determining his status as domestic or wild is also an upshot of its characterisation of animals as property, as this eliminates consideration of the animal's adaptability, preferences and sentience.

CHAPTER 3

PROCEDURAL MATTERS: STANDING

As with other parts of the law, litigation involving animal matters generates a plethora of procedural issues. Some of these, such as standing, are closely linked to the status of animals as property. Standing refers to the right of a person to bring and defend a court case. Due to the fact that animals are classified as property, they lack standing and are thus unable to initiate or defend court cases. Consequently, one difficult issue is whether a person can bring or defend an action on behalf of an animal.

In many jurisdictions, including Australia, standing in animal cases relies on common law rules derived from case law that require evidence of a “special interest” on the part of the plaintiff. The decisions in this Chapter demonstrate the difficulties that courts face when trying to determine whether interest groups have a sufficient “special interest” to allow them to litigate. In the United States, the courts have developed doctrines, based on “injury” and “zone of interests” to be protected under statute, that facilitates granting standing. The cases are particularly instructive for animal welfare and animal rights groups who wish to structure their organisations on the best possible footing to gain standing.

3.1 Australian Conservation Foundation Inc v Commonwealth (1980) **146 CLR 493**

Prepared by Ashleigh Best

Court

High Court of Australia

Facts

The Australian Conservation Foundation Inc (‘ACF’), the appellant, brought action against the Commonwealth of Australia, Ministers of State and the Reserve Bank (‘Commonwealth’), the respondents, alleging that the approval granted to a corporation for the development of a resort and tourist facility in central Queensland was invalid. In early 1978, the corporation initiating the development was instructed by the Commonwealth to prepare a draft environmental impact statement in accordance with the administrative procedures under the Environment Protection (Impact of Proposals) Act 1974 (Cth), (‘the Act’), which was made available for public comment. The ACF lodged a valid submission concerning the proposal within the time frame for public comment.

Some days later, the Acting Minister for the Environment announced that approval had been granted for either the acquisition of overseas funds for the development or the development of the resort and tourist facility itself. The ACF sought declarations and injunctions in the High Court of Australia to nullify the approval. The claim was based principally on the ground that the Commonwealth had reached its decision without regard to the final environmental impact statement, and therefore failed to observe required administrative procedures. The Commonwealth sought to have the claim struck out on the basis that the ACF lacked standing to bring the action.

Issue

- Whether the ACF had standing to enforce a public right

Decision and Reasons for Decision

A majority of the Full Court, agreeing with the decision of Aickin J at trial, held that the ACF did not have the necessary standing to maintain the action. Principally, this determination was based on the fact that the Minister's grant of approval did not expose the ACF to special damage or injure a special interest of the appellant.

In relation to standing generally, the Court emphasised that "apart from cases of constitutional validity", a member of the public with the same interest as everyone else "has no standing to sue to prevent the violation of a public right". While this was deemed the ordinary position, the Court explored various circumstances in which standing would be available for the enforcement of such a right.

Gibbs J noted that the enforcement of public rights by way of declarations and injunctions is the "responsibility of the Attorney-General" who, unlike in this case, may bring a related action on behalf of a member of the public who would not ordinarily have standing.

Stephen J and Gibbs J affirmed the capacity of legislation to grant standing for the enforcement of public rights. Stephen J rejected the contention that the legislation, by permitting and governing public contribution to environmental impact statements, had the effect of granting standing to the ACF as a participant in the process and, rather, found that the role of the ACF was limited to providing comments.

The Court referred to the English case of *Boyce v Paddington Borough Council* [1903] 1 Ch 109, which established that standing to enforce a public right may be available independently of the Attorney-General only where a private right is "at the same time interfered with", or a plaintiff "suffers special damage" as a consequence of the public right being infringed. The Court found that the ACF was not asserting a private right, but rather a "public wrong". Accordingly, while the ACF had been set up with the objective of promoting environmental protection, Stephen J was not satisfied that conduct "injurious to the object of that concern" namely, the construction of the resort and tourist facility, would cause special damage so as to vest the ACF with standing.

Gibbs J reformulated the special damage limb of the *Boyce* test to extend standing to a plaintiff in circumstances where they have a "special interest in the subject matter of an action". While conceding that "a person might have a special interest in the preservation of a particular environment", Gibbs J indicated that "an interest... does not mean a mere intellectual or emotional concern" and that there must be an advantage to be gained "other than the satisfaction of righting a wrong, upholding a principle or winning a contest", deeming the appellant's motivation inadequate. He also noted that a corporation "does not acquire standing because some of its members possess it". By reducing the appellant's cause to nothing more than a "belief", Gibbs J found against the presence of a special interest, and thus held that the appellant lacked standing to bring the action.

Mason J affirmed that a person will have standing provided they can demonstrate “actual or apprehended injury” to his or her “property or proprietary rights... business or economic interests and perhaps...social or political interests”. However, Mason J found that the “mere belief or concern” held by the ACF and the fact that its “primary object is to protect...the environment, by virtue of that characteristic alone” were inadequate to vest the ACF with standing.

Murphy J, in dissent, concluded that by inviting public contribution to the environmental impact statement, the Act disclosed an intention to grant members of the public the standing required to enforce the procedures under it. Murphy J also found that the appellant had a special interest, being “more particularly affected as [the appellant] has gone to the trouble of submitting comments”.

Significance of the Case

A party seeking to bring an action in respect of a public right must identify a special interest in the subject matter of the case. Intellectual or emotional concern by itself will not constitute a special interest, nor will a mere belief. The fact that a corporation is underpinned by certain objects does not provide that corporation with a special interest, and thus standing, to take action against conduct which harms those objects.

Although this case concerned environmental protection, rather than animal welfare, much of the reasoning can be applied to animal welfare issues. Indeed, as the cases of *Animal Liberation Ltd v Department of Environment and Conservation* [2007] NSWSC 221 and *Animal Lovers Volunteer Association v Weinberger* (1985) 765 F.2d 937 (9th Cir. 1985) demonstrate, such reasoning has already been applied to animal cases. It is also noteworthy, that in a later case, *Australian Conservation Foundation v Minister for Resources* (1989) 76 LGRA 200, the ACF was found to have standing in accordance with legislation that gave standing to “a person aggrieved”. The Court found that the ACF was the most important national conservation organisation and its objectives and activities were such to classify it as “a person aggrieved”. The later decision reflects an expansion in the test for standing in public interest matters at common law, as well as the breadth of the statutory test imposed under the Administrative Decisions (Judicial Review) Act 1977 (Cth).

3.2 *Animal Lovers Volunteer Association v Weinberger* (1985) 765 F.2d 937 (9th Cir. 1985)

Prepared by Paul Khodor

Court

United States Court of Appeals, Ninth Circuit

Facts

In 1977, the Fish and Wildlife Service of the Department of the Interior determined in accordance with the Endangered Species Act, 16 U.S.C. s 1531, that the removal of feral goats on San Clemente island was required to protect local endangered or threatened

animals and plants in critical habitat. San Clemente is a military enclave under the jurisdiction of the Navy and there is no public access to the island.

The Navy proposed an “aerial eradication” program involving Navy marksmen shooting the goats from helicopters, which attracted opposition from animal protection groups. However, the Navy had limited success with alternative methods, such as trapping and removing live goats from the island. Accordingly, the Navy announced its intention to proceed with the aerial eradication.

Animal Lovers Volunteer Association (‘ALVA’), the plaintiff, sought injunctive relief on the basis that the environmental impact statement prepared by the Navy was so inadequate as to violate the National Environmental Policy Act 42 USC ss 4321, 4332 (‘NEPA’). The substance of these contentions is not set out in the case because the Court decided the matter on the basis of standing. The District Court granted judgment in favour of the Navy and the ALVA appealed.

Issue

- Whether ALVA had standing to seek the remedy sought

Decision and Reasons for Decision

The Court held that ALVA lacked standing to maintain a NEPA suit challenging the Navy's goat eradication program. The Court clarified that while they were not excluding everyone from bringing proceedings against the Navy to prevent it from violating the NEPA, in the relevant circumstances, ALVA could not maintain its action as it lacked standing. The Court accordingly dispensed with any consideration of the merits of ALVA's litigation.

The Court stressed that a party seeking injunctive relief against another person's actions must satisfy two conditions in order to acquire standing. First, there must be an “injury in fact” arising from the action. Second, there is a requirement that the injury be “arguably within the zone of interests to be protected” by law.

In relation to the first requirement, the Court held that a mere assertion of organisational interest in a problem, unaccompanied by allegations of actual injury to members of the organisation, is not adequate to establish standing. In this particular case, the Court emphasised that a general contention based on the distress ALVA members would suffer was insufficient to establish individual injury. The Court reached this conclusion notwithstanding the fact that ALVA is dedicated to preventing inhumane treatment of animals and aerial culling was alleged to amount to cruelty.

Furthermore, the distress of ALVA members was held not to be the type of interest protected by NEPA. Their Honours cited *Metropolitan Edison Co. v People Against Nuclear Energy* 460 US 132 (1984) as authority for the proposition that the NEPA zone of interests does not cover persons claiming a psychological impact from a particular action. The Court recognised one possible exception, that is, where psychological injury results from a “direct sensory change”. This type of impact is one that unequivocally impacts on a person. Examples include, a person picking up on a distasteful smell, or objecting to events and matters that person could see in their environment. However, as

the property in question was private, ALVA had no access to it; no sensory impact was therefore possible.

The Court further found ALVA had not differentiated its interest in the matter from the general objection that may be felt by members of the public concerned with animal cruelty. This differentiation formed the core requirement of standing. The Court reached this conclusion largely based on ALVA's lack of longevity and demonstrated commitment to similar causes. In particular, ALVA had no prior activity preceding the litigation, and could not identify any other initiatives illustrative of its concern. As a result, it was held that neither ALVA as an organisation, nor its members, had a stake in the outcome of the case.

Significance of the Case

This case demonstrates how animal protection groups must be able to establish a unique interest in litigation in order to be granted standing in respect of it. Despite refusing to extend such standing in this matter, the Court's identification of the deficiencies in ALVA's claim was accompanied by examples of circumstances that may have produced a different result. Animal protection groups seeking standing may rely upon these. The Court also emphasised that a denial of standing for ALVA did not operate to prevent others from bringing an action against the Navy.

This case further demonstrates a reluctance of the Court to grant standing to ad-hoc animal advocacy groups, unless the group demonstrates an injury which is "distinct and palpable" and not "abstract" (*Allen v Wright*, 82 L.Ed.2d 556 (1984)). In Australia, the New South Wales Supreme Court applied similar reasoning in the case of *Animal Liberation Ltd v Department of Environment and Conservation* [2007] NSWSC 221.

3.3 Japan Whaling Association v American Cetacean Society 478 US 221 (1986)

Prepared by Brittany Kenaly

Court

United States Supreme Court

Facts

The United States and Japan were signatories of the International Convention for the Regulation of Whaling ('ICRW'). The ICRW was originally formed to set whaling quotas to manage the whaling industry. It established the International Whaling Commission ('IWC') to accomplish the ICRW's objectives by making the IWC responsible for implementing strategies. In 1982 the IWC ordered a five-year moratorium on all commercial whaling, to commence with the 1985-1986 season. This measure was binding on all ICRW member nations unless a nation lodged a timely objection to exempt itself from compliance. The IWC had no power to enforce its measures or to impose sanctions for non-compliance.

In an effort to remedy the IWC's enforcement deficiencies, the US enacted the Pelly and Packwood Amendments ('the Amendments'). These enabled the US to certify, and thereby impose sanctions, upon states whose nationals conducted fishing operations in such a way as to diminish the effectiveness of a program, such as that established pursuant to the ICRW. Sanctions were to be applied "in the case of flagrant violation of any international fishery conservation program to which the United States committed itself."

In 1984, the United States and Japan negotiated and reached an executive agreement under which Japan agreed to restrict its whaling and to achieve a total cessation of whaling by 1988. In exchange, the United States agreed to refrain from certifying Japan under the Amendments, insulating Japan against sanctions. The Secretary of Commerce deemed a compromise with Japan would more beneficial in the long-term to the conservation of whales. A consortium of conservation groups brought District Court actions seeking a writ of mandamus to compel the Secretary of Commerce to enforce the Amendments in order to induce Japan's adherence to the moratorium.

Issues

- Whether the claim was justiciable, meaning whether it was an appropriate claim for determination by a court
- Whether the Amendments required the Secretary to certify Japan for its failure to comply with the IWC whaling restrictions
- Whether the legislative history of the Amendments required the Secretary to certify Japan for its failure to comply with the IWC whaling restrictions

Decision and Reasons for the Decision

The Supreme Court found that the Secretary was authorised to determine whether a state's whaling activities diminished the effectiveness of the IWC, and that it was open to the Secretary to find that Japan's violation of the whaling restrictions did not fail that standard.

Justiciability

The Court found that it was competent to engage in judicial review of the matter, since not every political issue concerning foreign relations lies beyond the adjudicative reach of the courts. The judiciary has the authority to construe treaties and executive agreements, and to interpret congressional legislation; as the duty of the Secretary was expressed in the Amendments, the question of its content could be resolved by the Court using rules of statutory interpretation.

Presence of a requirement to certify

In respect of the claim that the Amendments required the Secretary to certify Japan for failing to adhere to the whaling quotas, the Court observed that the duty involved the

certification of states where their operations diminished the effectiveness of the ICRW. It held that such a duty was distinguishable from a duty to certify the deliberate taking of whales. As the legislation permitted the Secretary to refrain from certifying a state which failed to conform to the whaling restrictions, it was open to the Secretary to determine that it would be more effective to conclude the executive agreement than to certify Japan.

The relevant legislative history

The Court also found that the legislative history of the amendments did not support a conclusion that the Secretary was required to certify every breach of the IWC limits on whaling. Nothing in the Senate and House Committee Reports evinced an inflexible congressional intention to require the Secretary certify every state in breach of whaling restrictions.

Significance of the Case

This case demonstrates the difficulties with enforcing international agreements and the further difficulty of using domestic regimes to enhance that enforceability.

From the point of view of standing, the Court noted that the American Cetacean Society and other similar organisations had “alleged a sufficient ‘injury in fact’ in that the whale watching and studying of their members would be adversely affected by continued whale harvesting”. However, the case also highlights how environmental and animal protection issues can generate tension for regulators faced with making legal and policy decisions. Often statutes will be deliberately drafted to avoid imposition of mandatory obligations, precisely to give regulators leeway to deal with intractable issues. Yet, the outcome can compromise environmental and animal protection. Indeed in this case press reports speculated that an influential factor in the decision was the fact that Japan had substantial economic and political leverage in trade matters because of its \$58 billion dollar trade surplus with the United States.¹⁴

3.4 *Lujan v Defenders of Wildlife* 504 US 555 (SC, 1992)

Prepared by Rosario Russo

Court

United States Supreme Court

Facts

Section 7(a)(2) of the Endangered Species Act (‘the Act’) required that, where a US Federal agency funded programs and activities, the Secretaries of the Interior and Commerce were to consult with the appropriate Secretary to guarantee that those activities were unlikely to endanger the existence or habitat of any endangered or threatened species. Regulations initially extended the coverage of s 7(a)(2) to include

¹⁴ Farnsworth, *Mounting Conflict Over Trade Looms for United States and Japan*, New York Times, 9 March, 1987 at A1, col.4 < <http://www.nytimes.com/1987/03/09/business/mounting-conflict-over-trade-looms-for-us-and-japan.html> > (accessed April 2014).

actions taken in other countries; however, this was amended to limit the application of the section to activities undertaken in the United States and upon the high seas.

The respondents, Defenders of Wildlife, sought a declaratory judgment that the new regulations did not fall within the scope of s 7(a)(2) of the Act. An injunction was sought, calling for the reinstatement of the initial interpretation of s 7(a)(2). The matter was dismissed in the Federal District Court on the basis that the Defenders of Wildlife lacked standing. This decision was reversed by the Court of Appeals for the Eighth Circuit. Leave to appeal was granted by the United States Supreme Court.

Issues

- Whether the respondents had standing to bring this matter
- What must be proved to establish justiciability of the case
- What must be proved to establish standing
- Whether citizens could bring suits where their direct interests were not injured

Decision and Reasons for the Decision

The Court held that the Court of Appeal was in error in finding that the respondents had standing.

Whether the respondents had standing

The Court held that the respondents lacked standing to seek judicial review of the regulations. The respondents could not establish that they had suffered an injury in fact, that is, a concrete and particularised, actual or imminent invasion of a legally-protected interest. Therefore it was found that the Court of Appeal was in error in finding that the Act's citizen action provision gave the respondents standing.

While the respondents could establish that activities in foreign countries threatened certain species and habitats, the respondents could not prove they had suffered an "injury in fact". In particular, the respondents failed to show that any one of their members would be directly affected, notwithstanding the special interest of the members as a whole in the subject matter. To be satisfied, the "injury in fact" test requires more than an injury to a perceived interest; it requires an "imminent" injury. The mere possibility of being denied the opportunity to revisit project sites to observe endangered animals because of the lack of consultation was not an "imminent" injury.

Justiciability

Scalia J, reflecting the opinion of the Court, referred to the separation of powers doctrine in accordance with which the judicial arm of government deals with "cases" and "controversies" as mentioned in Article III of the United States Constitution. The doctrine of standing was expressed to be the core element of the "case" or "controversy" requirement, which must be satisfied before the matter can be heard by the courts.

Requirements of standing

The Court acknowledged that case law had established three elements crucial to proving standing. First, the plaintiff must have suffered an “injury in fact” – an interference with a legally-protected interest which is concrete and particularised and is “actual or imminent”, not “conjectural” or “hypothetical”. Second, a causal connection must exist between the injury and the conduct complained of. Third, it must be “likely”, as opposed to merely “speculative”, that the injury would be “redressed by a favourable decision”.

Bringing action without direct injury

A number of new theories on standing were suggested. First was that of an “ecosystem nexus”, which proposed that a person who used any part of a “contiguous ecosystem” negatively affected by activities would have standing even if the activities occurred overseas. This approach was rejected by the Court, which maintained that a plaintiff claiming injury from the relevant activities must adduce evidence regarding the affected area rather than an area “in the vicinity” of the activities. Additional theories included the “animal nexus” approach, where a person with an interest in studying or viewing endangered animals would have standing. The “vocation nexus” approach would also grant standing to any person with a professional interest in animals. As these theories could enable anyone observing or working with endangered animals throughout the world to attain standing by virtue of their characterisation as a harmed person, they failed due to the breadth of the arguments.

Significance of the Case

This case illustrates the difficulty associated with attaining standing in matters concerning the protection of endangered species and their habitats. This largely stems from the inability of the party bringing the action to identify direct and related harm. In the United States, the requirement for an “injury in fact” to the claimant is difficult to establish, minimising the likelihood of the applicant being able to sue for matters of general public interest. The case therefore demonstrates that the inhibiting effects of standing in the context of animal protection litigation are not exclusive to Australia.

3.5 Animal Liberation Ltd v Department of Environment and Conservation [2007] NSWSC 221

Prepared by Emily Shipp

Court

Supreme Court of New South Wales

Facts

The Department of Environment & Conservation, the defendant, proposed to carry out an aerial shooting operation of goats and pigs in Nattai Reserve and Wollondilly River Nature Reserve. The plaintiff, Animal Liberation Ltd, sought an interlocutory injunction to restrain this operation on the basis that it would likely involve breaches of the

Prevention of Cruelty to Animals Act 1979 ('the Act'). Specifically, Animal Liberation suggested that acts of cruelty were likely to occur because animals may be wounded and then die a long, inhumane death.

Issue

- Whether the plaintiff had standing to bring the proceedings

Decision and Reasons for the Decision

The Act does not provide a legislative basis for standing, therefore the Court applied the common law rules as set out in *Australian Conservation Foundation v The Commonwealth* (1980) 28 ALR 257 ('ACF').

Hamilton J held that Animal Liberation did not have standing and thus, must fail in their application for an injunction. Hamilton J's decision was based on *ACF*. In that case it was stated that:

It is quite clear that an ordinary member of the public, who has no interest other than that which any member of the public has in upholding the law, has no standing to sue to prevent the violation of a public right or to enforce the performance of a public duty ... a private citizen who has no special interest is incapable of bringing proceedings ...

Later it was held that:

An interest, for present purposes, does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails.

Hamilton J held that Animal Liberation was not "interested" within the meaning of the rule and that it accordingly did not have standing. While Animal Liberation had a "worthy sentiment" in bringing proceedings, it did not have the required "special interest". Although not made explicit in the judgment, Hamilton J appeared to conflate "worthy sentiment" with "mere intellectual or emotional concern".

Significance of the case

This case highlights the how the attainment of standing represents a major hurdle in animal protection litigation. To be successful, the person bringing the action must have a "special interest" in its subject matter, that is, they must stand to "gain some advantage"; a "mere intellectual or emotional concern" is not sufficient. While courts could construe the interests of persons bringing actions to protect the interests of animals either way, this case represents an example of where an organisation has been found to have no more than an intellectual concern.

CHAPTER 4

OTHER PROCEDURAL MATTERS

This Chapter deals with other important procedural matters relating to the standard of proof and consideration of who can be sued as a defendant. The decisions primarily stem from cases involving companion animals who have attacked other animals or humans. In these circumstances a plaintiff might prefer to sue a local council in order to optimise the likelihood of receiving payment following a verdict in their favour. However, as the case of *Kuehne bt Kuehne v Warren Shire Council* demonstrates, the plaintiff may need to overcome a preliminary issue determining whether the local council has an obligation to exercise its legislative and administrative powers. If not, the plaintiff must resort to other avenues of redress.

4.1 *Alford v Greater Shepparton City Council (General)* [2011] VCAT 322

Prepared by Rosario Russo

Court

Victorian Civil and Administrative Tribunal, Administrative Division

Facts

Alford, the applicant, was the owner of a dog declared a “dangerous dog” by the Greater Shepparton City Council, the respondent. In accordance with s 34 of the Domestic Animals Act 1994 (Vic) (“the Act”), the local Council may declare a dog dangerous if “the dog has caused the death of or serious injury to a person or animal by biting or attacking that person or animal”. Under the Act, a “serious injury” is defined as “an injury requiring medical or veterinary attention in the nature of (i) a broken bone, or (ii) a laceration, or (iii) a partial or total loss of sensation or function in a part of the body, or an injury requiring cosmetic surgery”.

It was alleged that Alford’s dog had attacked a goat belonging to the owner of a neighbouring property. The action before the Tribunal involved a review of the decision to declare the dog dangerous.

Issues

- Whether Alford’s dog did in fact bite or attack the neighbour’s goat
- Whether Alford’s dog was dangerous

Decision and Reasons for the Decision

The decision declaring Alford’s dog dangerous was set aside.

Whether Alford's dog caused the injury

VCAT Member Gerard Butcher accepted a veterinary report describing the injuries suffered by the goat and was therefore satisfied that the goat did suffer a "serious injury" as defined in the Act.

The Tribunal then turned to whether the applicant's dog was the cause of the injuries, stating that the requisite standard of proof was the civil standard, being the balance of probabilities. The Tribunal further noted that when the law requires proof of a fact, the Tribunal must feel an actual persuasion of the occurrence or existence of the fact. Proof cannot be found as a result of a mere mechanical comparison of probabilities, independent of any belief in its reality. The seriousness of the allegation made, the unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the Tribunal's reasonable satisfaction as to whether or not an issue has been proved.

Whether Alford's dog was dangerous

Evidence was admitted indicating an absence of prior or subsequent incidents involving Alford's dog and attesting to his gentle nature. Further evidence showed that the applicants and their neighbours had poor relations and a history of allegations of animals wandering onto each other's property. The unavailability of key witnesses for the Greater Shepparton City Council meant that the Tribunal was unable to test this evidence under cross-examination, and as a result, it was accorded less weight than sworn evidence.

In considering the evidence the Tribunal was reasonably satisfied that the applicant's dog did not cause the injury to the goat, and that he or she should consequently not be declared a dangerous dog.

Significance of the Case

The case demonstrates that the civil burden of proof, being the balance of probabilities applies when considering evidence whether a dog is a "dangerous dog" pursuant to s 34 of the Act. The VCAT must be persuaded of the actual occurrence or existence of an alleged event having regard to the gravity of the consequences before a declaration can be made.

4.2 Kuehne bt Kuehne v Warren Shire Council [2011] NSWDC 30

Prepared by Richard Hanson

Court

District Court of New South Wales

Facts

In July 2006, four year old Tyra Kuehne died after being mauled by pig hunting dogs in Warren, NSW. Tyra had wandered into her neighbour's unsecured backyard where the dogs attacked. Peter Kuehne and Dylan Kuehne, the plaintiffs, being Tyra's father and

brother, both brought legal action against Warren Shire Council, the defendant. The cases were considered jointly. The Kuehnes both claimed that the Council should have declared the pig-hunting dogs “dangerous” animals, pursuant to s 33 of the Companion Animals Act 1998 (NSW) (the Act). In accordance with s 51 of the Act, this would have resulted in more strict requirements in relation to the keeping of the dogs.

The council claimed the dogs were not legally dangerous, even though several complaints had been made to the council about the dogs’ aggressive behaviours.

Issues

- Whether the Council owed the Kuehnes a duty of care
- If so, whether the Council breached that duty by failing to exercise its powers under the Act

Decision and Reasons for Decision

Duty of care

The District Court found that the Kuehnes, and the community in general, were especially vulnerable people who relied on the Council to exercise its duties to protect them from aggressive dogs, and that the Council accordingly owed the Kuehnes a duty of care.

Breach of duty

In failing to exercise its legislative powers, the Council was held to have breached this duty. The Council’s decision not to act on the basis of the available evidence about the dogs was deemed to be “so unreasonable” that “no reasonable decision-maker could have made that decision”. The Court found that “but for” the Council’s failure to act on complaints about Mr Wilson’s dogs, the attack would not have occurred. Importantly, the Court determined that the dogs were dangerous within the meaning of the Act merely due to their nature as pig hunting dogs.

Significance of the Case

Following the death of Tyra, s 33 of the Act was changed to include dogs “kept or used for the purposes of hunting” within the definition of dangerous.

On an appeal brought by the Council (*Warren Shire Council v Kuehne and Another* [2012] NSWCA 81), it was found that the dogs could not be classified as dangerous solely on the basis that they were pig hunting dogs. One reason stemmed from the fact that there were no provisions in the Act for retroactivity. In addition, the appeal Court found that there were no other grounds upon which the council could have declared the dogs dangerous. Nevertheless the Court agreed with the reasoning of the primary judge about the role of the council and the importance of the relationship between the council and its citizens.

Although the Council was successful on appeal, councils remain bound to exercise their responsibilities under the Act.

CHAPTER 5

OBTAINING EVIDENCE, PROTESTS

Plaintiffs in cases such as *Booth v Bosworth* (Chapter 12) and *ABC v Lenah Game Meats Pty Ltd* relied on unlawfully obtained evidence, gathered without the consent of the owner and/or occupier of the premises. For animal advocates, the collection of this type of material, which might include surveillance footage, is essential to stimulate public awareness and bring to light breaches of the law. However, for others, such as the owner or occupier of the premises, this type of evidence is considered akin to agri-terrorism. In these latter cases, owners or occupiers focus on matters such as reputational damage caused by dissemination of the material. The matter is complicated legislative provisions such as s 138(1) of the *Evidence Act 1995* (Cth), which permit illegally obtained material to be admitted to court in limited circumstances. Moreover, activists have started using drones to capture footage of animal mistreatment, particularly at intensive agricultural facilities. The Australian government is considering using privacy regulation to prohibit the use of such drones. These issues have led to debate whether agriculture's claims to privacy for commercial reasons should prevail over the public interest.

5.1 Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR 199

Prepared by Jae-Hee Park

Court

High Court of Australia

Facts

Lenah Game Meats ('Lenah'), the respondent, operated an abattoir in Tasmania that processed possum meat for export. An anonymous person or group of persons trespassed onto the premises and installed video cameras on the ceiling, which captured footage of the slaughter and processing of brush tail possums. This footage was then supplied to Animal Liberation Ltd ('Animal Liberation') who, in turn, passed it on to the Australian Broadcasting Corporation ('ABC'), the appellant. On 16 March 1999, the ABC notified Lenah that it intended to broadcast this footage on its current affairs program, the 7:30 Report.

On 29 March 1999, Lenah commenced proceedings against the ABC and Animal Liberation. They sought urgent interlocutory injunctive relief to prevent the publication of the footage, claiming that the publication of the footage would cause substantial damage to their business.

This was rejected by Justice Underwood in the Supreme Court of Tasmania who held that there were insufficient grounds for interlocutory injunctive relief. Lenah successfully appealed to the Full Court of the Supreme Court of Tasmania and an interlocutory injunction was granted restraining the ABC from publishing the footage. In 2001 the ABC appealed to the High Court of Australia seeking to have the interlocutory injunction lifted.

Issues

- Whether interlocutory relief should have been awarded
- Whether the information contained in the footage was confidential
- Whether it would be unconscionable to publish material illegally obtained through an act of trespass
- Whether a tort of privacy was recognized in Australian law, and whether publication of the footage would amount to an invasion of Lenah's privacy

Decision and Reasons for the Decision

The appeal was allowed. The majority of the High Court held that, in the circumstances, interlocutory relief was unavailable and the decision of the Full Court of the Tasmanian Supreme Court was set aside. The main judgment was delivered by Justices Gummow and Hayne with whom Justice Gaudron concurred. Chief Justice Gleeson and Justice Kirby agreed that interlocutory injunction should not be awarded, despite reaching their conclusions on different grounds. Justice Callinan dissented.

Awarding an interlocutory injunction

Under s 11(12) of the Supreme Court Civil Procedure Act 1932 (Tas) the Supreme Court of Tasmania has power to grant an injunction wherever it appears "just and convenient" to do so. Previous authorities such as *Siskina (Cargo Owners) v Distos Compania Naviera SA* [1979] AC 210 and *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 provide that an injunction can be awarded in equity where there is a recognised legal cause of action and when there is an established equitable basis for the intervention provided by an injunction.

Justices Gummow and Hayne (Justice Gaudron concurring) affirmed previous authorities and added that an application for an interlocutory injunction must identify those legal rights sought to be protected or the equitable basis for intervention. Importantly, Gummow and Hayne JJ held that the equitable doctrine of "unconscionability" could not be used as a basis for awarding an injunction. Gleeson CJ agreed on similar grounds.

Callinan J, however, held that, whilst a legal cause of action was necessary in granting an injunction, in this case an injunction could be awarded to restrain the use of the footage as it had been obtained unlawfully.

Kirby J was the only member of the High Court who concluded that an interlocutory injunction could be awarded in the absence of an arguable legal cause of action or equitable basis for intervention. While he found that an injunction was available in this case, His Honour held that the constitutional implied freedom of political expression tilted the balance of convenience against an injunction being granted to restrain the media from publishing the material.

Breach of confidentiality

Justice Kirby alone accepted the argument that the publication of information which had been obtained through an act of trespass could be restrained as a result of breach of confidential information. The majority of the High Court, however, did not agree with this proposition. The majority of the High Court found that the activities which had been filmed as a result of trespass on private property were not confidential, on the basis that the operations of the abattoir were licensed by a public authority.

Chief Justice Gleeson held that not all information obtained as a result of trespass could be treated as confidential information. He added that all the circumstances surrounding the production of the film needed to be considered. In addition His Honour stated that: "If the activities filmed were private, then the law of breach of confidence is adequate to cover the case". His Honour suggested that private matters were those which if disclosed "would be highly offensive to the reasonable person of ordinary sensibilities". He concluded that in this case, there was no breach of confidence, as the information was neither private nor confidential.

Unconscionability

The majority of the Court consisting of Justice Gummow and Hayne (Justice Gaudron agreeing) found that a new cause of action based on the unconscionable conduct in question could not be established. Chief Justice Gleeson came to a similar conclusion.

Justice Kirby held that the Supreme Court could grant an injunction if the information was obtained through illegal, tortious, surreptitious or improper means and if the use of the information would be unconscionable. Nevertheless, he added that the unconscionable use of the information needed to be weighed up against the freedom of political communication and the public interest.

Justice Callinan held that an injunction should be granted, as the conduct of the ABC was unconscionable.

Privacy

The Court considered whether a right of privacy or a tort of privacy could be developed to justify Lenah's claim that an injunction should be issued due to invasion of privacy. It was previously established by the High Court of Australia in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 that a cause of action for breach of privacy does not exist in Australia.

As stated above, Chief Justice Gleeson found that the information was not private in nature, and this stance did not change simply because the case concerned events taking place on private property or because the information was obtained in a tortious way. Accordingly, his Honour concluded that Lenah should not be issued an injunction. Justices Gummow and Hayne (Gaudron concurring) stated that corporations should not be covered by the evolving protection afforded by privacy law. Their honours primarily reached this conclusion because corporations lack "the sensibilities, offence and injury...[which] provide a staple value for any developing law of privacy".

Justice Kirby refrained from considering whether a corporation should be entitled to any protection of privacy, or whether a tort of privacy exists or should be developed in Australia.

Justice Callinan suggested that privacy rights were closely tied with property rights and that the manner in which the footage was obtained was sufficient to invoke privacy protection in this case. In addition, His Honour did not rule out that corporations would be able to enjoy the same rights of privacy as a natural person.

Significance of the Case

The main significance of this case stems from the High Court's discussion about the development of Australian privacy laws. While no concrete conclusion was reached, the judgments did highlight inadequacies in the current law with respect to protecting the privacy of individuals and corporations. Importantly, Justices Gummow and Hayne held that the decision in *Victoria Part Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 would not encroach on the development of a common law right of privacy in Australia. The majority was of the view that if a new action for invasion of privacy were to be developed in Australia, it should be limited to protecting the privacy of natural persons. However, the varying approaches taken by the judges about the possible future of privacy laws suggest that there is inconsistency and uncertainty in the development of this area of law. In addition, the case illustrates the difficulties associated with balancing privacy, the public interest and freedom of expression.

5.2 Mississippi State University and the IAMS Company v PETA (No 2006 – CA – 02120 –SCT)

Prepared by Christopher McGrath

Court

Supreme Court of Mississippi

Facts

People for the Ethical Treatment of Animals, Inc. ('PETA'), the respondent, filed a complaint in the Chancery Court of Oktibbeha County, seeking disclosure regarding animal research being conducted by the Iams Company ('Iams'), a dog and cat food brand. The research had been approved by the Institutional Animal Care and Use Committee ('IACUC') of Mississippi State University ('MSU'), the appellant.

PETA sought an order to obtain data and information given to the IACUC by MSU with respect to in vivo research that was being undertaken by Iams. In order to obtain the Committee's approval for the research, MSU had submitted information about animal research protocols to the Committee in accordance with federal law.

MSU responded to PETA's claim with the affirmative defence that the documents PETA sought constituted trade secrets as well as "confidential commercial and financial information of a proprietary nature" and were therefore exempt under the Mississippi

Public Records Act. Iams added that the information sought was also exempt from disclosure because the information was subject to confidentiality agreements between itself and MSU. As evidence, Iams submitted an affidavit from Mr Carey, Director of Technical Communications for Iams, which stated that the information requested would reveal intellectual property and development strategies for future products.

After reviewing the documents in private, the Chancellor determined that Iams and MSU failed to “articulate, particularise or specify a justification so as to establish with specificity that the protocols were a trade secret”; however, certain documents categorised as “experimental design” were deemed trade secrets. Furthermore, the Court held that the protocols were not subject to any confidentiality contract between the two parties. Finally, the Chancellor ordered that any personal information about staff and documents relating to experimental design be erased and that the remainder be disclosed to PETA.

MSU and Iams jointly appealed the decision to the Supreme Court of Mississippi.

Issues

- Whether the information sought by PETA should have been deemed protected from disclosure

Decision and Reasons for Decision

The judgment was handed down by Randolph J of the Supreme Court of Mississippi Supreme Court, with the majority (Smith, Waller, Carlson, Dickinson and Lamar JJ) concurring. The Court found that the contract between MSU and Iams, as well as Mr Carey’s affidavit, provided sufficient evidence that the information sought was developed pursuant to the contract between MSU and Iams, and that Chancellor erred in deciding otherwise.

Furthermore, the Court found that the IACUC protocol forms requested by PETA were “public records” within the meaning of ss 25-61-3(b) of the Mississippi Annotated Code (Rev 2006) (‘the Code’). However, ss 25-61-9 of the Code stated that public records furnished by third parties containing trade secrets or confidential information were exempt from being disclosed in the public domain. The Court found that the Carey affidavit provided undisputed evidence on this point, and that PETA had failed to adduce sufficient evidence to rebut the exemption. Accordingly, the majority found that the protocols were exempt from the Mississippi Public Records Act and the decision from the Chancery Court was reversed.

Diaz PJ provided a dissenting opinion, finding that the information PETA sought did not constitute trade secrets or commercial and financial information of a proprietary nature. His Honour gave several reasons for this conclusion. First, the determination of the nature of the information was a question of fact rather than law and was, therefore, unable to be overturned by the Supreme Court (*City of Pascagoula v. Scheffler*, 487 So. 2d 196, 200 (Miss. 1986)). Second, the information requested in the blank protocol form provided by PETA related to the discomfort, distress and pain experienced by the animals; it could not be considered proprietary information with independent economic value. Finally, his honour found that the protection provided by the exemption extended only to trade secrets and confidential commercial and financial information made under a contract; as the Code

did not exclude all types of information developed under a contract, the mere fact that the information was produced as a result of a contract would not be sufficient to immunise it. Diaz PJ condemned the Court's decision to reverse the judgment on the basis that PETA failed to adduce evidence challenging the nature of the information requested, as absent authorisation, PETA lacked access to such information.

Significance of the Case

This case illustrates the way in which entities conducting animal experimentation may insulate themselves from public scrutiny by claiming intellectual property rights. In doing so, they limit the transparency of their processes which may obscure animal cruelty. It also highlights how the treatment of research animals is further concealed by the reliance upon internal review committees to safeguard their interests, as opposed to external enforcement mechanisms.

CHAPTER 6

TORTS AND DAMAGE

This Chapter presents a range of cases concerning civil wrongs involving animals. In some cases such as *Behrens v Bertram Mills Circus Ltd* and *Aleksoski & v State Rail Authority of NSW*, the animals were held to be the cause of personal injury to humans. In other cases such as *Beaumont v Cahir* an animal was injured and his or her owner sought compensation.

Where an animal is injured or killed, an important issue stems from the question of compensation. Although animals are often considered to be a part of the family, Australian courts struggle to award damages on the basis of anything other than characterisation of animals as property. Accordingly, while loss of the commercial value of an animal may be claimed, deprivation of the companionship provided by the animal is not recoverable.

In the United States a different line of thought is emerging. As the decision in *Ferguson v Birchmount Boarding Kennels Ltd* illustrates, an owner may be awarded special damages for pain and suffering for the loss of their animal. Damages are still based on the human's loss of an item of property; however, the damages extend beyond the objective commercial value of the animal.

Some of these cases use the term “scienter”, which refers to an action based on the fact that a defendant has existing knowledge of a set of circumstances and did not use that knowledge to preclude an injury to the plaintiff. In the context of animal law, scienter would relate to the defendant's prior knowledge of the aggressive nature of their animal, and their accompanying failure to guard the plaintiff against injury by the animal. This action has been progressively abolished in many jurisdictions.

6.1 *Robinson v Wagner* (1911) 30 NZLR 367

Prepared by Ashleigh Best

Court

Supreme Court of New Zealand

Facts

Section 16 of the Dog Registration Act 1908 (NZ) (‘the Act’) permitted a person who found an unregistered dog on their premises to “destroy” the dog. The defendant found the plaintiff's unregistered dog on his property and castrated him or her. As a result of the procedure, the dog became lethargic, impeding his ability to work. Consequently, the value of the dog decreased from £10 to £3. The plaintiff brought an action in damages against the defendant, claiming that as the defendant did not actually destroy the dog, he had failed to adhere to the remedy provided under the Act. Accordingly, the defendant should be liable for the economic loss sustained by the plaintiff as a result of the castration.

Issues

- Whether the permission to destroy an unregistered dog granted by the Act extended exclusively to killing the dog, or also allowed other damage, such as castration, to be inflicted upon the dog

Decision and Reasons for the Decision

Stout CJ found that, by castrating the dog, the defendant had destroyed the dog for the purposes of the Act. As the defendant's conduct in the circumstances was permitted by the Act, the plaintiff was unable to recover damages for the economic loss sustained.

Stout CJ referred to the decision in *Thompson v Burling* (1890) 8 NZLR 378, in which the Court found that a comparable Act excused a party who, in similar circumstances, had been charged with maliciously injuring a dog. Applying this case, the Court held that the Act permitted the analogous conduct of the defendant, which also fell short of killing the dog.

Stout CJ also identified that, although “the defendant could have killed the dog, [h]e did not kill the dog, but merely wounded it”. The defendant caused the plaintiff less economic loss than the Act permitted; the plaintiff accordingly suffered no damage for which he could take action against the defendant.

In interpreting the Act, Stout CJ affirmed that “the word ‘destroy’ does not only mean ‘kill’, [i]t may mean ‘ruin’.” As other sections of the Act specifically used the word “kill” where it was intended, Stout CJ concluded that “destroy” had been deliberately used and bore a meaning distinct from “kill”.

Significance of the Case

This case reflects the law's classification of animals as property. Injuries sustained by animals attract remedies commensurate with economic loss suffered by the animal's custodian, rather than the severity of the harm to the animal. In this instance, the reasoning of the Court was based on the animal's assigned monetary value, informed by the animal's capabilities. In addition, the case indicates that destruction of an animal is not limited to killing the animal, but may include ruining or impairing the animal in some way.

6.2 *Leeman v Montagu [1936] 2 All ER*

Prepared by Barnaby Austin

Court

High Court of Justice of England and Wales (Kings Bench Division)

Facts

Leeman, the plaintiff, bought a house in a semi-rural, though mostly residential area. The property was adjacent to Black Lake Farm, owned by Montagu, the defendant. Montagu was a poultry breeder. At night, Leeman and his wife were disturbed from noise emanating from Montagu's property, which was made by 750 cockerels housed in a nearby orchard.

In accordance with a request from Leeman, Montagu moved the cockerels from the orchard to limit the noise. However, some months later, Montagu returned 200 cockerels to the orchard resulting in unacceptable noise levels. Leeman sought an injunction to restrain Montagu from operating as a poultry breeder on the property.

Issues

- Whether the noise made by the cockerels constituted a nuisance
- Whether the action by Montagu best minimised this nuisance

Decision and Reasons for the Decision

Nuisance

The Court held that the noise did constitute a nuisance. The area was semi-rural, but mainly residential. Had the area been a strictly rural one, the noise may not have constituted a nuisance. The Court ordered an injunction, which restrained the defendant from continuing to operate his business as a poultry breeder on the property. The Court's decision to grant the injunction was made so as to limit the damage caused by the nuisance to the plaintiff's quiet enjoyment of his land.

Remedying the nuisance

The injunction was suspended for one month in order to allow the defendant an opportunity to reduce the nuisance. The Court held that the defendant would not breach the injunction by using the area up to the orchard for breeding cockerels using normal breeding pens, populated in the normal way.

Significance of the Case

The case exemplifies the threshold of disruption which must be met in order for noise generated during the normal operation of a poultry farm to amount to nuisance. It defines what constitutes a reasonable nuisance, specifically with respect to nuisance stemming from keeping animals.

6.3 *Behrens v Bertram Mills Circus Ltd.* [1957] 2 QB 1

Prepared by Betty Yeung

Court

Queen's Bench Division of the High Court of England and Wales

Facts

The Behrens were midgets on exhibition in a booth adjoining a circus in London run by Bertram Mills Circus Ltd. They occupied the booth in accordance with a licence granted by the Circus. On 2 January 1954, the Behrens' manager, Mr Whitehead, brought a Pomeranian dog named Simba to the booth, although this was prohibited by the Circus' rules. Simba became loose while the elephants were passing by the Behrens' booth, and started barking and snapping at the elephants. Bullu, one of the elephants, became frightened and chased after Simba, in the process knocking down the booth, and injuring Mr and Mrs Behrens who subsequently filed a suit against Bertram Mills Circus Ltd for damages. The Behrens had not released Simba.

Due to the Circus' conduct, the female plaintiff suffered physical injury causing her to remain incapacitated until June 1954, while Mr Behrens suffered shock. After her recovery, Mrs Behrens was left with residual incapacity, including not being able to play her musical instrument as before. Both plaintiffs claimed for loss of earnings during Mrs Behrens' recovery, as Mr Behrens was unable to go on tour and exhibition on his own.

The Behrens sought damages, relying upon three causes of action. First, they claimed that the conduct amounted to trespass; however, this claim was abandoned. Second, the Behrens claimed that the Circus breached its absolute duty as a keeper of a "dangerous animal" to confine or control the animal (scienter action). Third, they submitted that the circus was liable for negligence.

Issues

- Whether the Circus breached its absolute duty to the Behrens as a keeper of a dangerous animal (this was the scienter action)
- In the alternative, whether the Circus was liable for negligence

Decision and Reason for Decision

Scienter action

The Court articulated the rule underpinning a scienter action: "A person who keeps an animal with knowledge (scienter retinuit) of [his or her] tendency to do harm is strictly liable for damage [the animal] does if [the animal] escapes; [the person] is under an absolute duty to confine or control [the animal] so that [the animal] shall not do injury to others." All animals who are not by nature harmless or who have not been domesticated (*ferae naturae*) are presumed to have such a tendency to do harm. Domestic animals (*mansuetae naturae*) are presumed to be harmless until they have demonstrated vicious tendencies.

Although Bullu, the elephant in question, was domesticated, the Court determined the animal's category by reference to his or her species, rather than actual circumstances. As the Court observed, "harmfulness of the offending animal to be judged not by reference to its particular training and habits, but by reference to the general habits of the species to which [the animal] belongs."

The Court concluded on this issue by answering the five contentions raised by the Circus in defence of the scienter action.

In respect of the argument that elephants were not *ferae naturae*, as required for the rule to apply, the Court followed the decision in *Filburn v People's Palace and Aquarium Co Ltd* (1890) 25 QBD 258. This decision held that all elephants were considered to be dangerous, regardless of their nationality – in this case, Burmese.

The Circus submitted that the scienter doctrine imposes liability upon an owner only for acts which are vicious and savage, and that the conduct of Bullu did not have this character. However, the Court held that the Circus was "liable for any injury done while the elephant was out of control". On these facts, it was found that there was such a failure to maintain control over the elephant.

The Circus then argued that the injuries were a consequence of the fault of the Behrens. However, the Court rejected this argument as there was nothing to suggest that the Behrens permitted Simba to be present at the booth. Another person, Whitehead, had permitted this and he was not the Behrens' employee; nor had the Behrens any ability to control Whitehead's conduct. Even assuming that the Behrens knew of Simba's presence, this would be insufficient to establish fault on the Behrens' part as Simba's presence could not be deemed an "obvious danger".

Moreover, in dispensing with the plea of *volenti non fit injuria* (voluntary assumption of risk) made by the Circus, the Court held that it could not be established that the passing of elephants created an obvious risk.

Finally, the Circus claimed as a defence to liability that the wrongful act was one of a third party, namely Whitehead and his dog. However, the Court identified that *Baker v Snell* [1908] 2 KB 352, which held that the intervening act of a third party was no defence, was binding authority. As such, the Circus could not rely on this defence.

Taking into account loss of earnings and injury, Mrs Behrens was awarded 2930 pounds and Mr Behrens, 480 pounds.

Negligence

The Behrens claimed that the Circus had been negligent as an alternative submission, which could be relied upon if the Court rejected the action based on scienter.

The Court dismissed the claim that the elephants were not properly controlled when walking past the booth. It also found that any posts and fence which it was claimed should have been erected would have been useless as the public could not be fenced off from the booths.

While the Court was not satisfied that on the evidence the defendants took all reasonable measures to ensure that small animals were not brought into the fair, it was clear that Whitehead knew of the prohibition. Nonetheless, the Court also accepted that Whitehead, quite reasonably, did not appreciate the danger posed by the dog. Finally, the Court found that the Behrens were not aware of the dog's presence.

The Court did not definitively conclude on the matter of negligence.

Significance of the Case

This case confirmed that in determining whether or not harmful tendencies in an animal will be presumed for the purposes of a scienter action, the animal's species is the relevant test. All *ferae naturae* are presumed to be dangerous; as such, harmful tendencies do not need to be proved. The case reinforced the rule that the owner is under an absolute duty to confine or control a dangerous animal so that it will not do injury to others. Devlin J noted that whether the animal is dangerous is a question of law and not a question of fact, because it "is a matter upon which judicial notice has to be taken. The doctrine has from its formulation proceeded upon the supposition that the knowledge of what kinds of animals are tame and what are savage is common knowledge".

6.4 *Draper v Hodder* [1972] 2 QB 556

Prepared by Mansum Margaret Wong

Court

Court of Appeal of England and Wales (Civil Division)

Facts

Draper, the plaintiff, was three years old and lived with his parents on an un-gated property. This opened to a lane, located fifteen yards from the entrance to the defendant's property, which was also un-gated. The defendant was a breeder of Jack Russell Terriers and kept approximately thirty dogs and puppies.

While playing with another child in his backyard, Draper was attacked by seven terriers who had escaped from the defendant's property. Draper was severely injured, sustaining over one hundred bites. The Court noted that the dogs frequently visited the backyard and scavenged among the dustbins while Draper and other children were playing there without exhibiting any aggression.

A veterinary surgeon who was called as a witness for Draper identified the possibility that Jack Russell Terriers may get excited and attack children, and that Hodder, being an experienced dog breeder, should have been conscious of this characteristic. Further evidence provided by a dog breeder indicated that it was dangerous to allow Jack Russell Terriers to roam freely, as when they are with other dogs, they have a tendency to attack anything which is mobile.

Contrary to this evidence, a veterinary surgeon testifying on behalf of the defendant gave evidence that the terriers in question were of a particularly “mild strain.” The witness further stated that he had never heard of an attack on children by Jack Russell Terriers. However, he also stated that he would not permit a pack of these dogs to roam without supervision, since there was a slight chance that they may fight and cause harm.

Issues

- Whether the risk of injury to Draper was foreseeable, imposing a duty of care upon Hodder
- If so, whether Hodder breached his duty of care to Draper
- Whether Draper’s father, the second plaintiff, was liable in any way for the injury

Decision and Reasons for the Decision

The Court affirmed the decision of the trial judge that an action based on scienter could not be maintained as it was impossible to identify which dogs were responsible for the injuries.

Foreseeability of harm

The relevant test for foreseeability was whether harm could be occasioned, rather than whether the actual physical harm which was sustained could have been anticipated. It was established that Hodder was aware of the dogs’ freedom to roam and Draper’s presence in the near vicinity. Given the propensity of Jack Russell Terriers to attack humans when acting in a pack, Hodder should have known that the dogs could be aggressive. As such, the Court held that Hodder “ought... to have realised that risk of real harm to the child was involved.” Hodder therefore owed a duty of care to Draper.

Breach of duty of care

The expert evidence indicated that, given the risk of harm posed by the dogs roaming in packs, they should have been confined. Accordingly, it was held that Hodder breached his duty of care to Draper in failing to take “special precautions”, namely measures to restrain the dogs.

The responsibility of Draper’s father

The claim for a contribution from Draper’s father failed as it was held that he could not have known of the risk, and that as such, he was not under a duty to protect Draper from its manifestation.

Significance of the Case

There is a duty for the owner to take reasonable care to prevent damage by animals, including domestic and seemingly harmless animals. Failure to do so could result in the owner being liable on the grounds of negligence for damage caused by the animal to third

parties. The liability for a harmless animal's acts only arises if it has an abnormal dangerous characteristic that is known, or ought to be known, by its owner.

The case also raises interesting notions of animal culpability. In His Honour's statement of the facts, Davies LJ recounted that after discovering the puppies with blood around their mouths, Hodder shot two of them, and subsequently instructed his veterinary surgeon to euthanise five more. Hodder was deemed responsible for the injuries caused and as owner of the dogs he was also legally entitled to destroy the dogs whom he negligently permitted to escape. It is a consequence of animals' characterization as property that owners can deal with their animals in this way, even where humans are also liable for the animal's conduct.

6.5 Galea v Gillingham [1987] 2 Qd R 365

Prepared by Rosario Russo

Court

Supreme Court of Queensland

Facts

Twelve year old Galea, the plaintiff, accompanied her father to a property inspection. Gillingham, the defendant, owned the neighbouring property and the common boundary was unfenced. While Galea's father was inspecting the property, Galea was wandering around the house and was attacked by a German shepherd. She was bitten on her chest and stomach and suffered multiple scratches.

Galea sued Gillingham, claiming damages for the injury she sustained from the dog attack. The trial judge found that Galea's injuries occurred as a result of Gillingham's negligence. Gillingham appealed against this finding.

Issues

- Whether there was a foreseeable risk that the kind of injury sustained would be caused by the German shepherd

Decision and Reasons for Decision

Shepherdson J noted that *Draper v Hodder* [1972] 2 QB 556 established that a plaintiff suing in negligence for an attack by a domestic animal who was relatively placid prior to the incident, must prove:

- That in the absence of reasonable care by the animal's owner, there was a foreseeable risk that the type of injuries suffered by the plaintiff could have occurred; and
- A propensity on the part of the animal, not necessarily known to the owner, but one which was such that the owner ought to have known, and therefore, ought to

have foreseen, that the risk of the injury complained of could be caused by the animal.

His Honour added that it was not sufficient for a plaintiff to prove a failure by a defendant to guard against the possibility that a tame animal will act in an uncharacteristically dangerous way.

Shepherdson J affirmed that Galea was not required to prove that the precise injury was foreseeable, rather that it would be sufficient to establish that the injury fell within a reasonably foreseeable class of injuries. His Honour noted that it was foreseeable that the German shepherd, being a large dog, could injure a child by, for example, knocking him or her over. Gillingham's comments after the attack to the effect that the dog should have been tied up were held to be an indication that Gillingham actually foresaw a risk of injury.

Shepherdson J further stated that the manner of proving a special propensity or special circumstances rendering the risk of injury foreseeable will depend on the circumstances of the case. In this case, the comments made by Gillingham immediately after the attack were taken to indicate that he in fact knew of the German Shepherd's dangerous propensity. However, all that would have been necessary was for the plaintiff to prove that the special propensity or circumstances ought to have been foreseeable to Gillingham.

Significance of the Case

This case represents the adoption of principles in *Draper v Hodder* [1972] 2 QB 556 in Australia. It establishes that for a plaintiff to succeed in claiming negligence for a defendant's failure to take measures to protect the plaintiff from a domestic animal who is usually of a placid nature, the plaintiff must demonstrate two matters. First, without the implementation of such measures, there must be a foreseeable risk of harm of the kind sustained. Second, there must be a special propensity on the part of the animal, or special circumstances relating to him or her, such that the owner ought to have foreseen the risk of injury presented by the animal.

6.6 Aleksoski v State Rail Authority (NSW) [2000] NSWCA 19

Case note prepared by Hikari Kato.

Court

New South Wales Court of Appeal

Facts

Mr and Mrs Aleksoski, the appellants kept their five month old Rottweiler at their property which adjoined a public road, Waverley Drive. Irons was employed by the State Rail Authority, the respondent. Irons was riding his motorcycle to work along Waverley Drive at approximately sixty kilometres per hour, which was within the legal limit, when the Aleksoskis' Rottweiler ran out and collided with him on the road causing him to suffer serious injury. When the accident occurred, the Aleksoskis' property was unfenced, and the dog was free to run out onto Waverley Drive.

As Irons was travelling to work, the State Rail Authority incurred liability to pay workers' compensation. The State Rail Authority recovered a verdict against the Aleksoskis, in the sum of \$126,130 based upon a finding that Iron's injury was the consequence of the Aleksoskis' negligence. The Aleksoskis argued that Irons was liable for contributory negligence; however the trial judge rejected this contention.

In separate Court proceedings Aleksoski was charged under s 8(1) of the Dog Act 1966 (NSW) ('the Act') and pleaded guilty.

Issues

- Whether Irons' injury was foreseeable
- Whether the Aleksoskis breached their duty of care to Irons
- Whether the standard of knowledge required for the scienter doctrine applies to a claim in negligence
- Whether Irons was contributorily negligent

Decision and Reasons for the Decision

The Court dismissed the appeal.

Foreseeability of the injury

The fact that the Aleksoskis regularly restrained the Rottweiler supported an inference that the dog's escape onto the road was foreseeable. Further, the dog's propensity to run out to the street, and thereby risk causing an accident, was established by his or her medium size, breed and youth, which inhibited the dog's responsiveness to training.

Breach of duty of care

Mr Aleksoski's guilty plea under s 8(1) confirmed that the Rottweiler was in a public place and not under the control of a competent person. However, the Court emphasised that guilt under this provision would not, without more, establish negligence. The Court deemed it unnecessary to decide whether the trial judge relied solely on the male appellant's guilty plea in establishing negligence, because there was other evidence on which to base a conclusion that the appellants were negligent.

The Court noted that the State Rail Authority bore the onus of proof of negligence; it commented, "The mere fact of the collision on the public road with the appellants' dog did not, without more, establish negligence... The mere fact that a dog escapes from restraint, or indeed from a property, does not establish negligence". Liability, the Court emphasised, requires *proof* of negligence.

The Court held that there was sufficient evidence to establish that this case was more than the accidental escape of the animal, rather there was a lack of due care which justified the conclusion that the appellants were negligent. Ordinarily, the dog was restrained out of necessity rather than excessive caution; Mrs Aleksoski testified that the dog was

restrained due to his or her propensity to escape on to the road. As such, the failure to take similar precautions on the day of the accident was negligent.

Relevance of the standard of knowledge required for the scienter doctrine

The Court stated that the cause of action in negligence is an independent one. It stands outside the principles relating to an action on the basis of scienter. Accordingly, the State Rail Authority was not required to demonstrate that the Aleksoskis actually knew of the dog's vicious or dangerous propensity to be successful in negligence; it needed to establish that the Aleksoskis knew or ought to have known of the dangerous propensity in the Rottweiler, in addition to the other elements of negligence.

Contributory negligence

The Court affirmed the finding of the trial judge to the effect that there was no contributory negligence on Irons' part. He was an experienced bike rider who was travelling at the permissible speed on a familiar road. He had experienced no previous encounters with the dog. Hence, there was no failure by Irons to keep a proper look-out.

Significance of the Case

The case demonstrates the way in which an owner of an animal may be liable in negligence for failing to take precautions to restrain an animal where he or she has a special propensity which requires such protective measures to be taken and the risk of injury flowing from such a failure is reasonably foreseeable.

It also provides an insightful juxtaposition of the law's perception of the relative significance of human and animal interests. At trial, Mrs Aleksoski conceded that, as the dog's ability to escape to the road posed a danger to his or herself, the dog was never allowed outside unattended. This was used as evidence that Mrs Aleksoski was aware that if the dog escaped, he or she could cause a collision with road users and thereby cause human injury. The Court's consideration of animal interests was only relevant insofar as it could be used to establish a lack of regard to human interests.

6.7 *Collins v Carey* [2002] QSC 398

Prepared by Pamela Kalyvas

Court

Supreme Court of Queensland

Facts

Collins, the plaintiff, was a removalist employed by Grace Worldwide, the second defendant. Mr and Mrs Carey, the first defendants, hired Grace Worldwide, the second defendant, to pack and move their personal items from their house. Collins and two other employees of Grace Worldwide arrived at the house to undertake the removal. Mr Carey tied up his dog on a standard 2 to 2 ½ metre chain. The dog was chained in the yard, near

a cubby house which was to be moved. Mr Carey alleged that he told the removalist not to touch anything near the cubby house because the dog was chained there. However, contrary to this assertion, Collins alleged that Mr Carey asked him to remove the cubby house and that there was no mention made of the dog. Collins walked over to the cubby house, turned his back to the dog, and bent down to pick up a dismantled piece of the cubby house, and immediately after this, the dog bit him. Collins denied touching the dog before he or she bit him. In addition, one of the other removalists also said that he did not recall Mr Carey saying anything about the dog, or about not touching anything in the backyard.

Issues

- Whether the Careys were liable in scienter, negligence or both
- Whether Grace Worldwide was liable for negligence, breach of contract of employment or both
- Whether Collins was contributorily negligent

Decision and Reasons for Decision

The Court found in favour of Collins and awarded him \$130,062.05 in damages.

The liability of the Careys on the basis of scienter and negligence

The scienter action failed. The Court held that Collins did not show that Mr Carey had the requisite knowledge of the dog's aggressive tendencies to make out a case of scienter. The fact that Mr Carey gave a warning about the dog did not mean that either Mr or Mrs Carey knew that their dog had a tendency to bite or exhibit otherwise dangerous behaviour.

However, Mr Carey was found to be negligent because he did not restrain the dog to stop him or her being in the vicinity of the items to be moved. The Court relied on *Galea v Gillingham* [1987] 2 Qd R 365, which outlined that the plaintiff suing in negligence for damages as a result of injuries suffered by a domestic animal must prove that there:

“was a foreseeable risk that in the absence of reasonable care by the defendant, injuries of the type suffered could be caused by the animal; and a propensity on the part of the animal not necessarily known to the owner or keeper but one which was such that the owner or keeper knew or ought to have known and therefore ought to have foreseen that there was a real risk of the injury or damage complained of being caused by the animal exhibiting that propensity”

The Court, therefore, held that Mr Carey's statements and conduct indicated that he recognised that there was a risk that the dog might bite the removalists and that the risk was real enough for him to take the precaution of tying up the dog. Mr Carey, therefore, should have foreseen that there was a real risk of injury of one of the removalists being bitten by the dog. Accordingly, in the absence of reasonable care by Mr Carey, there was a risk that injuries of the type suffered by Collins would be sustained.

The liability of Grace Worldwide for negligence, breach of contract of employment or both

Grace Worldwide was found to have breached its duty of care in failing to ensure that all items which required removal were out of the range of the chained dog.

The liability of Collins for contributory negligence

The Court held that there was no contributory negligence on the part of Collins. He was bitten when he bent down to pick up a piece of the cubby house and in doing so, came within the dog's reach. Collins misjudged how far the dog could reach. This was a matter of inadvertence rather than negligence.

Significance of the Case

Animal owners may be held liable in negligence for failing to take adequate care to ensure that their animal does not injure a person who enters their property or approaches the vicinity in which the animal is kept. Any action taken by an animal's owner to restrain the animal may illustrate their recognition of a foreseeable risk that the animal could injure a person.

6.8 *Beaumont v Cahir* [2004] ACTSC 97

Prepared by Thuy Hoai Anh Nguyen

Court

Supreme Court of the ACT

Facts

Beaumont, the appellant, landed his hot air balloon on the National Equestrian Centre's paddock where Cahir, the respondent, and Yhani, the respondent's horse, were present. The horse was frightened and impaled herself on an uncapped star picket situated on the boundary fence, suffering serious injuries for which the Beaumont accepted liability. The Magistrate found that Cahir had acted reasonably in these circumstances in regards to treating the horse and mitigating losses and was thus not guilty of contributory negligence.

Issues

- Whether the quantum of damages payable amounted to the cost of services to bring the horse back to a sound condition or to the cost of a replacement horse
- Whether Cahir had acted reasonably to mitigate her loss
- Whether Cahir was a credible witness
- Whether Cahir was contributorily negligent

Decision and Reasons for Decision

The appeal was dismissed.

Quantum of damages payable

Cooper J held that Cahir was entitled to be restored to the position she would have been in had Beaumont not landed the hot air balloon in the paddock. She was therefore entitled to recover damages for the reasonable expenses incurred as a consequence of Beaumont's conduct. Cooper J echoed the decision in *Banco de Portugal v Waterlow & Sons Ltd.* [1932] UKHL 1, which held that reasonableness is a question of fact rather than one of law. His Honour found that the Magistrate had correctly treated "the fact that the horse was an injured suffering animal [who] required an immediate decision as to [her] treatment" as a relevant circumstance in determining the reasonableness of the decision to treat the horse rather than euthanise her. Unlike the case of a damaged vehicle, Cahir did not have the opportunity to obtain estimates of the cost of Yhani's treatment in order to compare this with the cost of replacing her. Further, Yhani had "special attributes on account of training, size and temperament which were particularly valued" by Cahir. Accordingly, Cahir was held to have acted reasonably in electing to treat the horse; the compensation recoverable by her was therefore not limited to the cost of a replacement horse.

Reasonable mitigation of loss

Beaumont submitted that the horse was worth "\$500 and no more in terms of market value" and that the treatment costs were unreasonable as they exceeded this amount greatly. However, Cooper J identified that market value was the cost of obtaining a "replacement chattel having the same or substantially the same characteristics of the chattel damaged if there exists a market in which such a substitute could be obtained". The relevant consideration was the use of the horse before injury and the use to which Cahir intended to put the horse in the future. Cahir did not bear any onus of proving whether or not she could find a suitable replacement horse; she was required only to prove that the money she spent on Yhani's treatment was a direct consequence of Beaumont's conduct and that it was reasonable for her to spend the money. Cooper J rejected the contention that Cahir approached the situation with an attitude to the effect that "money was no object" and without proper regard to Beaumont's interests. It was relevant that Cahir had received an initial estimate of the total cost of treatment for the horse before deciding to rehabilitate her. Accordingly, the Magistrate had correctly found that Cahir "was acting reasonably and thereby looking after the defendant's interests" and was thus entitled to compensation.

Cahir's credibility as a witness

Although Beaumont challenged Cahir's credibility on a number of bases, Cooper J found that there was nothing in the evidence which compelled the Magistrate to conclude the Cahir was not a credible witness.

Contributory negligence

The evidence indicated that the uncapped Telecom star picket was hard against the boundary fence wires, though the wires did not pass through it. As such, the uncapped Telecom star picket stood on the same foundation as the other star pickets and posed no greater danger to Yhani than the rest of the fence. Since Yhani had spent several years in the paddock without sustaining injury and Cahir had no power to remove the uncapped star pickets, she did not negligently contribute to Yhani's injury by keeping the horse in the paddock.

Significance of the Case

First, the case recognises a distinction between animate and inanimate property, which may affect a determination as to the reasonableness of any expenditure made to repair the property. The award of damages for Yhani's injuries took into account factors that would not ordinarily be considered in the case of damage to inanimate property. It was acknowledged that Yhani was "not an inanimate chattel, but rather a living animal purchased and trained...for dressage". The Court noted that there was an "affectionate bond" and a "unique" relationship between Yhani and Cahir. This case demonstrates that although the monetary value of an animal may be less than reinstatement costs, an owner may still be acting reasonably in expending additional money, due to the special relationship between the owner and the animal.

Second, that the unreasonableness of Cahir's refusal to euthanase Yhani was pleaded by Beaumont and entertained – though rejected - by the Court, highlights how the property status of animals has the potential to subordinate their interests to the financial interests of humans.

Third, the case illustrates the way in which damages for injury to an animal are calculated by reference to the economic loss suffered by the animal's owner, another consequence of the characterisation of animals as property. The suffering experienced by the animal is not an independent basis for recovery.

6.9 Petco Animal Supplies Inc v Schuster 144SW 3d 554 (Tex. Ct App. 2004)

Prepared by Hikari Kato

Court

Court of Appeals of Texas, Austin

Facts

Schuster, the respondent, kept a fourteen-month-old miniature Schnauzer, named Licorice, as a companion animal. Schuster left Licorice for grooming at a store operated by Petco, the appellant. On her return, Schuster noticed that Licorice was running

unrestrained in the street. After a four-day search of the area by Schuster and Petco employees, Licorice was found dead, having collided with traffic.

Schuster sued Petco for breach of contract, gross negligence and conversion. She obtained a default judgment, which awarded her damages to the value of \$2302.08 for the animal's replacement value, obedience school, microchip implantation and for lost wages incurred during her search for the animal. Schuster was also awarded \$160 in counselling costs, \$6750 in legal costs, \$10,000 each for mental anguish and "intrinsic value" loss of companionship, as well as \$10,000 in exemplary damages.

Issues

- Whether Schuster could claim damages for mental anguish, counselling costs, "intrinsic value" loss of companionship" and lost wages flowing from the loss of her dog
- Whether the Court improperly awarded exemplary damages
- Whether the compensation awarded for legal costs was excessive
- Whether, in allowing Schuster to claim in both tort and contract, the Court permitted double recovery

Decision and Reasons for the Decision

The Court reversed the previous court's decision relating to mental anguish damages, counselling costs, "intrinsic value" loss of companionship", lost wages and exemplary damages. However, it affirmed the findings as they related to the animal's replacement value, reimbursement of expenses for training and microchip implantation, legal fees and court costs.

Damages arising purely from the loss of a dog

The Court referred to three principles deriving from *Heilligmann v Rose*, 81 Tex. 222, 16 S.W. 931 (1891). First, the Court recalled that dogs are to be considered personal property for the purposes of determining damage. Second, it noted that damages for loss of a dog are to be awarded in accordance with his or her market value if the dog has one, or some other "special or pecuniary value" which may be determined by the usefulness of the dog or the services he or she rendered. Third, the Court indicated that this "special or pecuniary value" exclusively concerns the dog's economic value and does not refer to value stemming from companionship.

The Court then applied these principles to Schuster's claims. It found that, while a claim for mental anguish may or may not be sustained where the damage rendered to an animal is deliberate, here the damage was caused at most by gross negligence. As there was no "ill-will, animus or desire by Petco to harm" Schuster, the claim for mental anguish failed. The Court also rejected Schuster's argument that dog grooming was a special relationship which "intensely emotional non-commercial subjects", applying instead the general rule that damages for mental anguish caused by breach of contract cannot be awarded.

This also resulted in a reversal of the award for counselling expenses.

The Court also found that the decision in *Heilligmann* prevented the recovery of damages for “‘intrinsic value’ loss of companionship” in Licorice. The Court also considered the amicus brief (a brief provided by a person not a party to the proceedings that affords additional material for the court) of the Animal Legal Defense Fund that the Court’s perception of animals “fail[ed] to take account of the modern view of dogs as beloved friends and companions”. However, it held that, being an intermediate appellate court, it could not overrule the precedent in *Heilligmann*. The Court also indicated that as intrinsic value damages are only available where an item of property lacks market or replacement value, Schuster, having conceded that Licorice’s replacement value was \$500, would not be entitled to such damages in any event.

On the question of damages for loss of wages, the Court found that the loss of income was too remote from Petco’s conduct; that is it was not a sufficiently direct or foreseeable consequence of the conduct, for the Court to order damages on this basis.

Exemplary damages

The Court identified that for an award of exemplary damages to be made, Schuster would need to establish that the harm caused to her was the consequence of malice or fraud and that the act was an act of Petco as a corporation, rather than the unauthorised act of an employee. As it could not be said that the negligence which resulted in Licorice’s death was an act of Petco, exemplary damages were held to be unavailable.

Similarly, as exemplary damages are not recoverable for breach of contract, Schuster could not be awarded them on this alternative basis.

Damages for legal costs

Based on the work completed by Schuster’s lawyer in respect of the matter, the legal fees for which compensation was sought were not unreasonable.

Double recovery

Petco claimed that Schuster had been improperly awarded damages for both her claim concerning breach of contract and her claim in tort. However, the Court held that its reversal of the findings relating to mental anguish, counselling expenses, “‘intrinsic value’ loss of companionship” meant that only Schuster’s claims in contract succeeded. These included replacement value of the animal, reimbursement of expenses for training and microchip implantation, legal fees and court costs.

Significance of the Case

The case affirmed that the value of companion animals is measured solely by their pecuniary worth as property. This is notwithstanding that companion animals assume a greater significance in human life, a point which was emphasised by the Animal Legal Defense Fund in the matter. It is notable that the Court did not reject this proposition outright; it stated, “[a]s an intermediate appellate court, we are not free to mold Texas law as we see fit but must instead follow the precedents of the Texas Supreme Court unless

and until the high court overrules them or the Texas Legislature supersedes them by statute'. As such, while the characterisation of companion animals as nothing more than property may seem disjunctive with contemporary experience, the Court's reason for applying the precedent suggests that such a characterisation may not be unchangeable.

6.10 *Council of the City of Lake Macquarie v Morris* [2005] NSWSC 387

Prepared by Hikari Kato and Hollie Harber

Court

Supreme Court of New South Wales

Facts

Morris, the defendant, owned a Rottweiler named Sole and an American Pit Bull Terrier named Mishka, who were alleged to have attacked a Staffordshire Terrier. On 25 March 2004, rangers found Sole and Mishka standing near the Staffordshire Terrier who was lying injured and motionless in the gutter. Rangers also observed that the Mishka displayed aggression towards the injured dog by lunging towards him or her, although the witnesses did not witness any actual physical contact between the dogs which was assumed to have been made.

The Council of the City of Lake Macquarie prosecuted Morris for a breach of s 16(1)(a) of the Companion Animals Act 1998 (NSW) ('the Act'), alleging that his dogs had committed an attack which caused injury to, and the subsequent death of, the Staffordshire Terrier. Section 16(1)(a) stipulates that "If a dog rushes at, attacks, bites, harasses or chases any person or animal (other than vermin), whether or not any injury is caused to the person or animal, the owner of the dog is guilty of an offence". An American Pit Bull Terrier is also classified as a restricted breed, under s 55(1)(a) of The Act.

Morris claimed that there was no evidence as to which dog attacked whom; as such, it was claimed that the deceased dog's injury was the result of a "dog fight", rather than the consequence of a "dog attack". Morris also claimed the defence of provocation under s 16(2)(a) of the Act, which stated that an attack would not amount to an offence where it was "a result of the dog being teased, mistreated, attacked or otherwise provoked".

At the original trial, the Magistrate found that the Council of the City of Lake Macquarie could not negate a defence of provocation, put forward by Morris pursuant to s 16(2)(a) of the Act. Accordingly, the Magistrate found that there was insufficient evidence to prove the case against Morris beyond reasonable doubt, and dismissed the charge. The Council of the City of Lake Macquarie appealed. The appeal concerned only Mishka, the American Pit Bull Terrier. Morris submitted a Notice of Contention, claiming that it was not open to the Magistrate to find a prima facie case against him.

Issues

- Whether the dog's conduct fell within the definition of an "attack"
- Whether the Magistrate was incorrect to find that the Council was required to negative the defences, particularly provocation, without first considering whether the evidentiary burden required to raise the defence had been discharged by Morris
- Whether the Magistrate erred in finding a prima facie case against Morris

Decision and Reasons for Decision

The appeal was allowed based on a finding of an error of law. The matter was accordingly remitted to the Local Court to be heard and determined according to law.

The definition of an "attack"

To determine the definition of "attack" as used in s 16(1)(a), the Court considered the meaning of the term under s 16(1) of the Dog Act 1966 (NSW), as interpreted in *Eadie v Groombridge* (1992) 16 MVR 263. In that decision, the Court noted that "attacking" occurred if there was "an act of hostility or aggression". The case also found that if a dog "came at" a person in the street this was an attack under s 20(1) of the Dog Act 1966 (NSW). Furthermore, circumstances involving a "growling and barking dog charging at a person" might amount to an attack (see *Zappia v Allsop* [1994] NSWCA 355), as might running, barking and yapping at a horse (*Crump v Sarah* [1999] NSWSC 884; *Coleman v Barrat* [2004] NSWCA). The Court indicated that based on the wording of the section itself, to constitute an "attack" under s 16(1), it was not necessary to prove that injury, or physical contact, actually occurred between the dog and the person or animal who is said to have been attacked. Further, an offence could be based on a single act or a series of acts. In this case, rangers witnessed the act of aggression by Mishka towards the deceased dog, and this satisfied the requirement of a dog attack under s 16(1) of the Act. The Court noted that conduct comprising the attack for the purposes of The Act was not limited to the first act of aggression. It also held that "[i]t might be inferred from the presence of the two attacking dogs in the vicinity of the badly injured Staffordshire terrier that those two dogs had occasioned injuries to the third dog".

The operation of the defence

The Court identified that s 16(2)(a) of the Act established a defence of provocation to a charge under s 16(1), which placed an evidentiary onus on Morris to raise the matter contained within the defence. Once the matter was raised, it would be for the Council to negative beyond reasonable doubt. Section 16(2) stated that the attack would not be an offence if "the incident occurred as a result of" the provocation. As such, it was necessary to show that the attack was caused by the provocation. In this case, the minor injury on the American Pit Bull Terrier's head was not adequate to discharge the evidentiary burden for the purpose of s 16(2)(a).

The presence of a prima facie case against Morris

The Court also found, contrary to Morris's submission, that the aggressive conduct of Mishka as observed by the rangers was sufficient to establish a prima facie case.

Significance of the Case

This case established the kind of behaviour which could constitute an attack for the purposes of s 16(1) of the Act. An injury is not required to conclude that an "attack" took place; moreover, an absence of physical contact between the dog and the person or animal will not preclude liability under the provision. Evidence of "lunging", "hostile action" or "initial (offensive) movement" is sufficient. It is also important to note that the severity of the offence is increased if the dog is classified as either a "restricted" or "dangerous" dog (Companion Animals Act 1998 (NSW) s 16(1)(b)(b)).

6.11 *Ferguson v Birchmount Boarding Kennels Ltd* (2006) 79 OR (3d) 681

Prepared by Betty Yeung

Court

Ontario Superior Court of Justice

Facts

In August 2002, the Fergusons, the plaintiffs, had boarded their dog, Harley, with Birchmount Boarding Kennels Ltd, the defendant. Harley escaped the kennels by squeezing through a gap in the fence of an enclosure while being exercised. The co-owner of the kennel testified that after examining the fence, he could not see a hole or a gap in it. Evidence was also adduced to the effect that kennel staff inspected the fence on a daily basis, only two other dogs had ever previously escaped and that a "ride on" mower used by the gardener may have struck the fence, causing the board to loosen.

Ms Ferguson testified that prior to letting Harley out in her own backyard, she would check the fence, though would not check each board. She also gave evidence as to the effect the incident had on her; Ms Ferguson was emotionally distraught and hysterical when she heard the news. She was delayed in her return to Toronto due to a lack of available flights, and when she did return, she suffered insomnia and nightmares, precluding her from working.

In October 2002, the Fergusons acquired another dog of the same breed as Harley.

The Fergusons sued Birchmount for damages and the trial judge awarded them \$2,527.42 in damages for the loss of their dog.

Birchmount appealed on two grounds. First, it claimed that the trial judge had applied the wrong standard of care. Second, it argued that the trial judge failed to recognize that a companion animal is deemed by law to be a chattel, preventing the recovery of damages

for pain and suffering upon the loss of the animal.

Issues

- Whether the correct standard of care was applied
- Whether the trial judge was correct to award damages for pain and suffering flowing from the loss of a dog

Decision and Reasons for Decision

The standard of care

Birchmount claimed that the proper standard of care was based on the law of bailment and that to conclude that Birchmount was negligent, the trial judge would have first needed to find that Birchmount failed to take some precaution which the owner of a dog in a similar situation would have taken.

The Court rejected this ground of appeal. It identified that the law of bailment requires the court to consider what care a reasonable owner would have exercised for the safety of the item in the circumstances. The Court also adverted to the law of bailment's imposition of an additional "onus [on the bailee] to prove that he took the appropriate care or that his failure to do so did not contribute to the loss".

Birchmount did not take reasonable steps to ensure that the fence was sound in order to prevent Harley from escaping. If the gardener damaged the fence and this was a foreseeable consequence of the mowing, it would have been reasonable for Birchmount to inspect the fence. As it did not do this, it was foreseeable that Harley would escape.

The Court found that the decision of the trial judge was supported by the evidence and that the same conclusion would have been reached irrespective of whether a "bailment" standard was used.

Availability of damages for pain and suffering from the loss of a dog

The trial judge allowed an award of damages in the amount of \$1,417.12 on Mrs Ferguson claim for pain and suffering.

Birchmount argued that this finding failed to recognize that at law, animals are chattels, and that this status precludes the recovery of damages for suffering consequent upon their loss.

The Court distinguished cases upon which Birchmount relied in support of its contention. *Rogers v Rogers* [1980] OJ No 2229 (Dist Ct) concerned an application by a wife to access a dog owned by her husband, and the case centred upon whether the dog was a family asset. The Court in *Pezzente v McClain* [2005] BCJ No 1800 discussed whether a breeder should compensate the purchaser of a dog with health problems, for veterinary costs. In that case, the Court relied upon the classification of the dog as a "consumer product". However, in the present case, the Court indicated that it would be incorrect in

law to deem the characterisation of an animal as a consumer product as a general or universal proposition.

The Court referred to the decision in *Somerville v Malloy* [1999] OJ No 4208 106 OTC 389 (SCJ), in which a plaintiff suffered trauma from being attacked by a dog and also watching the dog killing his own dog. In that case, “[t]he court based its decision to award the plaintiff damages for the effect the dog attack had on him and particularly the emotional trauma sustained by him, on two legal principles: first, a tortfeasor must take his victim as he finds him; and, second, the recognized head of damage in tort actions based on mental distress.”.

The Court dismissed the ground of appeal on the basis of the suffering Mrs Ferguson experienced as a result of losing Harley.

Significance of the Case

This case is significant in that it challenges the common and longstanding conceptualisation of animals as mere consumer products, valued only in terms of their market worth. The case also recognises the distinct bond between humans and their companion animals, and that the loss of this warrants compensation.

6.12 *Reed v Stretenovic* [2008] NSWDC 202

Prepared by Lucinda Vale

Court

District Court of New South Wales

Facts

Proceedings were brought on behalf of Reed, the plaintiff, by Sullivan, his next friend, against the Stretenovics, the defendants, to recover damages pursuant to s 25 of the Companion Animals Act 1998 (NSW).

On 28 April 2005, Reed, who was 11 years old at the time, was attacked by the Stetenovics’ unleashed dog. The Stretenovics admitted liability at the outset of the trial. Accordingly, the trial proceeded as an assessment of damages and consideration of the psychological and physical consequences to Reed.

Reed and his friend were walking along Vincent Street, St Marys when the unleashed dog escaped through an open passenger’s door of the defendants’ car. The dog, a Jack Russell Kelpie, chased Reed’s companion, who managed to avoid being attacked. Reed ran to his home which was situated a short distance across the road. The dog caught up with Reed near his driveway and bit him at least three times on the right forearm, once on the abdomen and once on the right leg above the knee.

The dog released his or her grip on Reed after he or she was called away by the defendant, Mrs Stretenovic. Reed then ran into his home. Sullivan stated that it was her own screaming that led to the dog to let go of the plaintiff. Reed stated that he was in physical pain. He described the bleeding and how he felt sick and afraid from seeing the open cut on his arm. Sullivan wrapped Reed's arm in a towel and called an ambulance. According to Sullivan, Mr Stretenovic arrived at the house, walked into her home uninvited whereupon he aggressively and repeatedly argued that it was Reed's own fault that he was attacked because he should not have been playing in the street. However, Mr Stretenovic claimed he located the house, knocked on the door and introduced himself as the dog's owner whereupon he alleged Sullivan used offensive language at him.

Issues

- Whether the dog attack and its immediate aftermath occurred in the manner described by Reed and Sullivan
- The nature of the Reed's injuries and the reconciliation of differing psychiatric opinions
- Assessment of the damages claimed by the plaintiff

Decision and Reasons for Decision

The recount of the attack

Judge Levy took into account the factual differences between Mr Stretenovic and Reed and Sullivan concerning the presence and conduct of Mr Stretenovic at the house shortly after the dog attack as well as contradictions in the evidence given by the Stetenovics. His Honour accepted the evidence of Reed and Sullivan that Mr Stretenovic entered the house after the dog attack and exchanged words in the manner and to the effect described in their evidence.

The injuries and the reconciliation of the psychiatric opinions

With respect to the injuries, Levy J accepted that Reed sustained ten lacerations and puncture wounds to his right forearm and a small puncture wound to the right knee. The judge found that the dog bites also caused Reed to sustain dermatitis and itching of the right arm, on the basis of a "common sense presumptive inference that such symptoms are causally linked". Further, Levy J found that the dog bites led to Reed putting on excess weight and leading an abnormal lifestyle due to the psychological effects of the dog attack, including a change in his personality. However, the trial judge also accepted that apart from having residual scarring from the dog bite wounds, since Reed's post-hospital discharge he had undergone a relatively uneventful physical recovery. His Honour then turned to the competing psychiatric evidence and stated that he preferred the evidence of Reed's expert witness.

The quantum of damages

The Court assessed damages for non-economic loss in accordance with s 16 of the Civil Liability Act (2002) at 35% of a most extreme case. This gave a sum of \$154,500 based

on the interlinked problems of the emotional suffering and the unsightly permanently disfiguring scars suffered by Reed. His Honour noted that these factors represented a serious and permanent impairment in Reed's ability to enjoy the amenity of his life. Furthermore, his Honour assessed Reed's damages for future treatment in the sum of \$16,700. With regard to Reed's residual earning capacity his Honour awarded damages at 30% of average net weekly income between the ages of 18 and 65 years, after allowing a 25% discount for contingencies, resulting in an award for future economic loss of \$170,923. The total assessment of damages amounted to \$344,723.

Decision on appeal

The Stretenovics appealed. On appeal, Reed's damages were significantly reduced, particularly non-economic loss which was lowered from 35% to 20% of a most extreme case. The appeal judge, McColl J, found that the primary judge appeared to have applied either his personal opinion regarding Reed's future and present psychological condition and/or made findings of fact unsupported by evidence.

Significance of the Case

Although the damages were reduced on appeal, the case highlights the fact that those who are in control of an animal must exercise care; otherwise substantial damages may be awarded against them if the animal attacks and injures another person or animal.

CHAPTER 7

TRUSTS, WILLS AND FAMILY LAW

This Chapter predominantly deals with two scenarios: first, circumstances where a person makes a will and wishes to leave assets on trust for the benefit of an animal or animals; and second, where a couple is separating or divorcing and they are in dispute over custody and visitation with respect to their animals.

The difficulties stemming from these situations arise due to the characterisation of animals as property. As such, animals lack legal ‘personhood’ and are not able to be the direct recipient of a gift. If a testator does not take this point into account when drafting a will, the trust in favour of the animal(s) may be declared invalid. By the same token, animals may be given or bequeathed in a will in the same manner as other property.

In a similar vein, the property status of animals means that in custody disputes, animals will be distributed as assets of the marriage without consideration of the animals’ interests. However, as the decision in *Jarvis and Weston* highlights, the interests of animals may indirectly be taken into account where these interests coincide with the best interests of the humans involved in the matter, such as children of the marriage.

Overall, the cases demonstrate how the law has failed to keep pace with society’s evolving relationship with companion animals.

7.1 *Attorney General (NSW) v Donnelly (1958) 98 CLR*

Prepared by Hollie Harber

Court

High Court of Australia

Facts

This case involved two appeals heard together. They both related to clauses in the deceased testator’s will.

The first concerned a trust which applied to a property named “Elmslea”. The testator granted the property to such Order of Nuns of the Catholic Church or Christian Brothers as the executors and trustees selected. The second concerned a trust over the residue of the testator’s estate, which was to be used to raise money for a Convent as selected by the trustees.

At first instance, Myers J held that the first trust was not void for uncertainty and that the second trust was so void. The testator’s widow and children appealed the decision made in respect of the first trust and the Attorney General appealed the decision made in relation to the second trust.

Section 37D of the Conveyancing Act 1919 (NSW) (‘the Act’) provides:

“(1) No trust shall be held to be invalid by reason that some non-charitable and invalid purpose as well as some charitable purpose is or could be deemed to be included in any of the purposes to or for which an application of the trust funds or any part thereof is by such trust directed or allowed. (2) Any such trust shall be construed and given effect to in the same manner in all respects as if no application of the trust funds or of any part thereof to or for any such non-charitable and invalid purpose had been or could be deemed to have been so directed or allowed.”

Issues

- Whether the trust created in the testator’s will via clause 3, in respect to the property known as “Elmslea” was void for uncertainty
- Whether the trust created in the will via clause 5, as to the rest and residue of the estate both real and personal, was void for uncertainty

Decision and Reasons for the Decision

The first trust: that over “Elmslea”

In respect of the first trust, Dixon CJ and McTiernan J held that there was no territorial limitation upon the class of persons who could benefit from the trust. The intention of the trust was to empower trustees to select, at their discretion, a group to gift the property with. It was not intended that the trust would only operate with respect to the presently existing members of the group. As the trust was capable of being supported in part by a charitable purpose, it was valid under s 37D of the Act.

In respect of the first trust, Williams and Webb JJ found that whether or not it possessed a charitable purpose was immaterial because the gift was not one in perpetuity; it was given to those individuals comprising the community selected by the trustees at the date of the testator’s death.

Kitto J held that the first trust described “large, but none the less quite definite, bodies of persons and gives the whole beneficial interest in ‘Elmslea’ absolutely to such of those bodies as the trustees select.” The trust was upheld.

The appeal brought by the testator’s wife and children was therefore dismissed.

The second trust: that over the residual property

In relation to the second trust, Dixon CJ and McTiernan J held that the trust had a charitable purpose because “most convents would be the object of legal charity”. It therefore attracted the operation of s 37D of the Act. As the uncertainties which were said to render the trust void would “not suffice to invalidate what otherwise would be a charitable trust”, the trust was found to be valid.

Williams and Webb JJ identified that in accordance with s 37D of the Act “If the purpose is non-charitable but nevertheless valid the section has no operation. But once it is found that a trust directs or allows... the use of trust funds or any part thereof for a purpose that is charitable and also for a purpose that is non-charitable and invalid the section operates.”

Their Honours held that the second trust was clearly charitable because the trustees were “authorised to provide amenities for orders of nuns which are charitable and one way of completely satisfying the testator’s intention would be to expend the whole of the trust funds in providing amenities for those communities alone”. As such, the appeal of the Attorney General succeeded.

Kitto J also found that s 37D of the Act operated to save the second trust.

The appeal brought by the Attorney General was therefore upheld.

Appeal

The decision was appealed to the Privy Council: *Leahy v Attorney General of NSW* [1959] AC 459. The Privy Council confirmed the decision of the High Court of Australia.

Significance of the Case

This case demonstrates the way in which a trust will not be void for uncertainty where at least one of its purposes is charitable. This may be significant for animal protection organisations wishing to establish charitable trusts.

7.2 *Re Weaver; Trumble v Animal Welfare League of Victoria* [1963] VR 257

Prepared by Cathy Hoang

Court

Supreme Court of Victoria

Facts

Weaver, the testator, created a will dated 30 June 1957. Trumble was named as executor and trustee. The testator instructed Trumble to distribute real and personal property to certain relatives, friends and various institutions. The testator bequeathed £3000 on trust to the State School of Tewantin Queensland Library, with the net yearly income to be spent purchasing books and materials. These aspects of the will were not contested.

The testator further bequeathed £5000 on trust to the Animal Welfare League, which was to receive interest from the amount on a yearly basis. He also left £2000 on trust to pay and apply the net income to the Walter Theo Weaver Bursary Trust at the State School Tewantin Queensland. The residue of the estate was left on trust to the Bursary Fund. The gifts of £2000 and the balance of the estate were contested as it was claimed that they breached the rule against perpetuities. The gift to the Animal Welfare League was contested on the basis that it was a perpetual gift of income for purposes which were not charitable.

Issues

- Whether the £2000 and balance of the residue gifted to the Walter Theo Weaver Bursary were valid
- Whether the bequest of £5000 to the Animal Welfare League was valid

Decision and Reasons for the Decision

Gifts to the Walter Theo Weaver Bursary

It was argued that these gifts offended the rule against perpetuities, which would render them invalid unless they were for a charitable purpose. The Court held that even though the money could be applied to purposes other than education by the successful recipient, it would nonetheless “stimulate students at the school to a greater interest in their studies and result in a higher standard of education throughout the school”. It was therefore held to be a gift for the advancement of education and was accordingly valid on the basis of its charitable character.

Bequest to the Animal Welfare League

It was claimed that the gift to the Animal Welfare League was not for charitable purposes and therefore breached the rule against perpetuities.

The Animal Welfare League first argued that, upon its proper construction, the gift was a capital sum of £5000. The Court rejected this, holding that “the scope and extent of the gift which the testator intended to confer was a perpetual gift of the income of the sum he named.”

Second, the Animal Welfare League argued that its objects were charitable as the organisation existed for a purpose beneficial to the community, and that the gift could therefore survive perpetuity. The Court accepted the principle enunciated in *Re Grove-Grady; Plowden v Lawrence* [1929] 1 Ch 557 and *Re Wedgewood* [1915] 1 Ch 113. The former case established that the relevant questions to be answered were: “(1) Is the trust for a purpose beneficial to the community? (2) If it satisfies that first test is it charitable?” In respect of the first question, where a trust was created in favour of animals, it would be critical that the charitable trust be of benefit to the public or a significant section of the public. The Court held that the trust incorporated a requisite public benefit: “Nor do I think that the humane feelings of mankind will not be stirred by steps taken to promote and improve the welfare of animals unless they are sick animals in need of medical attention or some other form of succour.” Upon consideration of the League’s objects, the Court came to the conclusion that it was charitable.

Finally, the Animal Welfare League submitted that if its objects were both charitable and non-charitable, the gift would be saved by s 131 Property Law Act 1958 (Vic). The Court had already found that the objects of the League were charitable, and therefore did not need to consider this argument.

Accordingly, the Court found that the provisions in the will created a valid charitable trust in favour of the Animal Welfare League.

Significance of the Case

This case demonstrates the way in which a trust created for the protection of animals must satisfy the requirements of being for a charitable purpose and of public benefit. Significantly, the Court identified as important, the fact that the Animal Welfare League “may devote its energies and resources to the welfare of animals of all kinds is clearly on the authorities not in itself sufficient to deprive the league of its charitable character”. However, the Court also noted that the organisation devotes its energy to the welfare of all animals and this “might lead the Court to the conclusion that the benefit of a gift to the public might be outweighed by some proved detriment”.

7.3 *Arrington v Arrington* 613 SW 2D 656 (1981)

Prepared by Lucinda Vale

Court

Court of Civil Appeals of Texas, Fort Worth

Facts

Albert Arrington and Ruby Arrington were married on 2 February 1963. Prior to the marriage, Mrs Arrington owned property that included an automobile, mutual fund stocks, household furniture, appliances and fixtures, a house, some Southwest National Bank stock and personal effects. The dog, Bonnie Lou, was given to Mrs Arrington ten years prior to the litigation. Mr Arrington owned about twelve used cars, one-half of a golf course, a driving range lease, two chest-of-drawers, and twelve units. He also owed taxes and debts.

The divorce suit trial commenced 17 April 1979 and concluded 20 April 1979. The trial Court ordered a division of the property between Mr and Mrs Arrington. Mr Arrington adduced a number of arguments, including with respect to Bonnie Lou. In particular, although Mr Arrington had initially agreed that Mrs Arrington should have custody of Bonnie Lou as long as he had reasonable visitation rights, he later changed his mind. Mr Arrington argued that should have been appointed managing conservator (that is, given custody) of Bonnie Lou rather than visitation rights. Mr Arrington also took issue with other aspects of the property division.

Issues

- Whether Mr Arrington or Mrs Arrington should have custody of Bonnie Lou
- Whether the balance of the property should have been distributed as it was

Decision and Reasons for the Decision

Bonnie Lou

The Court identified the way in which the office of “managing conservator” was created to apply to human children rather than dogs. It observed that “[a] dog, for all its admirable and unique qualities, is not a human being... A dog is personal property, ownership of which is recognized under the law”. As Bonnie Lou was given to Mrs Arrington over ten years prior to the case, she was entitled to keep the animal. The Court thus found against Mr Arrington’s claim that he should have custody of Bonnie Lou, hopeful that both parties would “continue to enjoy the companionship of Bonnie Lou for years to come within the guidelines set by the trial court”.

Even though animals are legally treated as personal property, the Court spoke in terms that illustrate how society appreciates and loves dogs as domestic pets, or even as family members.

The other items of property

The Court affirmed the decision of the trial judge with respect to the other aspects of the property division.

Significance of the Case

This case reinforces the proposition that animals are treated as property under law. The companionship of Bonnie Lou was easily resolved under property concepts. Significantly, the Court identified that both parties had a relationship with Bonnie Lou and expressed concern for the continuity of those relationships, “We are sure there is enough love in that little canine heart to ‘go around’. Love is not a commodity that can be bought and sold or decreed. It should be shared and not argued about.”

7.4 In re The Marriage of Jay E. Stewart and Joan Kaye Wilson Iowa 356 N.W.2d 611 (Iowa Ct. App. 1984)

Prepared by Jae-Hee Park

Court

Court of Appeals of Iowa

Facts

Following divorce proceedings, Wilson appealed to the Iowa Court of Appeal contending that the division of property handed down by the trial Court was inequitable and that she should have been awarded alimony. In addition, she sought to reverse the trial Court’s decision that awarded to Stewart, her ex-husband, custody of their dog, Georgetta, whom he had gifted to her as a Christmas present.

Issues

- Whether Wilson or Stewart should have custody of Georgetta

Decision and Reasons for Decision

The Court of Appeal affirmed the decision of the trial Court, refusing to award alimony and gave custody of the dog to Stewart.

The trial judge had considered a number of matters when determining which party should have custody over Georgetta. This included the fact that the dog accompanied Stewart to his workplace, spent a substantial portion of the day with Stewart and remained with Stewart when the couple separated.

Sackett J who delivered the opinion of the Appeal Court confirmed that a dog is personal property and “while courts should not put a family pet in a position of being abused or uncared for, we do not have to determine the best interests of a pet”.

Significance of the Case

The case reinforces the status of animals as property as the decision places dogs in a similar category to other household chattels in the equitable distribution of assets during divorce proceedings. While dogs are perceived as members of the family, this is not acknowledged by many American jurisdictions, including Iowa, Pennsylvania (*Desanctis v. Pritchard* 803 A.2d 230 (Pa. Super. Ct.2002), and Florida (*Bennett v. Bennett* 655 SO.2d 109 (Fla.App. 1 Dist.,1995).

In New Jersey, a different approach is developing, with the Superior Court of New Jersey in the Appellate Division recognising that pets should be classified as a special category of property with “subjective value” to their owners (*Houseman v Dare* 966 A.2d 24 (N.J. Super. Ct. App. Div. 2009). Similarly, the Supreme Court of the New York County took into consideration the “best interests” of the pet in determining which party had custody of a 10-year-old cat (*Raymond v Lachmann* 695 N.Y.S.2d (N.Y.App.Div. 1999).

7.5 Murdoch v A-G (Tas) (No 2) (1992) 1 Tas R 117

Prepared by Alexandra Jackson

Court

Supreme Court of Tasmania

Facts

Gibson, the testator, left part of his estate “to DAVID BROWN Veterinary Surgeon...for the benefit of animals generally.” Gibson did not know Brown personally, but he knew that he was associated with the Tasmanian Animal Protection Society and that he provided veterinary services to the society for free. By the time Gibson died and his will was considered, Brown had been dead for many years.

It was argued for the Public Trustee that the provision in the will did not create a valid charitable trust because a gift “for the benefit of animals generally” is not a gift for charitable purposes and that the gift therefore failed.

Issues

- Whether the gift was a gift to David Brown absolutely
- Whether a gift for “the benefit of animals generally” constitutes a valid charitable bequest

Decision and Reasons for the Decision

The gift failed.

An absolute gift

It was held that the gift was not a gift to Brown absolutely.

A gift for the benefit of animals a valid charitable trust

It was also held that a gift for “the benefit of animals generally” was not a charitable gift, because it would not always benefit the community.

It was established in *Leahy v The Attorney-General (NSW)* (1959) 101 CLR 611 that a trust cannot be created for a purpose or object, as opposed to a trust created for a person or corporation, unless the purpose or object is charitable. A trust should be able to be performed by the Attorney-General, otherwise it must be performed by the person who will be the beneficiary of the trust. Since Brown was not the proper beneficiary of the gift in this case, the trust needed to be a gift for charitable purposes, otherwise there would be no one to perform it and it would fail.

Zeeman J analysed previous cases and found that valid gifts for the benefit of animals can also be said to benefit humans. He looked at *Re Wedgwood* [1915] 1 Ch 113 wherein Swinfen-Eady LJ stated that:

a gift for the benefit and protection of animals tends to promote and encourage kindness towards them, to discourage cruelty, and to ameliorate the condition of the brute creation, and thus to stimulate humane and generous sentiments in man towards the lower animals, and by these means promote feelings of humanity and morality generally, repress brutality, and thus elevate the human race.

Zeeman J noted that this statement clearly did not say that a gift for the purposes of animals is, without more, charitable; in fact it highlighted that preventing cruelty to animals benefits humanity by encouraging kindness towards humans. The Court differentiated between ‘protection’ and ‘benefit’ – a trust for the protection of animals is a valid charitable trust for the reasons adopted in *Re Wedgwood* [1915] 1 Ch 113. A trust for the “benefit” of animals is not a valid charitable trust because charitable gifts need to be for a “general public purpose beneficial to the *community*.”

The benefit to humans can be indirect. In *Attorney-General for South Australia v Bray* (1964) 111 CLR 402, the High Court found that a gift for “homeless, stray and unwanted animals” would not be for charitable purposes unless on its proper construction it referred to domestic animals, in which case it would benefit the community.

Tasmania had no law to save trusts for mixed charitable and non-charitable purposes. It was held that certain things that benefit animals would benefit humans, but that others would not. Therefore, the gift was not a valid charitable gift. In a jurisdiction that did provide for trusts for mixed charitable and non-charitable purposes, the position would perhaps have been otherwise as some activities benefitting animals are charitable because they also benefit humans e.g. rescuing stray domestic animals. The case of *Attorney General (NSW) v Donnelly* (1958) 98 CLR 538 provides an example of legislation which saves trusts which exist for both charitable and non-charitable purposes.

Significance of the Case

This case demonstrates that a gift made to assist animals for their own sake is not regarded as charitable for the purposes of a charitable trust. To be deemed charitable, the object of the trust either benefits humans, or serve to prevent cruelty to animals, rather than be for the benefit of animals generally.

7.6 *Bennett v Bennett* 655 So.2d 109 (1995)

Prepared by Mansum Margaret Wong

Court

District Court of Appeal of Florida, First District

Facts

In the final judgment of dissolution of marriage, possession of the divorced couple's dog, Roddy, was granted to Mr Bennett, and Mrs Bennett received visitation rights. She would be able to access the dog every other weekend and every other Christmas. Mr Bennett appealed against the decision, claiming that the trial court erred in conferring a right of visitation upon Mrs Bennett.

Issues

- Whether Mrs Bennett should have been awarded visitation rights with respect to Roddy

Decision and Reasons for the Decision

The Court of Appeal held that the trial judge had erred in granting Mrs Bennett visitation rights.

The Court found that the trial judge was incorrect to order visitation rights in relation to Roddy. The Court noted that under the law of Florida, animals are viewed as personal property, notwithstanding the fact that a dog may be considered a family member. It identified that “[t]here is no authority which provides for a trial court to grant custody or visitation pertaining to personal property”.

The Court considered it “unwise” to grant companion animals a special status in the context of dissolution cases. It noted that there would be difficulties and complications with respect to the enforcement and supervision of animal visitation rights.

Significance of the Case

This case illustrates the way in which the law deems animals to be personal property, regardless of the wide conceptualisation of them as members of the family. It also differentiated between children and animals in the context of family law proceedings, indicating that arrangements which could be made for the protection of children were not available to animals.

7.7 Perpetual Trustees Tasmania Ltd v State of Tasmania [2000] TASSC 68

Prepared by Cathy Hoang

Court

Supreme Court of Tasmania

Facts

Thompson, the testatrix, gifted her “dutiabale estate” or “residual estate” to Matterson, her trustee, for “his use absolutely” (clause 8). However, she also proclaimed that this property was to be used for the purposes, and in support of, “animal welfare”; the trustee was given absolute discretion to determine how the property was used in this respect (clause 9). The Perpetual Trustees Tasmania Ltd instituted proceedings in the Supreme Court of Tasmania to investigate the objective intentions and desire of the will drafted by the testatrix.

Issues

- Whether Matterson received an absolute gift of the entire residuary estate or only that property upon which duty is payable by reason of Thompson’s death
- If the gift was limited to the property upon which duty was payable by reason of Thompson’s death, whether the clause committing the property to animal welfare constituted a valid charitable trust

Decision and Reasons for the Decision

The extent of the gift to Matterson

The Court emphasised that the gift to Matterson in clause 8 was to be interpreted in light of the other powers extended to him in the will. It identified the way in which the will contemplated that Matterson may decline to act as trustee and noted that it was “inconceivable that the testatrix intended to vest all or portion of her estate to a stranger”. Any construction of clause 8 as an absolute gift would have also rendered other

provisions of the will redundant. For these reasons, the Court found that “[t]he term ‘absolutely’ relates to the discretionary purpose stated in clause 9. Clause 8 is a direction which coupled with clause 9 sets out the terms of the bequest”. There was no bequest to the trustee created by clause 8.

Whether a valid charitable trust was created

The Court distinguished the decision in *Murdoch v The Attorney-General* (1992) 1 Tas R 117 where a gift to a named veterinary surgeon “for the benefit of animals generally” was held not to be a charitable trust because the trust was construed to be for the benefit of animals, rather than the public. In the current case, Slicer J found that a bequest for “animal welfare” was a trust that could be deemed as charitable and also found that the word “welfare” is a term that connotes public interest. According to Slicer J:

a gift for the benefit of animals generally cannot be said to be for the benefit of the community. But the protection of homeless or unwanted animals, the suppression of cruelty to animals and the provision of veterinary treatment for stray animals have been held to be ones of charitable purpose... The rationale that in order to be charitable the terms of a trust must be of benefit to humankind can be accepted when the prevention of cruelty to animals, the prevention of the destruction of species, imbalance within the environment within the environment with the attendant harm to animals, are matters which enhance the life of humans.

Slicer J found that the predominant purpose of the trust was charitable, and as such, even if “welfare” could be said to connote charitable and non-charitable purposes, it would nonetheless be valid (Variation of Trusts Act 1994 (Tas) s 4). It was held that Thompson’s intention was unambiguous: “[t]he evidence shows that her predominant purpose was for the protection and care of animals who were neglected, abandoned or otherwise at risk.” As such, the will was found to create a valid charitable trust.

Significance of the Case

The case emphasises that the prevention of cruelty to animals and the protection of homeless or unwanted animals may be acceptable charitable purposes as they “enhance the life of humans”. The reasoning in the decision also highlights the anthropocentricity of the legal system; beneficial legal constructs such as charitable trusts are only available where human interests are furthered by their application.

7.8 *Jarvis and Weston* [2007] FamCA 1339

Prepared by Mary Ann Gourlay

Court

Family Court of Australia

Facts

Jarvis, the applicant, and Weston, the respondent, had separated and were in dispute over the final arrangements regarding the custody of their 11-year-old son. Areas of dispute

included where the boy would live and the school which he would attend. The question of where the child's dog should reside was also contested.

Issues

- The content of the custody arrangement in respect to the child
- Whether the child's dog should reside with his mother or father

Decision and Reasons for the Decision

The custody arrangement

The Court held that the son was to stay for the greater part of the time with his mother and go to the school near her home. He was to stay with his father every second weekend. The burden of travel associated with attending school represented a practical difficulty with the father's proposal. The Court found, "[w]hen his interests are weighed in the balance overall, the burden of such frequent travel on school days cannot be diminished. That fact, as well as the child's need also to spend leisure time in his mother's household, compels the adoption of the mother's proposal as being more consistent with his best interests overall."

Where the dog should reside

Once the arrangements for the child's custody had been drafted, a dispute arose as to with whom the child's dog would reside. The father took issue with the mother's collection of the dog as the issue had not been raised previously and he wanted more time to think about it. He also claimed that the Court had no jurisdiction to make an order about the dog. With respect to the matter of jurisdiction, the Court stated that "whether the issue falls to be considered under the accrued, associated, inherent, or *parens patriae* jurisdiction of the Court it can be found should the need arise." It then held that "The boy is attached to the dog. The dog is to go with the boy."

Significance of the Case

Jurisdiction in the federal sphere is possible

Moore J made a decision about the dog in the federal jurisdiction of the Family Court of Australia, rather than treating the issue of the animal's future as to be determined under state property law. Justice Moore acknowledged the arguments of the father's legal counsel regarding lack of jurisdiction to decide the dog's future may have been correct, but jurisdiction could be found "under the accrued, associated, inherent, or *parens patriae* jurisdiction of the Court".

Recognition of the relationship between boy and dog

This is the most significant aspect of the decision. The relationship between human and animal was recognised and taken into consideration – "The boy is attached to the dog. The dog is to go with the boy". There is no legally recognised framework within which to

consider such emotional attachments. It is solely up to the discretion of the Court to decide how to evaluate and make a decision about acknowledging such relationships.

Distribution of the pet as property to a person not party to the custody dispute

It could be inferred that although the boy was not in actuality one of the disputing parties, marital “property” under dispute, in the form of the dog, was effectively distributed to him. The attachment of the boy to the dog trumped conventional property law rules. Here the Court is taking the attachment between human and animal into account in its decision about how to distribute marital property.

This case illustrates the need to have better legislative frameworks that are underpinned by a more complex approach to animals that goes beyond the definition of animals as property. It also points to the ability of the common law, in some circumstances, to move beyond the definition of animals as property and enable a more complex judicial approach to animals.

7.9 *Houseman v Dare* 405 NJ Sup 538 (2009)

Prepared by Cathy Hoang

Court

Superior Court of New Jersey

Facts

Houseman, the appellant, and Dare, the respondent, had been engaged to be married for thirteen years and had jointly purchased a pedigree dog for \$1500. They registered the dog with the American Kennel Club, declaring that they both owned the dog.

The couple had a strained relationship, which resulted in the termination of their engagement. Dare wished to retain the residence, and he purchased Houseman’s interest in the property. When Houseman left the residence, she took the dog with her. Houseman claimed that she and Dare had reached a verbal agreement that Houseman would receive possession of the dog and one half of the value of the house. Although Houseman would not have sought more than a half share of the house if she were not to receive the dog, she emphasised that her primary concern in the course of the negotiations with Dare was possession of the dog.

Houseman allowed Dare to take the dog for visits. Houseman claimed that when she asked Dare to reduce the agreement to writing, he told her she could trust him and that he would not keep the dog away from her. In late February 2007, Houseman left the pet in the care of Dare whilst she was on vacation. Upon her return, she requested that the dog be returned to her, which Dare refused to do. Houseman commenced legal action against Dare, claiming specific performance of the oral arrangement and her right of ownership of the pet.

Dare sold the residence and received more than double the amount that was given to Houseman.

The trial Court held that Dare had taken unfair advantage of Houseman by giving her less than half of the interest in their residence. It was satisfied that there was an agreement pertaining to the dog, and as such, the trial Court ordered Dare to pay Houseman \$1500, the monetary value of the dog.

Houseman appealed the pre-trial determination that pets are personal property lacking the unique essential value to be the subject of an award of specific performance. She challenged this as a matter of law.

Issues

- Whether an agreement providing for ownership of a dog may be the subject of an award of specific performance

Decision and Reasons for the Decision

The appeal was allowed and the case remanded to the trial Court to re-consider the order for specific performance and to re-examine the oral agreement made between the parties.

The Court identified that the award of specific performance is available where “money damages cannot compensate the injured party for the special subjective benefits he or she derives from possession.” The Court also stated that “consideration of special subjective value is equally appropriate when a court is called upon to exercise its equitable jurisdiction to resolve a dispute between joint owners of property that cannot be partitioned or sold without hardship.”

The Court indicated that it and courts in other jurisdictions had recognised that pets have this special “subjective value”. There would be no reason for a court of equity to be more reluctant to resolve competing claims for possession of a companion animal based on the “sincere affection” of one party than to resolve competing claims to an inanimate object on the basis of a relationship with the donor.

It was held that the trial court erred by declining to consider the operation of the oral agreement. The Court identified that in the context of property division, agreements about property that is jointly held are material. It was held that the special subjective value of the dog could be gleaned from Houseman’s testimony about the animal’s importance to her, and her efforts to enforce her right of possession. The fact that Houseman had indicated what the dog’s financial value could not be “viewed as a concession that the stipulated value was adequate to compensate her for loss of the special value given her efforts to pursue her claim for specific performance at trial.” Dare did not establish that an order for specific performance would be harsh or oppressive to him, and any order which enabled him to retain possession of the dog simply because he had possession of him or her at trial would “reward him for his breach”.

The Court remanded the matter to the trial court to examine the oral agreement and the propriety of an award of specific performance.

The trial court’s conclusions regarding the amount due to Houseman for her interest in the residence and jointly held savings account were affirmed.

Significance of the Case

This case exemplifies the way in which the remedy of specific performance may be available to enforce property division agreements applying to companion animals. While reiterating the property status of an animal, the case emphasises that animals have a unique subjective value of the kind that allows them to be the subject of an award of specific performance. It is also significant to note that consideration is usually only given to the relevant party's interest in the animal, not on the welfare or best interests of the animal. The Court stated, "We are less confident that there are judicially discoverable and manageable standards for resolving questions of possession from the perspective of a pet, at least apart from cases involving abuse or neglect contrary to public policies expressed in laws designed to protect animals."

7.10 *Walmsley and Walmsley* [2009] FamCA 1209

Prepared by Richard Hanson

Court

Family Court of Australia

Facts

This case concerned both parenting and property settlement issues which were precluding the Walmsleys from reaching a final agreement. With respect to the property, the Walmsleys disputed their respective contributions. There was also a dispute as to the possession of the Walmsleys' companion animals. Mr Walmsley claimed that he had given the animals away and that he could not recover them. The Walmsleys were also contesting the arrangements for custody over the children.

Issues

- Whether the companion animals could be recovered
- The nature of the parenting and property settlement

Decision and Reasons for the Decision

Recovery of the companion animals

Strickland J ordered a conference between the parties and specifically ordered that Mr Walmsley provide details of the persons to whom the pets were given. Her Honour identified how the animals' return could facilitate the conclusion of an agreement, noting that:

if the pets can be returned...that would then lead...to a settlement of the property settlement issue because the husband has indicated that he would be prepared to consider and look at accepting the proposal of the wife which she would be prepared to make in the event that she gets the pets back.

The parenting and property agreements

The Court held that the matters pertaining to property settlement and parenting arrangements would need to be resolved by reference to evidence.

Significance of the Case

In this case, the Court prioritised the recovery of the companion animals as their absence was preventing the conclusion of an agreement between the parties, rather than because of Mrs Walmsley's patent and irreplaceable bond with the animals. In this way, the Court's reasoning was influenced by the property status of animals, which encourages consideration of animals' instrumental, rather than intrinsic, value.

CHAPTER 8

SERVICE ANIMALS

Humans have many uses for assistance animals. These include as guide dogs for the visually impaired, assistance dogs to help those with hearing difficulties, mobility problems and emotional issues. Animals, particularly dogs, have also been used in hospital visits where patients find the presence of dog therapeutic. The cases in this Chapter raise two main issues: first, what is an assistance animal; and second, what law applies to these animals. The first issue turns on whether an animal needs to have formal training as an assistance animal and whether it needs to be certified as such. The second issue explores the reach of anti-discrimination laws. It is important to keep in mind that anti-discrimination laws deal with discrimination against humans who use assistance animals, rather than discrimination against the animals themselves.

8.1 *Brown v Birss Nominees Pty Ltd [1997] HREOC 54*

Prepared by Paul Khodor

Court

Human Rights and Equal Opportunity Commission

Facts

On 4 September 1994, Brown sought accommodation at a caravan park owned by the respondent. The park did not allow pets or animals and reserved the right to refuse entry to people with pets or animals. Brown had a hearing impairment and he used a cochlear implant and also had a hearing-assistance dog, Taylor. Taylor wore a bright orange collar identifying him as a hearing assistance dog.

Upon arrival at the park Brown and Taylor were refused entry by the park's owner, Mrs Birss. Brown produced documentation evidencing that Taylor was an assistance dog and attempted to explain the exemptions provided by law in respect of hearing assistance dogs. Mrs Birss nonetheless refused them accommodation alleging that the decision was in part, due to Brown's aggressive attitude towards her.

Issues

- Whether Birss Pty Ltd, breached the Disability Discrimination Act 1992 (Cth) ('the Act') by refusing to accommodate Brown on the basis that he was accompanied by Taylor

Decision and Reasons for the Decision

The Inquiry Commissioner, Mr Graeme Inness, observed that the failure to provide accommodation to a person on the basis that he or she was accompanied by an assistance dog was a breach of the Act. Accordingly, the Commission awarded Mr Brown damages for the breach.

The Commission noted that ss 5(1) and 9 of the Act made it unlawful to provide less favourable treatment for the provision of goods and services because of a disability, including the less favourable treatment of a person with a hearing disability who is accompanied by a dog trained to assist with hearing. The Commission determined that as Brown's disability was at least a reason for Mrs Birrs' refusal to provide him with accommodation, Mrs Birrs' conduct attracted the application of the Act. The Commission rejected Mrs Birrs' claim that Brown's attitude was difficult or confronting. It was held that Brown had been discriminated against within the meaning of s 5 of the Act.

The Commission identified that the discrimination breached s 23(1) of the Act, which made it unlawful to discriminate against a person on the basis of a disability in the provision of access to premises. It also found that the refusal of accommodation amounted to a refusal to provide goods, services and facilities on the grounds of a disability, prohibited by s 24 of the Act. Section 24(2) established an exception to the general rule in s 24, available where the use of such facilities would cause unjustifiable hardship to the respondent. The Commission identified that this provision required "a weighing of the benefits and detriments of that refusal to both parties". In relation to Mrs Birrs's concerns pertaining to the possible damage to the park or injury to individuals which could result from the dog's presence, the Commission found that such consequences were unlikely considering the training hearing dogs received. Similarly, her concerns pertaining to loss of custom which may result from the admission of dogs to the park were dismissed; Taylor was a working animal, not a pet.

The Commission also identified that human rights legislation requires a balancing of rights. The Commission found that "In weighing those benefits and detriments, the benefits to Brown, gained by the use of a hearing dog and to others in the community who also use such trained animals for that sort of assistance, outweigh the disadvantages put by [Birrs] outlined above."

The Commission also found that the conduct breached s 25 of the Act, which made it unlawful for a person to discriminate against another person on the basis of their disability by refusing their application for accommodation.

Finally, the Commission noted that s 123 of the Act rendered the conduct of Mrs Birrs the conduct of Birss Pty Ltd.

The Commission awarded \$1000 in damages to Brown.

Significance of the Case

This case provides an example of circumstances in which the Commission may find that conduct is unlawfully discriminatory and where it may decline to apply the exception of hardship to this finding. The case also adopts an anthropocentric approach, centering on a service animal's utility to humans.

8.2 *Sheehan v Tin Can Bay Country Club* [2002] FMCA 95

Prepared by Richard Hanson

Court

Federal Magistrates Court

Facts

Sheehan, who was a war veteran, had attended the Tin Can Bay Country Club since 1997. In 1998, he trained a dog, Bonnie, to help him relieve symptoms of social anxiety. He began to take Bonnie to the club and after some time, stopped using a leash with Bonnie. Bonnie was not always with Sheehan at the club and was sometimes left outside. Bonnie did not accompany Sheehan on the golf course. Although initially insisting that Bonnie be kept on a leash, the club moved to ban Bonnie from the club.

Sheehan alleged that banning Bonnie from the club was discriminatory given that he had a disability. Sheehan first complained to the Human Rights and Equal Opportunity Commission. He argued that as a disabled person he was unfairly treated by the club because of Bonnie. The Human Rights Commission held that a broad definition of assistance dog under the Disability Discrimination Act 1992 (Cth) ('the Act') was ultimately "unsustainable" because it allowed any person who used a dog for companionship to claim that it alleviated a disability. Sheehan appealed the decision to the Federal Magistrates Court.

Issues

- Whether Bonnie was an assistance dog for the purposes of the Act
- Whether the club unlawfully discriminated against Sheehan under the Act

Decisions and Reasons for the Decision

Bonnie's characterisation as an assistance dog

The Magistrate found that "when the dog is outside the premises not in the direct control of Mr Sheehan and not being utilised by Mr Sheehan for his aid and comfort, [she] cannot be an assistance dog." It was also found that when Bonnie was not by Sheehan's side, she was not an assistance animal on the basis that there was no eye contact between Sheehan and Bonnie. However, the Magistrate found that the requirement that Bonnie be tethered when she was inside the club and under the control of Sheehan was unreasonable. The Magistrate identified that the evidence established that Bonnie "was very well trained and obedient and under the control of Mr Sheehan" and that Bonnie "would not react much more differently from that of a trained guide dog and no one suggests that a blind or other sight-disabled person would have to spend his or her entire time holding a guide dog, particularly in a situation in a club." In this respect, Bonnie qualified as an assistance dog.

The question of unlawful discrimination

With respect to whether Mr Sheehan was discriminated against, the Court had to consider

whether the actions of the respondent had directly or indirectly resulted in unfavourable treatment of Mr Sheehan compared to a hypothetical person without his disability. His Honour held that:

Given the evidence of the training of Bonnie, I don't think that the conduct of the club passed the reasonable test in requiring her to be tethered whilst under Mr Sheehan's direct control. I am of the view that the club did breach the Act by requiring the applicant to comply with a requirement (leashing his dog) with which a substantial proportion of persons without his disability are able to comply, which is not reasonable having regard to the circumstances of the case and with which the applicant does not comply.

The Court ordered that the Tin Can Bay Country Club permit Sheehan and Bonnie to attend the club's premises, and that Bonnie could remain unleashed while under the control of Sheehan. It also ordered that the club pay Sheehan \$1500 in damages.

Significance of the Case

This case establishes that dogs providing companionship to people for psychological conditions may qualify as "assistance dogs". The case also reinforced the way in which the property status of animals enables them to be used to service a range of human needs. Significantly, Bonnie's status as an "assistance dog" was tied to her precise function at any given time, "when the dog is outside the premises not in the direct control of Mr Sheehan and not being utilised by Mr Sheehan for his aid and comfort, [she] cannot be an assistance dog."

8.3 *Matthews v Commissioner Queensland Police Service* [2005] QSC 122

Prepared by Antonia Quinlivan

Court

Supreme Court of Queensland

Facts

Matthews, the applicant, suffered from a disability as a result of a brain injury. It affected his lifestyle and led to a sense of isolation. He was unable to leave his home without the presence of his two dogs. A doctor reported that without his dogs, Matthews would feel "bereft" and would lack the only positive interactions he had.

Mr Matthews was studying a PhD at the University of Queensland. He was told that his dogs were not welcome in the libraries. On several occasions, the police were called to insist upon this rule. Mr Matthews also encountered problems travelling with his dogs on public transport and the police were called.

Mr Matthews argued that contrary to ss 23 and 24 Disability Discrimination Act 1992 (Cth) ('the Act'), he was the subject of discrimination. He submitted that the

Commissioner of Police was the proper respondent as the police had been called to apply the alleged discrimination. Matthews sought the following orders:

- A declaration that he was entitled to access premises, areas and spaces including public transport, accompanied by his dogs
- An injunction to restrain the Commissioner of Police from removing him or requiring him to remove himself from premises, areas or spaces, including public transport when he is accompanied by his dogs
- A declaration that he was owed a fiduciary duty by Commissioner of Police and the Commissioner's servants and agents.

Issues

- Whether Matthews had been unlawfully discriminated against
- Whether the Supreme Court of Queensland was the appropriate forum for the resolution of the dispute
- Whether the Commissioner of Police was the relevant respondent
- Whether the Commissioner of Police owed Matthews a fiduciary duty

Decision and Reasons for the Decision

Whether unlawful discrimination had taken place

The Court held that Matthews had not established that he had been discriminated against within the terms of ss 6 or 9 of the Act. With respect to s 6, the Court found that the material before it was insufficient to underpin an assessment that any alleged discrimination was unreasonable. In relation to s 9, the Court observed:

The applicant does not have a visual or hearing disability and it is not at all clear to me that his dogs are “trained to assist the aggrieved person to alleviate the effect of the disability.” There is no evidence of any training apart from the applicant’s own statement to me, in the course of his submissions, that he trains his dogs. It isn’t plain that they are dogs trained in the sense which is relevant for the operation of section 9.

The Court concluded that Matthews could not establish that he was a victim of unlawful discrimination. This precluded Matthews’ access to the remedies he sought.

The appropriateness of the Supreme Court as a forum for the resolution of the dispute

The Court also accepted the Police Commissioner’s submission that the Human Rights and Equal Opportunity Commission was the appropriate forum for a discrimination complaint under part IIB of the Human Rights and Equal Opportunity Commission Act 1986 (Cth). The Court identified that the legislation was a “specialist regime set up for a context such as this” and that “it provides for particular procedures seen as appropriate for the resolution of such disputes”. Although the referral of a complaint to the Commission

would not exclude the jurisdiction of the Supreme Court to consider the matter, the availability of the Commission's procedure for resolving the matter provided "a powerful discretionary basis for refusing... relief."

The relevant respondent

As Matthew's complaint was that the University of Queensland and the persons responsible for the operation of the public transport discriminated against him, their absence was problematic. Although Matthews sought to join the University of Queensland to the proceedings and to bring a case against it, the Court found that he should first pursue his rights before the Commission.

The presence of a fiduciary duty

It was also held that there was no legal basis for a declaration that Matthews was owed a fiduciary duty.

Significance of the Case

This case suggests that to satisfy s 9 of the Act, the applicant must establish that the animal is a guide dog or another animal professionally trained to assist the applicant in alleviating the effect of a disability. Unless the assistance animal is *purpose trained* to alleviate the effect of a disability, the test may not be satisfied.

8.4 *Forest v Queensland Health* [2007] FCA 936

Prepared by Lucinda Vale

Court

Federal Court of Australia

Facts

Forest, the applicant, had a personality or anti-social disorder. To help him cope with this disorder he had trained both his dog Buddy to accompany him in public and also another dog, Knuckles, as Buddy was nearing the end of his working life as an assistance animal. Forest was a founder of Partners AWARE, an association providing programs involving assistance dogs for people with disabilities.

On 16 November 2004, Forest and Knuckles were refused service at Cairns Base Hospital. Access was also refused the next day and on three subsequent occasions. Forest was also refused access to the Smithfield Community Health Centre (with both Knuckles and Buddy). Forest brought two discrimination complaints to the Federal Court of Australia pursuant to the Disability Discrimination Act 1992 (Cth) ('the Act').

Forest argued that Knuckles was trained to alleviate the effect of his mental illness within the meaning of the Act and that to refuse him services while accompanied by Knuckles,

was a breach of the the Act. Forest also argued that Buddy was not a mere companion and continued to help him cope socially, as the dog had done since 1999.

Issues

- Whether Forest’s condition constituted a disability
- Whether the hospital’s refusal to admit Forest when he was accompanied by Knuckles and Buddy constituted discrimination within the terms of the Act
- Whether the conduct was unlawful under the Act

Decision and Reasons for the Decision

The personality disorder as a disability

Collier J held that Forest’s personality disorder was a relevant disability for the purposes of s 4(1)(g) of the Act.

Characterisation of the conduct as discrimination

It was held that Queensland had discriminated against Forest within the meaning of s 6 of the Act. The Court identified that the hospital imposed a condition upon Forest: “that he not attend the respondent’s premises with an animal, unless the animal is a seeing-eye dog or a hearing dog or unless the animal had been assessed by the respondent as having training and hygiene standards acceptable to the respondent.” It was found that a higher proportion of persons without the disability could comply with this requirement. The Court held that the hospital’s policies were unreasonable as they imposed “what [was] potentially an insuperable barrier for persons such as the applicant to cross” and the condition for access established “no objective criteria for the applicant to satisfy”.

Further, the Court held that the dogs were trained to alleviate the effects of Forest’s disability. As Forest was excluded from the hospital due to the presence of the dogs, the Court held that he was treated less favourably because he was accompanied by them, constituting discrimination under s 9 of the Act. Accordingly, the conduct met the definition of discrimination under the Act.

Breach of the Act

The Court held that the conduct of the hospital, in refusing to allow Forest access to its premises on the basis that he was accompanied by the dogs meant that Queensland contravened s 23(1) of the Act. For similar reasons, Queensland breached s 24(1)(a) of The Act for failing to provide health services to Forest due to the dogs’ presence. The Court held that it was not open to the hospital to plead that enabling Forest access with the dogs would result in unjustifiable hardship; Forest’s dogs were not “unruly, unhygienic, ill-behaved or ill-controlled”. Further, it did not impose unjustifiable hardship upon Queensland to require the hospital to develop and implement policies to assist it in identifying assistance animals. However, Collier J noted that the findings did “not extend to services performed in a sterile environment.”

Appeal

The State of Queensland appealed to the Full Federal Court. The majority of the Court held that Collier J had incorrectly applied s 6 of the Act. The Court accepted that the State had discriminated against Forest under s 9(1) because Forest was accompanied by Knuckles, but that the hospital did not do so, on the ground of his psychiatric disability. Therefore, Queensland did not engage in unlawful conduct under the Act.

Significance of the Case

It is relevant to note that the Full Federal Court was able to distinguish discrimination on the basis of disability and discrimination on the basis of an assistance dog used to alleviate the disability. Black CJ dissented and came to the view that the majority's judgment - that s 9 also required that the less favourable treatment be on the grounds of the aggrieved person's disability - would allow a disabled person to be refused entry to a building or a taxi with a guide dog. The Court did not make it clear how, as a matter of law, a decision-maker would separate the use of an assistance dog from the disability that necessitates the use of the assistance dog.

8.5 Ondrich v Kookaburra Park Eco Village [2009] FMCA 260

Prepared by Christopher McGrath

Court

Federal Magistrates Court of Australia

Facts

Ondrich, the applicant, lived with her husband, her children, and her dog, Punta, in a building scheme known as the Kookaburra Park Eco Village (the Park). The Park was a community title scheme and the body corporate had created by-laws prohibiting residents from keeping cats or dogs on both individual lots and the common property. Ondrich said she suffered various medical conditions including anxiety and depression-and that Punta was purchased to help alleviate some of her symptoms. Punta had received obedience training, but was not specially trained to assist with disabilities.

The Park tried to enforce the by-laws preventing Ondrich from keeping Punta. After mediation failed, Ondrich appealed to the Federal Magistrates Court alleging that removal of Punta amounted to discrimination under the Disability Discrimination Act 1992 (Cth) ('the Act').

Issues

- Whether Ondrich's condition was a disability within the meaning of s 4 of the Act
- Whether the conduct amounted to indirect discrimination within the terms of s 6 of the Act

- Whether the conduct amounted to discrimination within the terms of s 9 of the Act
- Whether the Park unlawfully discriminated under s 24 of the Act, and if so, whether the Park could relieve itself from liability by proving unjustifiable hardship

Decision and Reasons for the Decision

Whether the condition amounted to a disability

Burnett FM in the Federal Magistrate Court was satisfied that Ondrich suffered from psychiatric conditions sufficient to constitute a disability under s 4 of the Act.

The presence of indirect discrimination

The Court found that Ondrich could not establish discrimination within the terms of s 6 as she had failed to identify a base group, as well as a “comparative group” of which she was a member, to allow the Court to assess the alleged discrimination.

In reaching his conclusion, his Honour relied upon Black CJ’s dissent in *Forest v Queensland Health* and the requirement, in cases of indirect discrimination to identify an “appropriate base group” with which to compare the group comprising the individual who is aggrieved. The Court cited the test articulated by Collier J in *Forest v Queensland Health* [2007] FCA 936: “to determine whether there has been indirect discrimination, it is necessary to identify an “appropriate base group” with which to compare the group comprising the individual claiming discrimination, and to decide whether a substantially higher proportion of those individuals from the base group are able to comply with the relevant requirement or condition”. Ondrich failed to meet this threshold.

The presence of discrimination

Ondrich also failed to establish, under s 9, that Punta should be classified as an assistance animal. Under s 9, an assistance animal must be trained for the purposes of alleviating the disability. The Court held that Punta’s obedience created a significant bond with Ondrich and expert testimony noted that the presence of Punta reduced some of Ondrich’s anxiety. However, these factors did not satisfy the test. The Court could not be persuaded that there was a real nexus between Punta’s training and the assistance Punta provided to alleviate Ondrich’s disability. Simply having an assistance animal was not sufficient to enliven s 9.

Breach of the Act

As the Court found that Ondrich had failed to establish that she was discriminated against, it stated that it was unnecessary to consider whether or not the alleged discrimination was unlawful. However, the Court indicated that had Ondrich been able to establish discrimination under s 9, she would have been successful in claiming that the Park unlawfully discriminated under s 24 by refusing Ondrich access to its premises. The Park would not have been successful in arguing that a ruling of unlawful discrimination would impose unjustifiable hardship upon it under s 24(2).

Significance of the Case

Burnett FM reinforced the requirement under the Act that an assistance animal must have specific training to alleviate a disability for the purposes of the Act: “while obedience training clearly did assist the applicant and her dog it was not training to assist in the alleviation of the effects of her disability. From that evidence the fact of the dog’s companionship appears to be the cause of the applicant’s better psychological state of mind. However this evidence does not of itself demonstrate that training was required to develop that state of companionship.” The case also emphasised the importance of identifying both a base and a comparison group to establish indirect discrimination.

CHAPTER 9

RESEARCH and EXPERIMENTATION

The use of animals in research and experimentation is an established feature of human society. As Alex Bruce points out, in 2006 there was an increase of 23% in the use of animals in research and experimentation in Australia. Research involving animals must be screened and approved by animal ethics committees in accordance with the National Health and Medical Research Council's Australian Code of Practice for the Care and Use of Animals for Scientific Purposes (2013). The research needs to be justified and adhere to principles of replacement, reduction and refinement. Justification for projects is based on utilitarian criteria that inevitably consider *how* the research can proceed rather than *whether* it should proceed. Consequently, notwithstanding the oversight of animal ethics committees, the use of animals in research and experimentation still raises many moral and ethical dilemmas.

Moreover, as illustrated by the case in this Chapter, animal advocates will not find it easy to gain access to records and materials, indicating that arguably the system lacks sufficient transparency.

9.1 United Kingdom Secretary of State for the Home Department v British Union for the Abolition of Vivisection and another [2008] EWCA Civ 870

Prepared by Jennifer Hird

Court

England and Wales Court of Appeal

Facts

In December 2004, The British Union for the Abolition of Vivisection ('BUAV'), the respondent, made an application under the Freedom of Information Act 2000 (UK) ('FOI Act') to gain information from the Home Office pertaining to the licensing of animal research. The BUAV requested "the actual information" contained in each of the following licences: "wound healing; relief from chronic pain by use of antidepressants; studies involving disorders of balance; metabolism and excretion studies for new drugs; and genetically modified animals & respiratory diseases."

In March 2005, the head of the Animal Scientific Procedures Division at the Home Office responded to this request by providing a narrative document containing all information that he deemed appropriate to disclose. Information regarded as confidential was omitted, in accordance with the statutory exemptions relevant to disclosure.

The BUAV responded to the selective disclosure by arguing that some categories of material—deemed to be confidential, should not be. These categories were: "permissible purpose; duration of project; background; objectives & potential benefits; justification for

use of primates, cats, dogs or equidae; description of work; index of procedures; and housing conditions and environmental enrichment.”

The Secretary of State denied BUAV’s request for further information. This decision was upheld by the Information Commissioner. A further appeal to the Information Tribunal was allowed; it was held that the information had to be entitled to protection under the law of confidence, which required the person receiving it to have a legally enforceable obligation to keep it confidential. The BUAV lodged an appeal to the Queen’s Bench Division of the High Court of England and Wales. This appeal was allowed by Eady J. The BUAV appealed to the Court of Appeal.

Issues

- Whether the Information Tribunal was correct to read s 24 of the Animals (Scientific Procedures) Act 1986 (UK) as importing the three part test from *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 (*‘Coco’*)

Decision and Reasons for the Decision

Carnwath LJ delivered the judgement, dismissing the appeal and affirming the decision of Eady J and the Information Commissioner.

The BUAV submitted that s 24 of ASP Act only applied to information given in confidence to the Home Office. The BUAV further drew the Court’s attention to the decision of *Coco*, which held that the following questions needed to be answered in the affirmative before information could be deemed to be given in confidence:

- (a) Does the information in question have the necessary quality of confidence?
- (b) If so, was it disclosed in circumstances that gave rise to an obligation to maintain its confidentiality?
- (c) Would its disclosure in breach of that obligation cause harm to the person who made the original, confidential disclosure?

The BUAV submitted that the categories of material excluded by the Home Office did not meet this test, and that the information was not therefore not prohibited from being disclosed by s 24 of the ASP Act.

The Court held that the relevant test was a subjective one, “directed at the state of mind of the official or other person in possession of the information”. The question to be answered was “does he or she know or have reasonable grounds for believing that the information was ‘given in confidence’”? The Court also needed to determine whether at the time of giving the information, the giver expressly or by reasonable inference from the circumstances, intended that the information be held “in confidence”.

His Honour also stated that there was nothing within the relevant legislation to indicate that the Court should import an objective test derived from the law of confidentiality. The Court identified that the *Coco* tests were created to “hold a fair balance between competing commercial interests” in absence of contractual agreement and that there was no equivalent balance of competing interests in s 24 of the ASP Act. It was observed that the section was “concerned with the relations of citizen and state”. The aim of the statute was to regulate and protect the provision of confidential information. Importantly, there was nothing in the ASP Act to “justify limiting the scope of the protection by reference to

any more general interest in public information, such as was later given effect by FOI Act”.

The Court dismissed BUAV’s submission that standard procedures could not be confidential.

Finally, the Court observed that the effect of s 24 of the ASP Act was to induce “[a]n official wishing to use that information for some other purpose... to lean on the side of caution, in order to avoid criminal sanctions”. It also indicated that “a test based simply on ‘confidentiality’ may not adequately reflect the developments in the modern law, including the law of human rights”; however, it stated that this was not directly relevant to the matter at hand.

The BUAV petitioned to The Appeal Committee of the House of Lords to be granted leave to appeal. This petition was dismissed.

Significance of the Case

This case affirmed that a subjective test was to be applied in respect of s 24 of the ASP Act. Such a test increases the difficulty animal protection groups face when seeking access to information regarding animal experimentation, as it triggers the application of the prohibition where an “individual know[s] or ha[s] reasonable grounds for believing that the information was ‘given in confidence’”.

CHAPTER 10

ANIMALS, RELIGION AND CULTURAL PRACTISES

The use of animals in religion and cultural practices is a polarising issue. Freedom of religion and culture are perceived as fundamental rights in many democratic jurisdictions. While many people oppose certain religious practices such as animal sacrifice, others would argue any restriction on the expression of religion or culture is a violation of human rights. These considerations were critical to the decision in *Church of the Lukumi Babulu Aye v City of Hialeah*.

However, in *The Queen on the application of Swami Suryananda as a representative of The Community of The Many Names of God v The Welsh Ministers*, the court held that religious freedom based on the sacredness of animals cannot override public health issues.

10.1 *Church of the Lukumi Babalu Aye v City of Hialeah* 508 U.S. 520 (1993)

Prepared by Tiffany Lasschuit

Court

United States Supreme Court

Facts

In September 1987, the Council of the City of Hialeah ('the City'), the respondent, adopted ordinances concerning 'sacrifice'. The ordinances made animal sacrifice unlawful within the City of Hialeah. The City enacted this law shortly after learning that the Church of the Lukumi Babalu Aye ('the Church'), the appellant, planned to relocate to Hialeah. The Church practiced the Santeria religion, which involved animal sacrifice as one of its principal forms of devotion.

At first instance, while the Court acknowledged that the foregoing ordinances were not religiously neutral, it found in favour of the City, concluding that government interests in preventing public health risks and cruelty to animals justified the City's prohibition on ritual sacrifices. The Court of Appeals upheld this decision. It was appealed to the United States Supreme Court.

Issues

- Whether the ordinances were neutral
- Whether the ordinances were of general applicability
- Whether the ordinances were justified by a compelling governmental interest

Decision and Reasons for the Decision

The Court referred to “the general proposition” that under the Free Exercise Clause of the First Amendment “a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice”. The Court held that the ordinances were neither neutral nor of general application, and that they accordingly offended the Free Exercise Clause.

Neutrality

Justice Kennedy stated that the Free Exercise Clause prevents discrimination against some or all religious beliefs. The Court observed, “if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral”. In this case, the Court found that the use “words with strong religious connotations” such as “sacrifice” and “rituals” proved that the religious exercise of animal sacrifice was targeted. The Ordinances were designed to prohibit killings of animals by Santeria church members, but to exclude almost all other animal killings.

General applicability

The Court also held that each of the ordinances pursued the City’s governmental interests only against religious beliefs and therefore violated the requirement that laws burdening religious practice must be of general applicability. The Ordinances expressly prohibited animal killing by religious sacrifice, but many other types of animal slaughter were neither prohibited nor expressly approved. Therefore, the Ordinances could not be seen as being of general applicability.

Compelling governmental interest

The Court identified that a law lacking neutrality and general applicability was required to be both justified by a compelling governmental interest and narrowly tailored to advance that interest. The Court held that the ordinances could not satisfy these criteria, since they were not narrowly tailored to accomplish ostensible governmental interests. The ordinances were overbroad or under-inclusive and the interests could be achieved by narrower ordinances that burdened religion to a far lesser degree. Further, the City was unable to demonstrate that the government interests were compelling.

Significance of the Case

This decision illustrates the way in which the law may subordinate animal interests to religious freedom. Further, the case demonstrates that governmental interest in preventing cruelty to animals cannot be enshrined in legislation if the restrictions are narrow and only prohibit the conduct of a religious institution.

10.2 R (on the application of Swami Suryananda as a representative of The Community of The Many Names of God) v The Welsh Ministers [2007] EWHC 1736

Prepared by Jae-Hee Park

Court

High Court of Justice of England and Wales (Queen's Bench Division – Administrative Court)

Facts

Shambo, a temple bull adopted by The Community of Many Names of Gods ('the Community') at the Hindu Monastery and Temple at Skanda Vale in Carmarthenshire, tested positive to bovine tuberculosis ('BTB') after a routine skin test in April 2007. As a result, the Department for Environment, Food and Rural Affairs ('DEFRA') issued a Notice of Slaughter, dated 3 May 2007. The notice, which provided that the bull was to be slaughtered for the protection of public and animal health was served under s 32 of the Animal Health Act 1981 ('the Act'). The Community submitted letters to various government departments urging them to reconsider alternatives to slaughter by exercising their discretion under s 32 of The Act. These submissions were rejected and a letter dated 3 July 2007 was sent to the Community confirming that Shambo was to be slaughtered.

The Monks of the Community made an application on 6 July 2007 to the Administrative Court of the High Court for judicial review seeking to:

- Quash the Welsh Assembly Government's decision to issue a slaughter notice; and
- Challenge the decision of the Minister of Sustainability and Rural Development, Jane Davidson ('the Minister') not to exercise her discretion under s 32 of the Act to prevent the slaughter of Shambo.

The Committee argued that the slaughter of Shambo would breach art 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention'), which guarantees "the right to freedom of thought, conscience and religion" and the right "to manifest religion or belief in worship". Furthermore, the Community claimed that the Government made its decisions unlawfully by failing to take out a proper balancing exercise as required under art 9(2) of the Convention and by failing to justify why slaughter, rather than other viable alternatives, was necessary.

The Government submitted that the slaughter of Shambo would not engage art 9 at all and that it would not interfere with the manifestation of the Community's beliefs. The Government argued that it was necessary to slaughter the bull for two main reasons:

- 1) To eliminate the possibility of the risk of infection from Shambo to other cattle or humans; and
- 2) To carry out post mortem examinations of Shambo in order to assess and manage the disease in the rest of the herd at Skanda Vale and to ensure elimination of infection.

In addition, the Government claimed that if art 9(1) was engaged, the Community's right to religious freedom could be lawfully overridden under the second limb of art 9.

Shambo's welfare was only briefly mentioned in paragraph 62, where the National Assembly of Wales justified their decision for rejecting the Community's submission for alternatives to slaughter by suggesting that slaughter was in the "interests of the bullock", further providing that "[BTB] is a chronic debilitating disease and it would be unacceptable simply to allow symptoms to progress which would cause prolonged suffering before an eventual death."

Issues

- Whether the decisions to order the slaughter of Shambo were unlawful under art 9 of the Convention

Decision and Reasons for the Decision

The Court ruled that the slaughter notice of 3 May 2007 and the decision to pursue the slaughter on 3 July 2007 were both unlawful and should be quashed.

In accepting beyond any doubt that art 9 of the Convention was engaged, the Court considered the issue of whether the Government's interference with the Community's right to manifest their religious beliefs was justified under art 9(2) of the Convention. According to his Honour, such interference must be prescribed by law and must also be "necessary in a democratic society in pursuit of a legitimate aim". The legitimate aim relied on by the Government was the protection of public health including the health of animals and humans.

In addressing the issue of proportionality, the Court adopted the three-stage test laid down in *De Freitas v Permanent Secretary for Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69. His honour ruled that the Government had failed to carry out the balancing exercise required by art 9 of the Convention by "failing properly to identify and give appropriate weight to the public interest objective they were pursuing".

However, in handing down his judgment, his Honour reiterated that his ruling merely rendered the decisions unlawful and did not guarantee that Shambo or any other animal in the care of the Community, would be immune of slaughter under the government's future exercise of its discretion and powers under the Act.

The Welsh Assembly Government appealed. On 23 July 2007, the Court of Appeal upheld the appeal. Pill LJ ruled that the Minister had acted lawfully in refusing to exercise her discretion under s 32 of the Act to prevent the slaughter of Shambo. Shambo was eventually killed.

Significance of the Case

The decision demonstrates that there is an element of "public interest" with respect to animals with religious significance. However, this may not take precedence when animal health issues are at stake.

CHAPTER 11

ANIMALS AND COMMERCE

Animals are used in commerce for food, entertainment and as a tradeable commodity. However, animals are also sentient beings who humans relate to, at many different levels, and to some extent in contradictory ways. Those who consume animal products, for example, might make decisions based on whether their food has been cultivated in accordance with claims indicating that it is organic or free-range. As the decision in *Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 4)* [2013] FCA 665 highlights, consumer law can be a powerful tool for animal advocates. Moreover, consumers themselves are equally powerful stakeholders.

Other cases in this Chapter explore whether animals can be the subject of specific performance in contract law, and whether laws relating to the protection of animals as a natural resource can offend the protection of interstate trade contained within of s 92 of the Australian Constitution.

11.1 *Fergusson v Stevenson* (1951) 84 CLR 421

Prepared by Alexandra Jackson

Court

High Court of Australia

Facts

Stevenson, the defendant, was the Australian manager of an English company which bought and graded animal skins then exported them to tanneries in the United States.

In the course of conducting this business Stevenson knowingly had in his possession 1,318 kangaroo and wallaroo skins from animals who had been killed in Queensland and delivered to Stevenson in New South Wales for grading and exportation.

Stevenson was charged under s 19 of the Fauna Protection Act 1948 (NSW) ('the Act'). Section 19(1) provided that "any person who knowingly buys, sells, offers or consigns for sale or has in his possession, house or control any protected fauna at any time shall be liable to a penalty." Section 4 of the same Act defined "protected fauna" as "any fauna not mentioned in the First Schedule to this Act" and included the skin or any other part of such fauna. Kangaroos and wallaroos were not listed in the first schedule of the Act and were thus classed as protected fauna.

The killing of the kangaroos and wallaroos and the possession of them was lawful in Queensland; however s 19(1) of the Act also stated that the provision applied "whether such fauna was killed, taken or bought in or received from any State or Territory of the Commonwealth or the Dominion of New Zealand."

This case originated in the Central Court of Petty Sessions in Sydney. However, it was heard in the High Court as the Attorney-General exercised the power under s 40 of the

Judiciary Act 1903 (Cth) to remove any case pending in a State into the High Court where the cause arises under the Australian Constitution or involves its interpretation.

Issues

- Whether Stevenson, in transacting and possessing the animal skins, acted unlawfully

Decision and Reasons for the Decision

The Court found unanimously in favour of the defendant and the case was dismissed with costs. McTiernan J found for the defendant on different grounds from the majority and submitted a separate judgment.

The State argued that s 19 of the Act existed for the purpose of the protection and preservation of fauna and that s 92 should not be used to give inter-State transactions freedom from adhering to those laws. The Court rejected this argument and found that the relevant facts were that the defendant had received the skins in the course of a transaction of interstate trade and commerce and that the allegedly unlawful possession arose directly from the interstate transaction. As freedom of interstate trade and commerce was protected by s 92 of the Australian Constitution, the Court held that the Act could not prohibit the transaction.

McTiernan J examined the definitions of “fauna” and “protected fauna” in the Act and found that the words “protected fauna” applied only to fauna originating in New South Wales. This excluded the wallaroo and kangaroo skins which were the subject of the charge, as the animals had been killed in Queensland. Thus, McTiernan J found that the facts did not fall within s 19 of The Act. Accordingly, His Honour did not need to consider the question of whether s 19 was incompatible with s 92 of the Australian Constitution.

Significance of the Case

This case reveals some of the problems that may be attributed to fragmented and inconsistent legislation among the states. Possession of the skins was lawful in Queensland and unlawful in New South Wales, which led the Court to find that the New South Wales law contravened the freedom of interstate trade and commerce enshrined in the Australian Constitution.

This decision effectively made the possession of the animal skins legal provided they were being transacted between states, or on the minority decision, killed interstate and then transported to New South Wales. The Court’s application of the legislation in light of the Constitution substantially diluted the intended effect of s 19 of the Act, which was to regulate the sale and possession of fauna - the definition of which encompassed their skins - for the purpose of protecting and preserving them.

11.2 *The Millstream Pty Ltd v Schultz* [1980] 1 NSWLR 547

Prepared by Betty Ming Wai Yeung

Court

Supreme Court of New South Wales Equity Division

Facts

On 3 May 1979, the managing director of Millstream Pty Ltd ('Millstream'), the plaintiff, agreed to purchase 40 fallow deer from Schultz, the defendant. The deer were to be delivered to Millstream's property no later than mid-July 1979 at a price of \$20,000, with a third of this sum payable up front and the balance payable upon delivery.

Millstream paid Schultz \$6,700 on 11 May 1979 as an upfront payment. The delivery date was postponed to 1 September 1979 by agreement of both parties. However, on that date Schultz did not deliver any deer and "repudiated the obligation to deliver."

On 3 October 1979, Millstream sought specific performance of the contract for sale. On 10 October 1979, Millstream obtained an interlocutory injunction to restrain "the defendant from selling or disposing of the deer."

At the trial the defendant was not in a position to deliver the deer. Evidence suggested that he had them on or about 1 September 1979, but that he disposed of them elsewhere. On the second day of proceedings, the plaintiff abandoned the claim for specific performance, and sought only declarations and orders relating to damages.

Issues

- Whether there was an enforceable contract between the two parties which had been breached
- The quantum of damages payable

Decision and Reasons for the Decision

Existence and breach of contract

McLelland J came to the conclusion that there was a contractual agreement between the parties under which the defendant would sell the forty head of fallow deer to the plaintiff on the terms described on 3 May 1979.

The Court ruled that a contract was formed between the parties on 3 May 1979 with specific terms and that these terms were not too uncertain to form a contract.

By failing to deliver the deer on the 1 September 1979, Schultz breached the contract and repudiated his obligation to deliver the animals.

Award of damages

The Court held that as it could not be demonstrated that at the time the proceedings were commenced, the Court could have awarded specific performance, damages under s 68 of the Supreme Court Act (NSW) were not available.

Schultz argued that Millstream's initial request for specific performance was inconsistent with an election to terminate the contract as repudiated by Schultz, and that as such, the Millstream's cause of action for damages for loss of bargain had not accrued at the time the proceedings were commenced. The Court rejected this argument, finding that in the context of a claim for damages for loss of bargain, the "relevant cause of action is the breach of the contract, [which] accrues upon the occurrence of the breach".

The Court concluded:

In the present case, the relevant breach is the failure of [Schultz] to deliver deer in accordance with the terms of the contract. That breach is to be taken to have occurred and, therefore, the [Millstream's] cause of action to have accrued, on 1st September, 1979... [I]t is now too late for [tSchultz] to remedy his breach because, in my opinion, the claim of the [Millstream] to recover the \$6,700 part payment together with interest...was a sufficient election to terminate the contract.

In addition, the Court found that it would not be appropriate to imply a term that a particular percentage of the pregnant does which were contracted for would produce live fawns. Further, Millstream was unable to recover the \$6,700 as a debt, because the right to do so only came into being when the contract was terminated, which was after the commencement of proceedings.

Millstream was awarded damages for the breach, equal to the value of the gross benefit of which Millstream had been deprived as a result of Schultz's breach, less the unpaid balance of the purchase price. The \$6,700 part payment which had been made by Millstream was taken into account in the assessment of damages.

Significance of the Case

This case illustrates the way in which the law of contracts applies to transactions involving animals, a consequence of their property status.

11.3 *Cole v Whitfield (Tasmanian Lobster case) (1988) 165 CLR 360*

Prepared by Pamela Kalyvas

Court

High Court of Australia

Facts

The appellant was a senior inspector of the Tasmanian Fisheries Development Authority ('TFDA'), the body responsible for the enforcement of the provisions of the Fisheries Act 1959 (Tas) ('the Act') and the Sea Fisheries Regulations 1962 (Tas) ('the Regulations').

Whitfield, the respondent, was the operations manager of the Boomer Park Crayfish Farm, Dunalley in Tasmania ('Boomer Park'). Boomer Park purchased and marketed live crayfish throughout Australia and internationally. On 5 January 1983, a district fisheries inspector employed by the TFDA inspected Boomer Park and discovered sixty male crayfish and thirty-seven female crayfish who were under the prescribed minimum size for crayfish in Tasmania. These undersized crayfish were part of a delivery from South Australia.

Whitfield was charged with possession of undersized crayfish in violation of the provisions of regs 31(1)(d)(ix),(x) and 44(3) of the Sea Fisheries Regulations 1962 (Tas). Whitfield pleaded not guilty and sought to rely upon the protection of s 92 of the Constitution of the Commonwealth of Australia, which provides:

On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

Issues

- Whether regs 31(1)(d)(ix) and (x) of the Regulations were inconsistent with s 92 of the Australia Constitution

Decision and Reasons for the Decision

The Court decided that regs 31(1)(d)(ix) and (x) of the Regulations, when applied to the possession of the crayfish, were compatible with the freedom guaranteed by s 92 of the Australian Constitution. As such, the charges laid with respect to possession of undersized crayfish were valid.

The Court referred to the history of s 92 and the intention of the drafters of the Australian Constitution. Their Honours reasoned that although the provision was intended to eliminate all border customs duties, there was no suggestion that it was intended to prevent the enactment of regulations necessary for the conduct of business. Accordingly, while s 92 was designed to preclude the imposition of protectionist burdens, the section did not guarantee a measure of freedom with respect to trade and commerce that would leave parties immune from all legislative or executive oversight. The "absolute freedom" of s 92 was said to relate to immunity from discriminatory burdens of a protectionist kind. The Court distinguished between different types of laws:

A law which has its real object the prescription of a standard for a product or service or a norm of commercial conduct will not ordinarily be grounded by protectionism and will not be prohibited by s 92. But if a law, which may be otherwise justified by reference to an object which is not protectionist, discriminates against inter-State trade or commerce in pursuit of that object in a

way or to an extent which warrants characterization of the law as protectionist, a court will be justified in concluding that it nonetheless offends s 92.

The Court considered whether the burdens of the regulations imposed on interstate trade in crayfish were so disadvantageous “to interstate trade in crayfish as to raise a protective barrier around Tasmanian trade in crayfish.” It held that prohibitions against the sale and possession of undersized crayfish had no discriminatory protectionist purpose and the object of the prohibitions was “to assist in the protection and conservation of an important and valuable resource, the stock of Tasmanian crayfish.”

Significance of the Case

The case recognised that laws protecting natural resources may impact on trade between states. Such laws are nevertheless vital to the long-term maintenance of natural resources.

This case also exemplifies the predominance of profitability in the context of trade in animal products. That possession of undersized sea animals was prohibited to preserve the stock of the “resource” rather than for the purpose of protecting young animals highlights how animal interests are often only upheld incidentally in commerce.

11.4 Fares Rural Meat And Livestock Co Pty Ltd v Australian Meat And Live-Stock Corporation and Others (1990) 96 ALR 153

Prepared by Barnaby Austin

Court

Federal Court of Australia

Facts

The Australian Meat and Live Stock Corporation (‘the Corporation’), the first respondent, was responsible for issuing licences to export live sheep. Fares Rural Meat and Livestock Co Pty Ltd (‘Fares’), the applicant, was the holder of a licence from the Corporation. On 22 August 1989, the Corporation issued an order to licence holders not to export or sell sheep to Saudi Arabia. This order remained in force until 21 December 1989, from which time export to Saudi Arabia could resume, subject to close monitoring on a shipment-by-shipment basis.

On 23 March 1990, Fares sold a shipment of 90,000 sheep to Multitrade, pending approval from the Corporation to export the sheep to Dammam, Saudi Arabia. The approval was received on 26 March 1990. The terms of the contract meant that ownership of the sheep passed from Fares to Multitrade as the sheep boarded the vessel.

In early April, shipments of sheep exported to Saudi Arabia and Jordan by other Australian export companies were rejected because of the presence of “scabby mouth disease” in some sheep. On 10 April 1990, Multitrade on-sold the shipment of sheep to Mr Sulaiman Ali Al Khalaf, for delivery at Dammam, Saudi Arabia. On 17 April 1990,

the Corporation issued an order to Fares rescinding the approval to export sheep to Saudi Arabia and instead granted approval to export sheep to a country other than Saudi Arabia.

In response, Fares sought judicial review of the decision in the Federal Court.

Issues

- Whether the approval granted by the Corporation was defective
- Whether the Corporation could direct a shipment elsewhere
- Whether the decision to rescind approval was subject to review under the Administrative Decisions Judicial Review Act 1977 (Cth) ('ADJR Act')

Decision and Reasons for the Decision

The Federal Court rejected both of the Corporation's arguments and found for the Applicant.

The approval

The Court held that the effect of Fare's contractual arrangements with Multitrade was that it could export the sheep without contravening any condition of its live export licence. It was held that Fares "was nonetheless an exporter because it acted upon a contract with Multitrade made before the necessary approval to the implementation of that contract." The approval was not therefore invalidated by the contractual arrangements with Multitrade.

The Court also dismissed on factual grounds the claim that the application for approval was defective because it failed to stipulate a consignee.

A power to direct shipments elsewhere

The Court held that the conditions of the licence obliged Fares to ensure the cargo was taken to the port of discharge first, in this case in Saudi Arabia, after departing Australia.

Jurisdiction to make the decision

The Federal Court agreed with the Applicant's submission that the Corporation could not rescind its approval, as it had not been given subject to any condition subsequent, so could not be withdrawn in the way attempted on 17 April 1990. The Court found:

Subject to the qualification arising from the conditions that were imposed, the scheme of control established by the Order and Directions in question had been worked out with the giving of approval, the prohibition on export thereby being lifted. The scheme did not provide for such a rescission of approval after the licensee in question had made its final arrangements on the faith of the operation of the approval in accordance with its terms.

Accordingly, the Court held that "the communication of 17 April was ineffective to re-impose upon the applicant a prohibition upon export to Saudi Arabia of the live sheep in question."

Although the Court disposed of the matter by finding that the Corporation lacked the requisite power to make the decision, it considered the other grounds raised by Fares. Fares claimed that the decision was an improper exercise of power. The Court rejected the argument that the decision was unreasonable within the terms of the ADJR Act and that the Corporation had failed to have regard to relevant considerations. However, the Court held that had it not granted relief to Fares on the basis of the primary ground argued, it would have allowed review for denial of natural justice.

The Federal Court of Australia made three orders in its decision on 24 April 1990:

1. To set aside the order made by the Corporation on 17 April 1990, which rescinded the applicant's permission to export live sheep to Saudi Arabia;
2. To declare that the order from the Corporation on 27 March 1990 that gave approval to the applicant to export sheep to Saudi Arabia not be rescinded and remained in effect.
3. That the Corporation pay the applicants costs.

Significance of the case

This case illustrates the way in which administrative law, and in particular judicial review, does not always serve animal interests. In this way, it exemplifies how administrative decisions made to protect animal welfare are not immune from review.

11.5 *Borg v Howlett* [1996] NSWSC 153

Prepared by Marta Nottidge

Court

Supreme Court of New South Wales

Facts

Borg, the plaintiff, was the successful bidder of a horse and thought he or she was purchasing the horse of Lot 109. Howlett, the defendant, was the vendor. The purchase price was \$2000. Howlett did not intend to sell the horse of Lot 109, rather intended to sell only the horse of Lot 101. It was discovered almost one year later that Borg had actually received the horse of Lot 101. Borg sought specific performance of the contract which would vest him or her with ownership of the horse of Lot 109. Borg was willing to surrender the horse of Lot 101. Howlett resisted the order for specific performance, raising several defences.

Issues

- Whether there was a valid contract
- Whether any contract would be set aside in equity, as it would be unconscionable for Borg to enforce the contract in light of the mistake
- Whether in receiving the horse of Lot 101, Borg received what he or she contracted for
- Whether the terms of the auction sale prevented an application for specific performance
- Whether specific performance was available in equity for this kind of contract
- Whether the Court should deny specific performance on discretionary grounds

Decision and Reasons for Decision

Validity of the contract

The Court held that there was a valid contract, finding that “at this particular sale, where something was advertised in the catalogue and when there was an inspection, and when there was a successful bid at auction, it is very difficult to say that the parties did not intend to make any contract at all.” While the precise subject matter of the contract required ascertainment, there was no equivocation in the making of the contract.

Equitable intervention on the basis of mistake

The Court did not discern sufficient factual material to set the contract aside on the basis of a mistake. The mistake was solely the mistake of Howlett, the vendor, and there was little evidence arising on the facts to substantiate hardship as a consequence of the mistake.

The content of the contract

The Court held that “on the facts of this case the subject matter of the sale was not the horse which was physically inspected but the horse which was set out in the catalogue with all its details, that is, the subject matter of the contract was the horse” of Lot 109.

The terms of the auction sale preventing specific performance

The Court indicated that “the whole system which is implicit in the conditions, as well as occasionally explicit, was that the vendor was to supply the horse as detailed in the catalogue, the purchaser was able to purchase it from the catalogue and that the auctioneer was not to be sued if there was some mistake.” As such, the terms of the auction sale did not provide Howlett with a defence.

Availability of specific performance

The Court held that the “aspects of uniqueness and the conjecture as to damages” characterising the case rendered specific performance appropriate.

Discretionary grounds for refusing relief

The Court rejected Howlett’s claim that Borg’s conduct involved laches.

The Court accordingly awarded specific performance.

Significance of the Case

This case embodies the property paradigm with which the law conceives of animals, referring to the horse as a “chattel”. The decision differentiates between chattels with unique characteristics and those without them, a distinction relevant to the availability of specific performance.

11.6 *Noah v The Attorney General* (2003) HCJ 9232/01

Prepared by Alysha Byrne

Court

Israel High Court of Justice

Facts

The Israeli Foundation of Animal Protection Organisations (‘Noah’), the petitioner, sought to have the force-feeding of geese, for the purpose of producing foie gras, deemed illegal. They also requested for the regulations to be annulled.

The Court described the practice of foie gras as follows. The force-feeding of geese would produce an enlarged and fatty liver within the goose, which would then be used to make foie gras. The goose would be fed by a tube forced into his or her oesophagus, and this procedure would be repeated several times a day. The amount of food that would be force-fed would significantly exceed that which the geese required, and thus, the liver would become several times larger than the size of a normal liver.

Section 2(a) of the Israeli Cruelty to Animals Law (Protection of Animals) 1994 (‘the Law’), specified that: “A person will not torture an animal, will not be cruel toward it, or abuse it in any way.” The Cruelty to Animals Regulations (Protection of Animals) (Force-Feeding of Geese) 2001 (‘the Regulations’) were designed to prevent the suffering of geese during force-feeding. These regulations also prohibit the establishment of new force-feeding farms and the expansion of existing farms.

Issues

- Whether force-feeding constituted ‘torture’, ‘cruelty’ or ‘abuse’

- If so, whether the process (and thus the regulations) should be deemed illegal

Decision and Reasons for Decision

The majority, consisting of T Strasberg-Cohen J and E Rivlin J, found that the force-feeding of geese constituted an abuse of animals and thus violated s 2(a) of the Law. As a result, the Court annulled the regulations regarding the force-feeding of geese. Grunis J dissented.

Strasberg-Cohen J held that the circumstances where human interests will supersede those of animals depend upon the “culture, values and worldview of society and its members.” As a result, Her Honour concluded that “agricultural needs” (as discussed by Grunis J in dissent) should not have a sweeping precedence over animal interests. Agricultural interests should be weighed against the suffering of the animal, the type of suffering and the severity of the suffering. Conclusively, Strasberg-Cohen J found that the regulations did not effectively seek to prevent suffering, and thus deviated too significantly from the purpose of the law. Her Honour decided, in agreement with E Rivlin J, that the regulations should be annulled and that force-feeding of geese should be prohibited. However, Her Honour took into account the obiter of Grunis J by establishing a delayed amendment banning force-feeding.

In determining whether the force-feeding of geese constituted torture, cruelty or abuse, Grunis J turned to the case of *Animals Live v Hamat Gader Recreation Enterprises* (LCA 1684/96). In that case, the Court held that for an act to amount to torture, cruelty or abuse, the act ought to be regarded by a bystander as constituting torture, cruelty or abuse. The measure and extent of the pain or suffering need not be particularly great, and the Court must determine whether the procedures that caused the suffering are proportionate to the purpose for which they are used. Grunis J found that it was clear that a bystander would find the force-feeding of geese to be torture, abuse or cruelty. However, Grunis J also emphasised the importance of balancing the interests of the geese with “agricultural needs”. The purpose of the force-feeding process is to provide food for human consumption. Even though Grunis J noted that foie gras is a culinary delicacy, and thus would not be given the same weight as basic foods, he did acknowledge the detrimental effect on producers of deeming the process illegal. Grunis J sought to apply regulations in the European Union that minimised the process of force-feeding, yet did not prohibit it. In balancing the interests of the geese and “agricultural needs”, Grunis J found that the economic and social consequences to be faced by farmers would outweigh the suffering of the geese. His Honour’s minority decision held that the regulations were not invalid and thus the force-feeding of geese was not illegal. In obiter, Grunis J pointed out that if regulations on farming industries were to be altered, they should contain a transitional period to allow farmers to reorganise their methods and re-train employees.

Significance of the Case

This case established a precedent for the prohibition of the force-feeding of geese in the existing foie gras industry. The Court recognised the significant suffering experienced by the geese, and thus deemed the process unlawful.

11.7 *Fitz-Alan v Felton* [2004] NSWSC 1118

Prepared by Matthew Jones

Court

Supreme Court of New South Wales

Facts

Adkins kept a horse named Dunnoon on behalf of Felton, the defendant. On 15 May 1997 Fitz-Alan, the plaintiff, approached Adkins to borrow Dunnoon. Adkins agreed, pending confirmation from Felton.

In June 1997, Fitz-Alan took her daughter to Adkins' stables to test ride Dunnoon. After a successful test ride Adkins spoke words to the effect of "take him and try him, if he is not suitable bring him back, otherwise bring him back when Angela is finished with him". Fitz-Alan then questioned if he wanted any money for the horse at which point Adkins replied with "No, provided he is looked after and returned when you are finished with him".

In August 2000, after finding out that Angela was no longer living in the area and was therefore no longer caring for Dunnoon, Felton sued Fitz-Alan seeking the return of Dunnoon. In November 2003, the Local Court Magistrate found a breach of the agreement and ordered that Dunnoon be returned to Felton.

Issues

- Whether the Magistrate erred in disallowing additional evidence
- Whether the Magistrate erred in finding that the horse was lent
- Whether the remedy was appropriately awarded

Decision and Reasons for the Decision

The appeal was dismissed and the orders of the Magistrate were affirmed.

Admission of statements into evidence

The plaintiff argued that the Magistrate erred in law by not allowing further statements into evidence. The details of the statements had no significant bearing on the findings of the case and therefore will not be outlined. The Court noted that the Magistrate had allowed some aspects of the further statements into evidence, There was no error of law.

The finding that the horse was lent

The plaintiff argued that the Magistrate's finding that the horse was lent and given on the condition that it was to be used in equestrian-related events was made without reference

to any significant evidence. The main issue the Magistrate dealt with was whether the oral agreement between Fitz-Alan and Adkins was a conditional loan or a gift.

It was found with reference to the evidence that Dunoon was not a gift and the arrangements were a conditional loan. This was emphasised by Adkins' statement regarding the use of the Dunoon, which included terms that he or she be looked after and returned when Angela was finished with the horse. The evidence of Angela indicated that she moved to Sydney and used Dunoon "occasionally". As this did not satisfy the terms upon which the horse was handed over, the Magistrate found that the agreement had been breached as the horse was not used as stipulated. The Court on appeal agreed with the Magistrate that there was sufficient evidence and facts to support such a finding and that there was accordingly no error of law.

The remedy

The Magistrate stated that the remedy was either the return of Dunoon, or an award for compensation to be paid to Felton. Section 28A of the Local Court (Civil Claims) Act 1970 (NSW) clearly stated that the remedy was a discretionary one. Therefore, the Court affirmed the decision of the Magistrate to exercise the discretion by ordering that Dunoon be returned.

Significance of the Case

This case illustrates the way in which the property status of animals enables possession of them to be transferred according to the will of their owner. It also exemplifies how contract law may be used to protect animals where terms of the contract require them to be cared for.

11.8 New Jersey Society for the Prevention of Cruelty to Animals et al v New Jersey Dept of Agriculture 955 A.2d 886 (N.J. 2008)

Prepared by Hollie Harber

Court

Supreme Court of New Jersey

Facts

Pursuant to Title 4, Agriculture and Domestic Animals, of the New Jersey Statutes Annotated ('NJSA'), the Department of Agriculture ('the Department'), the respondent, had authority to create regulations concerning the welfare of domestic livestock, including the "raising, keeping and marketing of farm animals." The regulations were to be humane and in this respect, the Department was under an obligation to consult with the New Jersey Agricultural Experiment Station in its development of the regulations. The New Jersey Society for the Prevention of Cruelty to Animals ('NJSPCA'), the appellants, were under an obligation to enforce the "humane" regulations.

The Department's regulations were challenged by the NJSPCA on the basis that the Department "failed to comply with the legislature's standard to ensure humane treatment of domestic livestock." The Appellate Division Court dismissed the challenge, and the NJSPCA subsequently brought the appeal to the Supreme Court.

Issues

- Whether the Department "failed in general to comply with the legislative mandate that it create standards that are 'humane'"
- Whether the Department "created an impermissibly broad and vague category of permitted practices by referring to 'routine husbandry practices' as generally acceptable"
- Whether the Department "failed to create an adequate regulatory scheme by utilising undefined or ill-defined terms that cannot serve as objectively enforceable standards"
- Whether the Department "embraced a variety of specific practices that are either objectively inhumane or supported by inadequate scientific evidence as to their usefulness, or that fail to meet any accepted definition of the term humane"

Decision and Reasons for the Decision

The regulations were held to be valid as they were not arbitrary or capricious in their entirety.

Failure to comply with the legislative mandate

The appellants argued that regulations in their entirety failed to carry out their legislative function of embodying standards that were humane. However, the Court rejected this, holding that:

The specific challenges to the regulations, both as to particular practices and as to the safe harbor provisions, do not, in and of themselves, nor in the larger context of the regulatory process, suggest that the Department failed to propose and adopt regulations that are essentially grounded upon a determination about what practices are humane. In the absence of some evidence that the regulations include some pervasive defect in process or content, we decline to invalidate them in their entirety.

Language creating a safe harbour for acts meeting the definition of routine husbandry practices

The Court held that the NJSPCA's contention regarding the Department's definition of "routine husbandry practices" had merit. It held that:

By adopting a definition of exceptional breadth, by failing to create an adequate record in support of this decision, and by implicitly permitting techniques that cannot meet the statutory mandate to base its regulations on a determination about what is humane, the Department has adopted regulations that are arbitrary and capricious. We therefore strike as invalid the definition of routine husbandry practices.

Specific practices

The NJSPCA argued that certain practices specifically permitted by the regulations were demonstrably inhumane, and that the authorisation of them was not supported by science.

With respect to tail docking, the Court held that as there was an absence of evidence to support the practice or any attempt to confine it to circumstances where it was beneficial and objectively humane, the authorisation of the practice in the regulations could not stand.

The Court combined its analysis of de-beaking of chickens and turkeys, toe-trimming of turkeys and the castration of cattle, horses and swine. The Court found that there was “sufficient credible evidence... to support the agency’s conclusion that these techniques can be performed in a humane manner and should be permitted”. However, the Court found the regulations failed to define the terms “terms sanitary manner, knowledgeable individual, or minimize pain” or impose an “objective criteria against which to determine whether any particular individual performing the procedure measures up to these standards”. As such, the requirement in the regulations that the practices be performed in a sanitary manner by a knowledgeable individual in such a way as to minimize pain was meaningless.

The practice of crating and tethering veal calves and swine were found to be supported by sufficient credible evidence, and the regulations permitting them were therefore not arbitrary or capricious.

Finally, the Court considered the transportation of sick or downed animals. As the law prohibited the entry of a disabled animal into the food chain, the Department argued that “a downed animal simply will not be transported for slaughter and...the only instance of a sick or downed animal being transported at all would, in all likelihood, involve taking [him or her] to a veterinarian for treatment”. The Court concluded that “[a]lthough there is evidence in the record that a downed animal may suffer greatly... we cannot conclude that the Department’s decision to permit farmers the option of choosing transport for slaughter is arbitrary or capricious.”

Accordingly, the Court held:

The...challenge to the regulations in their entirety is rejected. The specific challenges to the reliance on routine husbandry practices as defined in the regulations, and to the reliance on knowledgeable individual and in such a way as to minimize pain are sustained. The specific challenges to the practices, with the exception of the practice of tail docking, are otherwise rejected.

Significance of the Case

The decision approves a utilitarian approach to animal welfare. At one point, the Court observed with respect to the confinement of veal calves and swine:

Far from simply adopting techniques already in place or embracing practices that serve only the economic ends of the agricultural community as petitioners suggest, these regulations reflect that the Department took seriously its mandate to identify humane practices, but did so in recognition

of the need to balance those concerns with the interests of the farmers whose livelihood depends on such techniques and whose existence would be threatened were they to be banned.

11.9 *Tilikum v. Sea World Parks & Entertainment, Inc.* 1259, 842 F.Supp.2d 1259 (S.D.Cal. 2012)

Prepared by Brittany Kenaly

Court

United States District Court: Southern District of California

Facts

Five wild-caught orcas, Tilikum, Katina, Corky, Kasatka and Ulises, were held captive in tanks at Sea World, the defendant, for public display and also to perform. People for the Ethical Treatment of Animals ('PETA'), acting as the Next Friends for the plaintiff orcas, alleged that the marine mammals were unlawfully being held as slaves. PETA claimed that the orcas were "(1) held physically and psychologically captive; (2) without the means of escape; (3) separated from their homes and families; (4) unable to engage in natural behaviours...; (5) subjugated to the will and desires of Sea World; (6) confined in unnatural, stressful and inadequate conditions; and (7) subject to artificial insemination or sperm collection for the purposes of involuntary breeding." PETA alleged that these practices violated the Thirteenth Amendment and brought an action on behalf of the orcas as their Next Friends-seeking declaratory and injunctive relief.

Issues

- Whether the orcas were afforded protection under the Thirteenth Amendment
- Whether the orcas had standing

Decision and Reasons for the Decisions

District Judge Jeffrey Miller was the first judge in U.S. history to consider the notion that the definition of slavery should not exclude any species. Judge Miller ruled that the plain language, historical context and judicial interpretation of the Thirteenth Amendment indicated that it only applies to human beings.

Applicability of the Thirteenth Amendment

The Court examined the development and rationale of the Thirteenth Amendment, concluding that "[a]s 'slavery' and 'involuntary servitude' are uniquely human activities, as those terms have been historically and contemporaneously applied, there is simply no basis to construe the Thirteenth Amendment as applying to non-humans".

Standing

The Court identified the way in which the Constitution limited federal judicial power to “‘cases’ and ‘controversies’”. As there was “no likelihood of redress under the Thirteenth Amendment because the Amendment only applies to humans and not orcas”, the Court held that there was “no ‘case’ or ‘controversy’”, divesting the plaintiffs of standing and the Court of subject matter jurisdiction.

Significance of the Case

This case demonstrates that the law is still strongly based on the underlying presumption that animals are property and that wild creatures, in this case orcas, can be reduced to objects of possession by Sea World’s capture of them. The case also raises important issues relating to standing. At present there is neither societal recognition nor a “jurisprudential revelation” that animals must be afforded legal personhood based on their autonomy. While it is doubtful that animals will achieve equal status under the law, some writers, such as Maddux have noted that in the context of a widespread growth of human rights in international law the Thirteenth Amendment argument in this case is compelling (Emma A. Maddux, ‘Time to Stand: Exploring the Past, Present, and Future of Nonhuman Animal Standing’, (2013) 47 *Wake Forest Law Review* 1243).

11.10 Zappia v Allsop [1994] NSWCA 355

Prepared by Pamela Kalyvas

Court

New South Wales Court of Appeal

Facts

Allsop, the respondent, and his son were riding their bicycles along Clarke Street, Riverstone. A large dog emerged from Lot 24 Clarke Street, barking and growling at Allsop and his son. The dog ran towards the bicycles and collided with the rear wheel of Allsop’s bicycle causing him to be thrown to the ground, rendering him unconscious. Allsop was transported by ambulance to Blacktown hospital, where he was treated for concussion and minor abrasions. Allsop sued Zappia, the appellant, who was the owner of the property at Lot 24, Clarke Street for damages. Allsop relied on two causes of action. First, Allsop argued that Zappia was liable pursuant to s 20 of the Dog Act 1966 (NSW) (‘the Act’). Second, Allsop argued that Mr Zappia was liable in negligence at common law

At first instance, Allsop succeeded on both actions, though the Court held that he was liable for contributory negligence. Zappia appealed, contending that he was not the owner of the dog and also that the Court erred in its determination of the cause of action created by s 20 of the Act. Allsop cross appealed against the finding on contributory negligence.

Issues

- Whether Zappia was the owner of the dog
- Whether the elements of s 20 of the Act were established
- Whether Allsop was contributorily negligent

Decision and Reasons for the Decision

The Court dismissed the appeal and upheld the cross appeal.

Ownership of the dog

The Court held that Mr Zappia was in fact the owner of the dog and therefore upheld the decision of the trial judge. The Court noted that an “owner” was defined in s 4 of the Act as “the person by whom the dog is ordinarily kept” and included at s 4(a) premises “where the dog is, at any particular time, ordinarily kept on any land or in any premises, the person who is the occupier of that land or those premises at that time...”

It was accepted that Mr. Zappia was the occupier of Lot 24, but he argued that the facts contained within the evidence did not establish that the dog was ordinarily kept on that land. The Court found that the evidence led to a divergent conclusion. Allsop recalled that the dog came out of Zappia’s property and chased him about thirty times in the three to four months prior to the accident. The Court held that this was powerful evidence that the dog was ordinarily kept at Zappia’s premises. The Court also relied on additional material, including that the dog was permitted to feed on Zappia’s land. The Court rejected Zappia’s argument that prior to the accident, the dog only came onto the property to scavenge and was chased away when he or she did. It held that “The combination of the respondent's evidence as to the events prior to the accident and the appellant's admission that the dog was kept on the premises from the day after the accident raise in my mind an irresistible inference that the dog was ordinarily kept there both prior to and after the accident.”

Satisfaction of s 20 of the Act

The Court observed that to establish liability under s 20 of the Act, “it is necessary for a plaintiff to establish, first, that he or she suffered bodily injury and, secondly, that the injury was caused by a dog wounding him or her in the course of an attack upon him or her.” The Court rejected Zappia’s argument that “the particular wording used in the section introduces the...limitation of liability to occasions of direct wounding by a dog”, deeming such a limitation to be artificial. As such, that Allsop was injured as a result of the collision was sufficient to establish liability under the provision.

Kirby P diverged from the majority on this point, finding that the phrase “dog wounding” imported a required of “direct contact between the dog and the injured person.”

Contributory negligence

The Court reversed the finding of contributory negligence, holding that Allsop had every right to use the road and that Allsop's failure to complain to the Local Council or Zappia about the dog could not base a finding that he was contributorily negligent.

Significance of the Case

This case demonstrates how "ownership" of a dog may take a range of forms and provides an example of what it means to be "a person by whom the animal is ordinarily kept."

Mirroring s 4 of the Dog Act 1966 (NSW) is s 7(1)(b) of the Companion Animals Act 1998 (NSW). The provision states that "the person by whom the animal is ordinarily kept" is the "owner" of a companion animal for the purposes of the Act. The "inclusions" provided for in the Dog Act 1966 (NSW) are no longer part of the current Act; however, the interpretation of where the animal is "ordinarily kept" is still relevant.

11.11 Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 4) [2013] FCA 665

Prepared by Emily Shipp

Court

Federal Court of Australia

Facts

Turi Foods Pty Ltd, Baiada Poultry Pty Ltd, Bartter Enterprises Pty Ltd and the Australian Chicken Meat Federation Inc ('the Federation'), the respondents, bred, grew, produced and supplied meat chickens in Australia and enjoyed a significant share in this market. The chickens produced by the respondents spent their lives in sheds which varied in size from 1000 square metres to 3000 square metres and at any one time the sheds held 30,000 to 40,000 chickens. The respondents represented on packaging and in advertising that the chickens were "free to roam" in large barns.

The Australian Competition and Consumer Commission ('ACCC'), the applicant, contended that the respondents had been involved in contraventions of the Trade Practices Act 1974 (Cth) (now the Australian Consumer Law). Specifically, the ACCC alleged that the respondents had engaged in misleading or deceptive conduct, or conduct that was likely to mislead or deceive consumers, in contravention of s 52 of the Trade Practices Act 1974 (Cth) ('the Act') (now s 18 of the Australian Consumer Law).

The ACCC also contended that the respondents had falsely represented that the goods had a particular history, contravening s 53(a) of The Act. The ACCC further claimed that the respondents had misled the public as to the nature and characteristics of goods, contravening s 55.

The judgment referred in some detail to the evidence on population densities in the sheds where the broiler chickens spent their lives. The ACCC calculated that the average amount of space available to each chicken was equal to or less than the size of an A4 sheet of paper.

Issues

- Whether the respondents had engaged in misleading or deceptive conduct by claiming that the chickens were “free to roam”, thus contravening s 52 of the Act
- Whether the respondents had falsely represented that the chickens had a particular history, thus contravening s 53(a) of the Act
- Whether the respondents had misled the public as to the nature or characteristics of the chickens, thus contravening s 55 of the Act
- Whether the Federation could rely on the “media safe harbour defence” due to their being a “prescribed information provider”
- The ordinary and natural meaning of the phrase “free to roam”

Decision and Reasons for the Decision

Contraventions of ss 52 and 53(a) of the Act

Tracey J held that the respondents had contravened ss 52 and 53(a) of the Act. His Honour found that the ACCC had made out their case and that the representation that chickens were “free to roam” in large barns was likely to mislead or deceive consumers as to the circumstances in which the chickens had been raised. Further, it was held that the respondents had promoted a “false history” of the living conditions of the chickens and so had also contravened s 53 of the Act.

Contravention of s 55 of The Act

Tracey J held, however, that the ACCC had not made out its case with regards to s 55 of the Act, which prohibits persons from engaging in conduct that is liable to mislead the public as to the nature and characteristics of goods. Tracey J held that the “free to roam” representations did not relate to the inherent qualities of the chickens themselves, with the result that there was no contravention of this particular section.

Media safe harbour

It was held that the Federation could not rely on the “media safe harbour defence” found in s 65A of the Act. Tracey J accepted that the Federation was a “prescribed information provider” and so could potentially be protected from liability by this defence. However, His Honour found that the Federation was not entitled to the defence, as the “free to roam” representation was made for the purpose of promoting the sale of chicken meat.

The meaning of “free to roam”

Tracey J concluded that the ordinary and natural meaning of “free to roam”, as understood by a significant number of hypothetical consumers, was “the largely uninhibited ability of the chickens to move around at will in an aimless manner”. In coming to his decision, his Honour undertook a review of the sheds as well as receiving evidence from both parties about the stocking densities of birds in the sheds. From the evidence his Honour concluded that the representation that the birds were “free to roam” was likely to mislead or deceive. His Honour did not accept the respondents’ contention that the reference to large barns would convey to the reader a sufficient understanding of the number and size of the chickens in the barns.

Tracey J stated that thousands of chickens were in such close proximity that very little, if any, or the floor surface could be seen. Until the numbers of birds in the sheds dropped at some point between the 33rd and 42nd days of the growth cycle, his Honour held that chickens could not be said to be free to move around the sheds at will and with a sufficient degree of unimpeded movement to justify the assertion that they were free to roam.

Significance of the Case

This case is an example of how consumer law can be indirectly invoked to improve the welfare of industrially farmed animals. It highlights the crucial role that consumers can play through their decisions to purchase particular products, and the motivations behind these decisions. The case also reinforces that entities involved in animal agriculture cannot dishonestly represent the nature of their farming methods. It is notable that any contribution consumer law makes to animal welfare is indirect; consumer law exists to protect the interests of humans in a commercial context.

CHAPTER 12

ANIMALS AND ENVIRONMENTAL PROTECTION

Animal welfare and environmental protection are two areas of the law that can sometimes conflict. Environmental law primarily involves regulating human activities that potentially affect the natural and built environments. It frequently involves the protection of biodiversity, at the species, population or ecosystem levels, and does not consider individual animals. Moreover, environmental legislation such as the *Threatened Species Conservation Act 1995* (NSW) facilitates the listing of “key threatening processes” that predominantly relate to introduced species such as, foxes, cats, goats, rabbits, deer and feral dogs. Government policy favours the eradication of these animals in circumstances that animal advocates argue lack appropriate safeguards for the animals’ welfare. In this regard also see the case of *Animal Lovers Volunteer Association v Weinberger* that was discussed in Chapter 3.

In some situations, as illustrated in *Booth v Bosworth*, environmental and animal welfare issues are more closely aligned.

12.1 *Booth v Bosworth* [2001] FCA 1453

Prepared by Emily Shipp

Court

Federal Court of Australia

Facts

Booth, the applicant, applied to the Court for an injunction restraining the Bosworths, the respondents, from killing Spectacled Flying Foxes on their lychee orchard in North Queensland. The Bosworths had erected electrical fences in a grid pattern (‘the Grid’) with the purpose of electrocuting flying foxes who approached or departed from the orchard.

Booth applied for an injunction under the Environmental Protection and Biodiversity Conservation Act 1999 (‘the Act’) on the basis that the operation of the Bosworths’ Grid had, or was likely to have, a significant impact on the world heritage values of a declared World Heritage property. The Bosworths’ orchard was located in close proximity to the Wet Tropics World Heritage Area, which is a listed property under the World Heritage Convention.

Booth had visited the Bosworths’ lychee orchard on four nights during the 2000-2001 lychee season and on each night had counted the number of dead Spectacled Flying Foxes on and under the Grid. The average number was 377 per night. The Bosworths did not give evidence regarding the number and species of flying foxes killed by the Grid. The Court concluded, assisted by expert evidence, that the number of female Spectacled Flying Foxes killed by the Grid during the 2000-2001 lychee season fell within the range of 9,900 and 10,800. The Court also accepted expert evidence that the total Australian population of Spectacled Flying Foxes in 2000 did not exceed 100,000.

Issues

- Whether the operation of the Grid caused, and would it continue to cause, injury and death to a large number of Spectacled Flying Foxes
- Whether the Spectacled Flying Foxes were resident within the Wet Tropics World Heritage Area and whether the Spectacled Flying Foxes contributed to the biodiversity, ecological function and ongoing evolutionary processes of the Wet Tropics Area
- Whether the injury and death of the Spectacled Flying Foxes was likely to have, or would have, a significant impact on the world heritage values of the Wet Tropics Area

Decision and the Reasons for the Decision

Branson J found that the operation of the Grid had, or was likely to have, a significant impact on the world heritage values of the Wet Tropics World Heritage Area within the meaning of s 12 of the Act. His Honour accordingly held that the Bosworths had contravened s 12 of the Act through their operation of the Grid without approval. Under subsection 475(2) of the Act, the Court therefore had discretionary power to grant an injunction restraining the Bosworths from operating the Grid.

The effect of the operation of the Grid

Guided by expert evidence, Branson J found that approximately 20% of the population of adult female Spectacled Flying Foxes in Australia had been killed by the respondents' Grid. He further found that if the Grid were allowed to continue during future lychee seasons, there would be an on-going dramatic decline in population, leading to a halving of the population of Spectacled Flying Foxes in less than five years. Branson J concluded that the probable impact of the operation of the Grid would be to render the Spectacled Flying Fox an endangered species in less than five years.

The connection to the World Heritage Area

Branson J held that, given the proximity of the Wet Tropics World Heritage Area to the farm, the Spectacled Flying Foxes killed by the Grid resided in the World Heritage Area.

His Honour noted that the dramatic impact on the population of Spectacled Flying Foxes entailed a significant impact on the world heritage values of the Wet Tropics World Heritage Area. His Honour stated at [105] that:

A dramatic decline in the population of a species, so as to render the species endangered, where that species forms a part ... of the record of the Earth's evolutionary history or of the biological diversity of a most important and significant habitat ... is to be understood as having an impact that is important, notable or of consequence.

Significant impact

Branson J found that a large number of Spectacled Flying Foxes had been killed by the operation of the Bosworths' Grid and that these flying foxes contributed to the biodiversity and evolutionary processes of the Wet Tropics World Heritage Area. Thus, Branson J was satisfied that the disappearance or significant reduction in the numbers of Spectacled Flying Foxes within the Wet Tropics World Heritage Area would have a significant impact on the World Heritage values of the area.

Significance of the case

This case demonstrates that the way in which environmental law may indirectly protect animals from cruelty, although cruelty to individual Spectacled Flying Foxes through injuring or killing them by electrocution was not taken into account. An injunction could only be obtained when the killing was on such a scale that the species was likely to become endangered. Nevertheless, individual animals benefitted from the protection of the Wet Tropics World Heritage Area as a whole.

12.2 Animal Liberation Ltd v National Parks and Wildlife Service **[2003] NSWSC 457**

Prepared by Jennifer Hird

Court

Supreme Court of New South Wales

Facts

The Director General of the National Parks & Wildlife Service ('Director General'), the defendant, proposed to cull wild goats in the Woomargama National Park by conducting a shoot from a helicopter. Animal Liberation Limited ('Animal Liberation'), the plaintiff, sought an interlocutory injunction to restrain the defendant in the Supreme Court of New South Wales. Animal Liberation argued that the aerial culling of animals constituted cruelty. This argument was based on the risk that some animals may not be killed outright, and would be left to suffer for some time prior to dying. Furthermore, it was unlikely that injured animals would be able to be located and euthanised.

In arguing their case, Animal Liberation referred to the aerial culling of wild goats on Lord Howe Island in 1999. After the cull, local residents took photographs of the animals' remains, which were then examined by a forensic pathologist, Dr Kevin A P Lee. In his opinion, some of the animals showed clear signs of movement and others showed no visible evidence of injury. Dr Lee concluded that this strongly indicated that not all of the goats had been killed immediately in the shoot. Dr Lee also found no evidence of finishing up or coup de grace shots that would end the animals' suffering. Finally, Animal Liberation asserted that the National Parks and Wildlife Service conducted or was associated with the Lord Howe Island cull.

On the other hand, the Director General claimed that cruelty could not be inferred from the evidence. Moreover, the Director General denied any connection with the Lord Howe

Island cull. Finally, the Director General argued that the Court should not intervene to restrain a statutory agency, as part of the executive government, from carrying out its duty to manage national parks, where the actions did not involve unnecessary cruelty.

Issues

- Whether the Director General was involved in the Lord Howe Island cull
- Whether the aerial cull presented a risk of cruelty
- Whether the Court should award Animal Liberation the interlocutory injunction to restrain the aerial cull

Decision and Reasons for the Decision

Involvement with the Lord Howe Island cull

While Hamilton J found that the Lord Howe Island cull was conducted by the Lord Howe Island Board, His Honour was satisfied that the Director General had a representative on the Board and was consulted regarding the cull. Moreover, the defendant dealt with complaints and wrote letters regarding the satisfactoriness of the cull on behalf of the Minister. His Honour inferred that the defendant believed in the correctness of these views regarding the satisfactoriness of the cull, and that he held these views in his capacity as Director General as well as in any other capacity.

The risk of cruelty

Hamilton J noted that the Director General only provided a broad statement that the shoot would be conducted properly. However, the Director General gave similar assurances concerning the Lord Howe Island cull. Accordingly, Hamilton J did not regard the Director General's assurances as negating the risk of cruelty in the proposed shoot.

The award of an interlocutory injunction

In deciding whether to grant an interlocutory injunction, the strength of Animal Liberation's argument was weighed against other considerations including the balance of convenience: a balancing of the harm that would be suffered if the cull were carried out immediately against any damage that would be suffered by the defendant if an injunction were granted. On the balance of convenience, His Honour ordered an interlocutory injunction for a period of four to six weeks, the duration of which was to be determined at a final hearing. The prospect of cruelty to animals in an immediate cull was held to outweigh any damage that might have been suffered by the Director General.

Significance of the Case

While the decision did not stop the aerial culling, it nonetheless provided judicial recognition of animal sentience and the need to recognise such sentience in the decision to

cull “feral animals”. It represents yet another example of the utilitarian approach to animal welfare that forms the foundation of animal regulation in Australia.

12.3 Rural Export and Trading (WA) PL & Samex Australian Meat Co Pty v Hahnheuser (2008) FCAFC 156

Prepared by Tiffany Lasschuit

Court

Federal Court of Australia

Facts

Hahnheuser, the respondent, a member of Animal Liberation SA Inc, entered a sheep feedlot in Portland, Victoria. He placed ham and water into two feed troughs for 1,694 sheep who were being held in preparation for live export on the *MV Al Shuwaikh* several days later. Hahnheuser publicised what he had done and caused a video to be recorded of the contamination. He explained the contamination was intended to preclude the animals from satisfying Halal requirements for consumption by Muslims in Middle Eastern destinations.

The case was heard on appeal from a single judge of the Federal Court of Australia. The primary judge found that the activity of Hahnheuser was “substantially related to environmental protection” within the meaning of s 45DD(3)(a) of the Trade Practices Act 1974 (Cth) (‘The Act’). The Court held that Hahnheuser’s actions substantially hindered Samex Australian Meat Co Pty (‘Samex’), the second applicant, from engaging in trade or commerce by exporting sheep in an adjacent paddock within the meaning of s 45DB(1). However, the judge held that these actions were intended to protect the sheep from suffering and this was within the meaning of the “environmental protection” exemption in s 45DD(3)(a).

Issues

- Whether the protection of sheep from suffering during shipment to the Middle East was within the meaning of “environmental protection” as used in s 45DD(3)(a) of The Act
- Whether the onus of proving that the dominant purpose for Hahnheuser’s conduct was substantially related to environmental protection lay with Hahnheuser or Samex

Decision and Reasons for the Decision

The appeal was allowed, with the Court finding that the first respondent (Ralph Hahnheuser) had engaged in conduct for the purpose of preventing and substantially hindering Samex from engaging in trade or commerce. This was a contravention of s 45DB(1) of the Act.

Hahnheuser was ordered to pay Samex's costs and damages exceeding \$72,000, with this award based on the cost of purchasing the sheep and having them processed into meat products in Australia.

Characterisation of the conduct as environmental protection

The Court rejected the argument that the case fell within the “environmental protection” exemption under s 45DD(3)(a) of The Act.

In considering the word “environment”, the Court referred to *Queensland v Murphy* (1990) 95 ALR 493, where it was held that “what constitutes the relevant environment must be ascertained by reference to the person, object or group surrounded or affected”. The Court concluded that Hahnheuser did not have the dominant purpose of protecting the sheep in the environment of the paddock. Instead, he was attempting to protect them from the live export shipping process.

The Court agreed with the judge at first instance that the expression “environmental protection” in s 45DD(3)(a) of The Act should be given a wide construction. However, the Court indicated that this must be balanced with the Parliament's aim to sustain overseas trade, reflected in s 45DB(1). The ordinary and natural meaning of “environmental protection” as used in s 45DD(3), could not realistically include preventing the movement of animals to a new location.

The onus of proving the dominant purpose

The Court held that it was preferable to approach the construction of s 45DD(3) as requiring Hahnheuser, as respondent, to discharge the burden of proving that his actions fell within the exemption provided by s 45DD(3). However, the Court did not deem it necessary to conclusively answer this since the appeal succeeded on the basis of Hahnheuser's failure to establish the “environmental protection” exemption under s 45DD(3).

Significance of the Case

The case established that the protection of sheep from live export does not amount to environmental protection for the purposes of s 45DD(3)(a) of The Act. Therefore, protection of this kind is not a defence to a claim of preventing or hindering trade under s 45DB(1). Notably, it was held that there was no direct or primary intention to cause economic loss. In response to the case, the Victorian Parliament amended the Crimes Act 1958 (Vic), adding s 249, which makes it an offence to recklessly to cause economic loss.

CHAPTER 13

ANIMALS AND CRIMINAL LAW

Due to the fact that animals are classified as property, humans can be liable for crimes, such as theft, committed against animals. The crime however is committed against the owner of the animal, rather than the animal itself (see *R v Buttle*).

At the same time, humans can also be criminally liable for acts of cruelty perpetrated against animals, which is unlike most forms of property. This aspect of the criminal law is overwhelmingly established on the animal welfare paradigm. Yet, welfare laws do not apply in a consistent manner across the spectrum of animals. Hence the notion of ‘cruelty’ depends on the type of animal and the way he or she is treated. Accordingly, treatment that is consistent with industry codes of conduct may be carried out on animals used in food production, notwithstanding that the same treatment would be deemed an act of cruelty if carried out on a different animal. This is what commentators describe as a type of ‘speciesism’.

Within criminal sentencing law, penalties for cruelty to animals are generally lenient. This reflects a judicial perception that cruelty to animals is not as serious as other crimes. The cases of *Richardson v RSPCA*, *Turner v Cole* and *Wood v Chute* illustrate the range of punitive sanctions issued by courts.

13.1 *Charlton v Crafter* [1943] SASR 158

Prepared by Michael Croft

Court

Supreme Court of South Australia

Facts

Section 116 of the Criminal Law Consolidation Act 1935 (SA) (‘the Act’) provided that:

any person who unlawfully and maliciously ... places poison in such a position as to be easily partaken of by any ... animal ... ordinarily kept ... for any domestic purpose shall be guilty of an offence punishable summarily.

Morgan, a pastry cook and caterer, encouraged the presence of cats near his property to provide protection against rats and mice. Charlton, the appellant, was the owner of the adjacent delicatessen and considered the cats a nuisance. He therefore put down strychnine baits where they were likely to be found by the cats. Charlton was convicted in the Court of summary jurisdiction and appealed to the Supreme Court of South Australia. He argued that the cats were not within the protection of the section, and that the poison had been laid in good faith for the protection of his property.

Issues

- Whether the cats were protected by s 116 of the Act

- Whether the conduct was unlawful and malicious

Decision and Reasons for the Decision

The Court found that the cats were protected by s 116 and that Charlton could not successfully argue that he was protecting his property as laying baits was not necessary in the circumstances.

Applicability of s 116

Napier CJ held that, as cats are “ordinarily kept...for [a] domestic purpose,” they fell within the protection conferred by the section. While the cats were “less domesticated than...many of the species,” the Court held that there was sufficient evidence to underpin a finding that they were owned and kept to serve one of the species’ original purposes. The Court indicated that it would be adequate to “show that the poison was laid where it was likely to be taken by any domestic animal”, and as such, the provision applied.

Unlawfulness and malice

Just as the destruction of another’s property was “prima facie” unlawful, the laying of poisoned baits was similarly unlawful. However, to secure a conviction under s 116 of the Act, the prosecutor was required to establish the requisite mens rea; s 116 of the Act required the offence to have been committed maliciously, that is it must have been a “wrongful act, done intentionally, without just cause or excuse”. Napier CJ cited authority to the effect that every property owner is entitled to use reasonable means of protecting their property against trespass. Accordingly, an individual would have “just cause” or “excuse” if they possessed an honest belief that what he or she did was necessary to protect his or her property. Further, a reasonable person would not consider the course of action to be necessary if he or she must have known that less drastic measures were available. The Court highlighted the distinction between an impulsive act, designed to fend off a trespasser, and the deliberate “act of laying a bait, for the very purpose of luring the animal on to [his or her] destruction”. It was also relevant that the use of strychnine could not be considered “either swift or merciful,” and that the s 116 was designed to prevent animal cruelty. Napier CJ noted that Charlton had alternative measures open to him, such as complaining to Morgan and concluded that Carlton could not successfully plead the defence. The appeal was accordingly dismissed.

Significance of the Case

This case provides an example of circumstances in which a proprietary interest in an animal took priority over a competing proprietary interest. In stating “[i]t is, prima facie, wrongful and ‘unlawful’ to destroy the property of another, and... the laying of poisoned baits is likewise wrongful”, the Court indicated that the mischief s 116 sought to abate was the improper destruction of property. Notwithstanding this, a defence based upon an interest in the protection of one’s property was unavailable as there were alternative courses of action which did not involve animal cruelty.

13.2 *R v Buttle* (1960) 60 SR (NSW) 320

Prepared by Vuu-Cindy Dang

Court

New South Wales Court of Criminal Appeal

Facts

Buttle, the defendant, was guiding his sheep along a highway when he became aware that a number of crossbred lambs had joined his flock. Despite knowing that these crossbred lambs were not his property, he drove all the sheep into his paddock. Later that day, Buttle killed and skinned two of the crossbred lambs. He was convicted of larceny and found to have trespassed. Buttle appealed.

Issues

- Whether there was sufficient evidence to support the conviction of larceny
- Whether the defendant had committed trespass in relation to the lambs

Decision and Reasons for the Decision

The findings pertaining to trespass and larceny were upheld.

Larceny

The Court rejected Buttle's argument that he had kept the lambs in his paddock to prevent them from straying.

Trespass

The driving of lambs who did not belong to Buttle into his paddock constituted a wrongful acquisition of possession of the lambs. The act was therefore a trespass against the true owner. Although the animals were in the physical presence of another flock, they nonetheless remained in the true owner's possession until Buttle acquired possession of the animals and appropriated them for his use. At this point in time, Buttle committed a trespass against the true owner and committed the offence of larceny. The Court held that the evidence relating to Buttle's conduct provided a sufficient basis upon which to conclude that he had intended to steal the sheep.

Significance of the Case

This case illustrates the law's longstanding characterisation of animals as property. Buttle's wrongful acquisition and destruction of the lambs was criminal because it amounted to an offence against property, rather than for any reason relating to animal welfare.

13.3 *R v Menard* (1979) 43 CCC(2d) 458 (Que CA)

Prepared by Michael Croft

Court

Quebec Court of Appeal

Facts

Menard operated an animal shelter, which had a policy of killing stray animals who were not claimed within three days. Such animals were placed in a small metallic chamber, which was then filled with carbon monoxide from a car engine. Although the animals normally died within two minutes, they would usually remain conscious for the first thirty seconds. The evidence indicated that the animals experienced pain, suffering and burns during this time. Further, it was possible to modify this process to eliminate such suffering without significant cost or difficulty. Menard was convicted of wilfully causing unnecessary pain and suffering to animals contrary to s 402(1)(a) of the Canadian Criminal Code ('the Code'). However, his conviction was overturned on appeal ('first appellate Court'), where it was held that the Crown had failed to establish proof of substantial suffering. The Crown appealed to the Quebec Court of Appeal.

Issues

- Whether the first appellate Court misinterpreted the concept of "pain and suffering" as found in s 402 of the Code
- Whether the first appellate Court was incorrect to conclude that s 402 of the Code required the "pain and suffering" to be substantial
- Whether the first appellate Court had misinterpreted the concept of necessity as a defence
- Whether Menard's conduct breached s 402 of the Code

Decision and Reasons for the Decision

The Court found that the pain and suffering caused by Mr Menard was unnecessary within the meaning of s 402 of the Code.

"Pain and suffering"

The primary judgement was handed down by Lamer JA, with whom Lajoie and Bélanger JJA agreed. Lamer JA found that the Code's characterisation of cruelty aligned with Hawkins J's definition of the concept in *Ford v Wiley* (1889) 23 QBD 203. In that case, Hawkins J found that "To support a conviction then, two things must be proved — first, that pain or suffering has been inflicted in fact. Secondly, that it was inflicted cruelly, that is, without necessity, or, in other words, without good reason."

The requirement that pain and suffering be substantial

Lamer JA inferred that the legislative intent was not to criminalise actions that caused “the least physical discomfort” to animals; however, the Court held that it was “to this extent, but no more, that one may speak of quantification”. It was held that “the amount of pain is of no importance in itself from the moment it is inflicted wilfully... if it was done without necessity...and without justification, legal excuse or colour of right”.

Necessity

Lamer JA reasoned that, in some circumstances, it may be necessary to subject an animal to suffering, either for the benefit of humans or the animal his or herself. For example, testing medicinal remedies, although involving significant pain for animals, is ultimately necessary. Lamer JA expressed that “[t]he animal is subordinate to nature and to man” and that “[i]t will often be in the interests of man to kill and mutilate wild or domestic animals, to subjugate them and, to this end, to tame them with all the painful consequences this may entail for them.”

However, his honour also recognised that, as humans claim to be rational, the treatment of animals must “reflect... those virtues we seek to promote in our relations among humans.” Accordingly, he interpreted the element of necessity as prohibiting the infliction of pain, suffering or injury which was not inevitable in the context of the purposes and circumstances of inflicting the pain. Relevant considerations were held to include “the social priorities, the means available and their accessibility.” In expounding this principle, Lamer JA emphasised “the privileged position which man occupies in nature,” and asserted that eating meat is justified by this privilege.

Breach of s 402 of The Code

Lamer JA considered that euthanising stray dogs may be necessary in some circumstances. Accordingly, that act could not be denounced in itself. However, in the present case, the pain and suffering experienced during the initial thirty seconds could have been avoided easily and without significant cost. Accordingly, it could not be considered inevitable, and Menard was therefore guilty of the offence. Lamer JA allowed the appeal, and restored the conviction.

Significance of the Case

This case is significant in the sense that the conclusion as to necessity was supported by a philosophical analysis concerning the relative superiority of humans to animals. The Court emphasised the way in which there were limits upon the way in which humans could treat animals, and that excessive cruelty would be unacceptable. Nonetheless, the reasoning in the case entrenches the subordination of animal interests to valid human purposes; where the purpose for exploiting or harming animals is legitimate, the suffering inflicted may be deemed legitimate as well. In this case, the conduct was not unlawful by virtue of the inviolability of animals; rather it was unlawful as it was unnecessary.

13.4 *Wood v Chute* (1993) 111 FLR 420

Prepared by Matthew Jones

Court

Supreme Court of the Northern Territory of Australia

Facts

On 4 August 1992, Wood, the appellant, committed an act of bestiality on a female dog by having sexual intercourse with her. The offender was in a communal area and in full view of a number of flats. The activity lasted several minutes until a bystander observed the conduct and called the police. Wood was then arrested.

The Alice Springs Court of Summary Jurisdiction found the offender guilty of having carnal knowledge with an animal under s 138 of the Criminal Code (NT) and sentenced him to fourteen days imprisonment. Wood appealed the decision.

Issues

- Whether the sentence was manifestly excessive in light of the general and special deterrent principles of sentencing
- Whether the Magistrate failed to sufficiently consider whether the offence called for imprisonment

Decision and Reasons for the Decision

The appeal was dismissed.

Whether the sentence was manifestly excessive

Wood argued that since he was a chronic alcoholic he should be judged independently from the general community, such that the need for the sentence imposed to have a general deterrent effect was not relevant. The Court rejected this proposition, highlighting its awareness that “a very substantial proportion of offences dealt with by the court are committed by persons under the influence of intoxicating liquor often in combination with medication or other drugs.” The Court also adverted to the way in which many members of the general community become intoxicated and do not commit offences. However, the Court did agree that general deterrence was not a significant factor in determining an appropriate sentence since the offence was not— a prevalent one. Rather, the Court observed that the Magistrate had “placed particular emphasis on the fact that the act was committed in an open area, near a block of flats, in broad daylight and... [was] observed by a number of children...”

Wood’s counsel also argued that because of Wood’s alcoholism, instead of imposing a period of imprisonment, the Magistrate should have made attempts to pursue rehabilitation options available in Alice Springs. The Court held that the Magistrate did not err in failing to consider the alternative option of rehabilitation. The Court noted that

this avenue was not raised by Wood's counsel in the Court of Summary Jurisdiction. On the contrary, Wood's counsel had stated that rehabilitation was not required in Wood's circumstances, arguing that his criminal record did not suggest that he was likely to re-commit this offence.

Assessment of the severity of the offence

On the second ground of appeal, Wood claimed that the Magistrate failed adequately to explain why he found the act so offensive. Wood's counsel referred to cases involving sexual offences on young girls, in which the offenders were given wholly suspended sentences. It was argued for Wood that the community would find the offences in these cases to be more repugnant than the one involved in the present case.

However, the context of this case invalidated this argument; the female who witnessed the act immediately called the police. Assuming the witness to be a reasonable community member, the Court was satisfied that her views could be taken to encompass the views of the community at large, such that the act was one capable of evoking significant public outrage. The Court considered the overall circumstances of the case, including the social, cultural and environmental factors and other means of punishment and held that the Magistrate's sentence was an appropriate penalty to deter Wood from committing the offence again.

Significance of the Case

This case deals with conduct which is rarely brought before the courts. Significantly, the Court rejected Wood's submission that the sexual assault of a female by a male was necessarily more repugnant and outrageous to the community than the act of sexual intercourse with a dog, and that therefore, a custodial sentence for the latter was inappropriate. Although the Court did suggest that the authorities dealing with sexual assault relied upon by Wood in making this argument were "not necessarily indicators of the sentences given generally for such offences", the judgment reflects a shift away from the assumption that the mistreatment of animals is inherently and inevitably less severe than the mistreatment of humans. However, it should be noted that the circumstances in which the conduct occurred, namely in public and in the presence of children, were influential upon the decision of the Magistrate.

13.5 *Mason v Tritton and Another* (1994) 34 NSWLR 572

Prepared by Alysha Byrne

Court

New South Wales Court of Appeal

Facts

On 9 October 1991, Mason, the defendant, who was a member of the Aboriginal community, was charged under the Fisheries and Oyster Farms (General) Regulation 1989 (NSW) ('the Regulation') for the possession of 92 abalone. This number exceeded

the permitted quantity under s 34(1)(c) of the Regulation. The Regulation provided that it was “an offence for a person to shuck abalone adjacent to ocean water, and, without a permit or licence, to have more than ten abalone in possession.” The Regulation sought to prohibit any person from selling abalone to a commercial market without a permit.

The case was initially heard by a Magistrate in the Local Court, Mason unsuccessfully arguing that he had a native title right to take the abalone from waters on the South Coast of New South Wales. Mason’s argument failed because he did not adduce evidence that demonstrated how his activities fell within the scope of a native title right.

Mason then appealed to the Supreme Court of New South Wales where Young J rejected his arguments. Young J determined that an Aboriginal’s right to fish was not considered a land right, and thus *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1 (*‘Mabo’*) was of no relevant application. Furthermore, his Honour found that there was insufficient evidence for Mason to establish his biological descent from the Aboriginal Australians who had a customary right to fish in the specific waters.

Issues

- Whether the right to fish could constitute a native title right
- Whether Mason established that he conducted the fishing activities in accordance with a native title right
- Whether The Regulation operated to extinguish any native title right

Decision and Reasons for the Decision

Gleeson CJ, Kirby P and Priestley JA determined that Mason’s appeal should be dismissed.

The right to fish as a native title right

Gleeson CJ stated that to establish that he was not bound by the Regulation, Mason was required to prove that he was a member “of a class who [had] exercised some form of right pursuant to a system of rules recognised by the common law”. To achieve this, it was first necessary for Mason to “give content to those rules”. Gleeson CJ held that Mason failed to do this.

Priestley JA recognised that s 223 of the Native Title Act 1993 (Cth) “put beyond doubt the inclusion of hunting, gathering or fishing rights and interests within the meaning of native title”. However, Priestley JA held that there was nothing in the evidence to demonstrate that Mason “was biologically descended from any Aboriginal group dating back to just before the establishment of the common law which observed a system of rules relating to either fishing generally or to abalone in particular on any specific part of the New South Wales South Coast.”

Kirby P recognised that under the common law there may a customary right of Aboriginal Australians to fish. To establish such a right, Kirby P referred to the reasoning of Brennan J in *Mabo*, which affirmed that a native title right would only exist when a group of

indigenous peoples have “a connexion with the land.” Kirby P determined that such a connexion with the land is a question of fact, and thus it is incumbent on the appellant to prove such a relationship.

To dispel Young J’s belief that the right to fish was not a land right, Kirby P characterised it as a usufructuary right, entitling Aboriginal Australians to use and take the benefit of land belonging to another without any proprietary interest in that land. Brennan J noted in *Mabo* that such a usufructuary right, which is not proprietary in nature, is no impediment to the recognition of native title. Therefore, Kirby P accepted the Mason’s argument that fishing rights fell within the meaning of “connexion with” the land.

To prove a “connexion with” the land, Kirby P drew upon the decision of Brennan J in *Mabo*. At common law, a person claiming the native title right must bring evidence that he/she is a biological descendant of the indigenous clan that has *continuously* fished in the particular lands. It was held that Mason successfully proved that he was of Aboriginal descent, and that his clan traditionally fished abalone as a source of food, which had been maintained over a substantial period of time.

Mason’s conduct as an exercise of that right

Gleeson CJ stated that in addition to giving “content to those rules” Mason claimed comprised his native title right, he was required to “bring himself and his activities within their scope”. According to Gleeson CJ, Mason had failed to satisfy this requirement. His Honour drew attention to the fact that Mason had failed to establish that any native title right extended to the fishing of a commercial quantity of abalone.

Similarly Priestley JA found that Mason had not established that he had engaged in the fishing activities in accordance with the claimed native title right. His Honour identified a “complete absence of evidence... that in diving for abalone... [Mason] was doing so either in the assertion of or pursuant to a system of rules which he recognised and adhered to”.

Kirby P found that Mason failed to provide sufficient evidence that *at the time* he caught the abalone, he was exercising his native title right to fish, rather than fishing for a commercial purpose. Kirby P further noted that had Mason provided such evidence he would have been entitled to relief.

Extinguishment of any right

As obiter, Kirby P addressed the third issue and stated that native title might only be extinguished by a regulation when it expressly excludes a use that comprises the native title claim. As the regulation in question did not reveal a “clear and plain intention” to extinguish the native title right to fish, according to Kirby P, Mason would have been successful *if* he could have shown that he was exercising a native title right.

Significance of the Case

This case acknowledged that in certain circumstances, a native title right to fish may be invoked to circumvent regulations prohibiting fishing. However, in order to establish such a right, a person must provide evidence of their Aboriginal descent and a system of

customary rules involving a continuous use of the land to fish. In addition, a claimant must prove that the fishing activities were engaged in pursuant to that customary right. See also the later decision of *Yanner v Eaton* (1999) 201 CLR 351 set out in this book.

13.6 *Sutton v Derschaw & Ors* (1995) 82 A Crim R 318

Prepared by Antonia Quinlivan

Court

Supreme Court of Western Australia

Facts

Derschaw, Murphy and Clifton, the respondents, were each charged with being in possession of fish caught in contravention of s 12(1)(d) of the Fisheries Act 1905 (WA) ('the Act'). Under s 9(1) of the Act, a notice had been issued which prohibited all unspecified persons from fishing in an area known as Six Mile Creek located near Port Hedland in the Pilbara Region of Western Australia. Section 56(1) of the Act permitted people of Aboriginal descent to take fish for personal purposes, subject to s 9 and other sections.

At first instance, the Magistrate dismissed the charges on the basis that Derschaw, Murphy and Clifton were acting in pursuit of a native title right to fish in the area which had not been extinguished by The Act and that accordingly, the notice did not apply to them.

The Crown appealed.

Issues

- Whether Derschaw, Murphy and Clifton held a native title right to fish in the area
- Whether the fishing was conducted in the exercise of any such right or as an activity lacking the support of such a right
- Whether Derschaw, Murphy and Clifton discharged their evidential burden upon them to raise a doubt about their guilt

Decision and Reasons for the Decision

Hennan J upheld the appeal.

In upholding the appeal, his Honour found that the evidence adduced by the respondents did not support the existence of a native title right to fish.

The presence of a native title right to fish

Heenan J approved of comments made by Gleeson CJ in *Mason v Tritton* (1994) 34 NSWLR 572 (*'Mason'*):

Fishing is an activity which is so natural... that some care needs to be exercised in passing from an observation that people have engaged in that activity to an assertion that they are members of a class who have exercised some form of right pursuant to a system of rules recognised by the common law.

His Honour also adopted the view expressed by Kirby P in *Mason* that a 'right to fish' based upon traditional laws and customs could be a recognisable form of native title defended by the common law of Australia where the principles established in *Mabo & Ors v Queensland (No 2)* (1992) 175 CLR 1 were satisfied. Heenan J also referred to Kirby P's statement of the requirements of a native title claim as expressed in *Mason*, indicating that before an individual may claim a native title right to fish the claimant must adduce evidence that:

- "Traditional laws and customs, including the right to fish, were enjoyed by an Aboriginal community over the area in question immediately before the Crown claimed sovereignty;
- The claimant was a biological descendant of the original Aboriginal community;
- The claimant and his or her intermediate descendants had continued to observe the relevant laws and customs; and
- The claimant's activity in fishing for the fish in question was an exercise of those traditional laws and customs"

While the evidence demonstrated that certain Aboriginal communities in the Port Hedland area probably had a right to fish in the waters of Six Mile Creek and that Derschaw, Clifton and Murphy were likely to be descendants of those communities, the evidence did not "show the extent of the right". The evidence also failed to establish who could exercise the right, whether it was restricted by season, time or frequency, how it came to be established, whether it was subject to rules.

The conduct as an exercise of any native title right

Heenan J rejected the claim that the fishing was an exercise of a native title right, holding that "the evidence does not show that the netting of mullet... on the afternoon in question was an exercise of traditional laws and customs bearing upon the right." It was observed that Derschaw, Murphy and Clifton "were not fishing for, or as members of, any particular original Aboriginal community... They were fishing for a multitude of people, many of whom did not live in the area."

Discharging the evidential burden

Heenan J concluded that "there was no evidence... to raise a reasonable doubt as to whether the notice applied to" Derschaw, Murphy and Clifton. As such, they had failed to discharge the evidential onus on them to raise a doubt as to their guilt for contravening the notice.

Significance of the Case

Although regulations prohibiting fishing in a particular region could not be circumvented by a claim to native title fishing rights in this case, it nonetheless contemplated that there may be scope for the invocation of such native title rights for this purpose. It entertained the notion that native title rights can provide a defence to criminal breaches of State fishing laws. It is important to note that s 211 of the Native Title Act 1993 (Cth) now provides a level of exemption for non-commercial fishing pursuant to native title rights.

13.7 *Holland v Crisafulli* [1999] 2 Qd R 249

Prepared by Matthew Jones

Court

Supreme Court of Queensland

Facts

On 2 July 1997, a dog entered a residence, turned over a cage and attacked and killed a guinea pig who was inside the cage. Brisbane City Council ('The Council') declared the dog "dangerous" pursuant to s 33(i)(b) of the Dog Registration and Control Ordinance 1984 (Qld) ('the Ordinance').

Holland, the applicant, took the issue to court on the basis that there was "no evidence to justify the making of the decision" (Judicial Review Act 1991 (Qld) s 20(2)(h)).

Issues

- Whether there was evidence upon which The Council could declare the dog dangerous

Decision and Reasons for the Decision

The Court held that the classification of the dog as "dangerous" was appropriately made.

The Ordinance classified dogs according to three groups:

- General Dogs;
- Prescribed Dogs – whose entire breed are deemed dangerous (for example greyhounds); and
- Dangerous Dogs – who are determined to be dangerous on a case by case basis by the relevant council.

The Court noted that "the description of a dog as 'dangerous' or 'ferocious' relates to its nature or disposition".

Holland argued on the basis of the English decision of *Sansom v Chief Constable of Kent* [1981] Crim LR 617, with respect to the propensities of dogs to chase other animals. In that case, a dog was found not to be dangerous even though he or she entered a

neighbour's premises, opened a rabbit cage and killed two tame rabbits. In that case, the Court held “that it was in the nature of dogs to chase, wound and kill other little animals; that wild rabbits were game; that it was lot to ask a dog to distinguish a tame from a wild rabbit or to distinguish [his or her] colour”. Holland further argued that rabbits were similar to guinea pigs and that her dog was only exhibiting natural, rather than dangerous, behaviour when he or she wounded and killed the smaller animal.

The Court, did not accept any “logical distinction between a dog's propensity to pursue animals such as sheep and its propensity to pursue other animals such as guinea pigs”. The Court held that the size of the prey is irrelevant in determining whether a dog is dangerous or whether the species of animal is of a type normally pursued by a dog. Further, the Ordinance imposed an obligation upon an owner of a dangerous dog to keep the dog under proper control by ensuring that, when in public, he or she was fitted with a muzzle so as to prevent him or her from biting “any person or animal”. The definition of “animal” was deemed “inclusive”; despite the exclusion of undomesticated birds from the class of animals upon which The Ordinance sought to confer protection, the Court identified “no reason to distinguish between four-legged animals according to whether they are of a type which dogs normally pursue or whether they are wild or tame.”

The Court therefore held that there was sufficient evidence to satisfy the Council officers orders that the dog be classified as “dangerous”.

Significance of decision

This case supports the view that dogs are dangerous if they have the tendency to wound, attack, harm or kill either another animal or a human, regardless of whether the animal attacked is small, tame or even wild, and regardless of whether the dog has a higher tendency to pursue these smaller animals. Significantly, this is one decision in which the Court eschewed an approach to animal protection on the basis of species; the size of guinea pigs was irrelevant to the consequence of their destruction for the purposes of characterising the dog as dangerous.

13.8 *Yanner v Eaton* (1999) 201 CLR 351

Prepared by Thuy Hoai Anh Nguyen

Court

High Court of Australia

Facts

Between 31 October and 1 December 1994, Yanner, the appellant, a member of the Gunmulla clan of the Gangalidda tribe, killed two juvenile estuarine crocodiles, using a traditional harpoon, ate a portion of the kill, froze the rest of the meat and the skins of the crocodiles and kept them at his home.

Section 54(1)(a) of the Fauna Conservation Act 1974 (Qld) (‘The Fauna Act’) stipulated:

A person shall not take, keep or attempt to take or keep fauna of any kind unless he is the holder of a licence, permit, certificate or other authority granted and issued under this Act.

Yanner did not hold a licence, permit, certificate or other authority granted and issued under the Fauna Act. He was charged in the Magistrates Court of Queensland with one count of taking fauna in breach of the Fauna Act.

Yanner argued that s 211 of the Native Title Act 1993 (Cth) (Native Title Act) applied, which permitted native title holders to engage in fishing activities (which would otherwise be prohibited), where they do so in order to satisfy their personal, domestic or non-commercial communal needs and exercise or enjoy their native title rights and interests.

The Magistrate found that Yanner's clan had a connection with the area in which the crocodiles were taken. This connection was found to have existed prior to the introduction of the common law in Queensland and to have continued after this time. The Magistrate further found that it was a traditional custom of the clan to hunt juvenile crocodiles.

This argument was accepted by the Magistrate, but subsequently overturned by the Queensland Court of Appeal. Following a grant of special leave, the appellant appealed to the High Court.

Issues

- Whether Yanner held a native title right
- Whether The Fauna Act conferred full beneficial ownership of the crocodiles in the Crown
- Whether The Fauna Act extinguished any native title right

Decision and Reasons for the Decision

A majority of the High Court, Gleeson CJ, Gaudron, Kirby and Hayne JJ, as well as Gummow J in a separate opinion, allowed the appeal.

The exercise of a native title right

According to Gleeson CJ, Gaudron, Kirby and Hayne JJ "The hunting and fishing rights and interests upon which the appellant relied...were rights and interests "possessed under the traditional laws acknowledged, and the traditional customs observed", by the clan and tribe of which the appellant was a member". As such, those "rights and interests were recognised by the common law of Australia".

Gummow J held that the killing of estuarine crocodiles was a "class of activity" within the meaning of s 211 of the Native Title Act and that the rights were recognized by the common law.

Full beneficial ownership

Gleeson CJ, Gaudron, Kirby and Hayne JJ identified that “[b]ecause ‘property’ is a comprehensive term it can be used to describe all or any of very many different kinds of relationship between a person and a subject matter.” However, Their Honours rejected the argument that The Fauna Act conferred the Crown with full beneficial ownership over the animals for four reasons: first, it was difficult to identify which fauna is owned by the Crown; second, The Act vested limited rights in the Crown in respect of the animals, who were “to remain outside the possession of, and beyond disposition by, humans”; third, The Act itself suggested that the property rights it conferred could not be equated with the property individuals have in domestic animals and; fourth, it was possible that The Act conferred such rights “as a necessary step in creating a royalty system”.

In His Honour’s judgment, Gummow J made some observations about the common law’s treatment of animals as the object of property rights:

The common law divides animals into two categories, harmless or domestic (*mansuetae naturae*) and those which are dangerous or wild by nature (*ferae naturae*). The distinction is significant. *Ferae naturae*, such as estuarine crocodiles which are dangerous and wild by nature, are reduced to property at common law when killed or for so long as they have been taken or tamed by the person claiming title... Further, the owner of a fee simple, who has not licensed the right to hunt, take or kill *ferae naturae*, has a qualified property *ratione soli* in them for the time being while they are on that owner’s land. In contrast, *mansuetae naturae* found on a fee simple are owned by the landowner.

Gummow J held that the “the legal relations, described in s 7 as the ‘vesting’ of ‘property’, arise only if a person ‘takes’ or ‘keeps’ ‘fauna’”, that is, that the Crown would only come to own the animal when a person took or kept him or her. His Honour held that such rights were “limited to those which may have arisen, ... first by way of royalty and, secondly, by penalty exacted from a person who contravened the statutory proscriptions supporting the royalty regime”, these being the relevant statutory interests.

McHugh J found that nothing in the Fauna Act indicated that the Crown should take a more limited form of property than that which the concept ordinarily denotes. Accordingly, his Honour found that “The section gives to the Crown every right, power, privilege and benefit that does or will exist in respect of fauna together with the right, subject to the Act, to exclude every other person from enjoying those rights, powers, privileges and benefits. That is the ordinary meaning of property...”

Callinan J held that the scheme of the Fauna Act evinced an intention that the legislature should have “absolute property” in all fauna to whom the legislation applied.

Extinguishment

Gleeson CJ, Gaudron, Kirby and Hayne JJ held that the Fauna Act did not extinguish Yanner’s native title interest. It was observed that “*regulating* the way in which rights and interests may be exercised is not inconsistent with their continued existence.” Their Honours found this conclusion supported by s 211 of the Native Title Act, which “necessarily” assumed that this kind of prohibition did “not affect the existence of the native title rights and interests in relation to which the activity is pursued.” Accordingly, by virtue of s 211(2) of the Native Title Act and s 109 of the Constitution, Yanner could

continue hunting or fishing for crocodiles for “the purpose of satisfying personal, domestic or non-commercial communal needs” notwithstanding the restriction.

Gummow J held that the regulation of hunting inhering in the Fauna Act’s requirement that Indigenous persons obtain licenses in order to hunt “did not abrogate the native title right.” On the contrary, the regulation was consistent with the continuity of that right.

McHugh J held that the legislation precluded Yanner’s reliance on a native title act to hunt the crocodiles;

By declaring that the property in fauna in Queensland is vested in the Crown and then in subsequent sections defining the circumstances in which others may take that property, the Act proclaimed upon its commencement that henceforth no one, land owner, Aboriginal or holder of a grant from the Crown, had any right to kill, take or appropriate fauna as defined.

Callinan J held that, owing to a “direct collision between the custom or right claimed here, of taking and eating crocodiles, and the ownership of them by the State of Queensland”, the former had been extinguished by the Fauna Act.

Significance of the Case

This case illustrates the common conflict between human cultural or spiritual interests in exploiting animals and environmental or welfare based animal protection interests. Where the former are recognised by Commonwealth legislation and the latter by State legislation, by virtue of s 109 of the Constitution, the former will prevail.

The case also highlights the difference between proprietary interests in domestic and wild animals. The former can be subject to absolute ownership whilst the latter, are only capable of qualified ownership-and limited property rights.

13.9 *Brayshaw v Liosatos and Brayshaw v Liosatos* [2001] ACTSC 2

Prepared by Christopher McGrath

Court

Supreme Court of the ACT

Facts

Thomas and David Brayshaw, the appellants, owned a property in an area that had been experiencing drought conditions for several years. Over one hundred head of cattle lived on the property, although the exact number fluctuated from time to time as cattle from the adjacent national park would often wander onto the property and other cattle would leave the property, venturing into the national park.

After receiving a report that the cattle were “weak and sick in nature,” a senior veterinary officer attended the property. After several visits, the veterinary officer gave an account of the welfare of the cattle, which included percentages of Body Score Condition (BSC), as well as references to visible signs of disease and the poor health of the calves. During his

visits, the senior veterinary officer advised the Brayshaws that they should provide supplementary food and drench the cattle or otherwise remove the cattle from the land. On a return visit in August 1998, the senior veterinary officer found a dead calf who had suffered liver fluke infestation, which could have contributed to his or her death.

The RSPCA attended the property and upon inspection of the cattle, assumed responsibility for their welfare, although they were not removed. The Brayshaws were then charged pursuant to s 8 of the Animal Welfare Act 1992 (ACT) ('The Act') for being persons in charge of the cattle who had both neglected them in a way that caused them pain and failed to provide them with adequate food.

As a defence to these charges, the Brayshaws gave evidence suggesting that the cattle were in "light condition ... but strong" and that they had provided supplementary feed to the cattle in the form of hay bales containing oats. They also argued that the 132 head of cattle were drenched in April 1998 but that an influx of feral cattle made it impossible to determine which animals had been drenched.

At first instance, the magistrate found that the defendants' failure to take sufficient steps to feed or drench the cattle, or to remove them from the land, resulted in their poor condition. The Brayshaws were therefore guilty of both charges. They appealed.

Issues

- Whether the Magistrate had failed to take into account certain evidence
- Whether the Brayshaws had disputed ownership of the cattle
- Whether the charge of failing to provide adequate feed had been made out
- Whether the charge of neglect had been made out

Decision and Reasons for the Decision

On appeal, Higgins J found that the magistrate had made several errors.

Evidence

Higgins J held that the Magistrate had incorrectly interpreted the evidence of Dr Andrews. That evidence suggested that "Malnutrition will cause breakdown of body tissues but it is only if that process is prolonged beyond the use of available reserves of body fat that the condition becomes terminal and hence causes suffering to the affected animal".

Similarly, Higgins J found that the Magistrate had misconstrued the evidence given by Dr Hayes; on a proper construction, this suggested that the weight loss would not necessarily have caused the cattle any pain.

Further, the Magistrate's findings failed to make any reference to the Brayshaws' evidence:

that all available cattle had been drenched in April, that cattle had been provided

with supplementary feed since May and that there was no evidence that the few cattle found to have been in a terminal or dangerously weak state, as opposed to merely being undernourished, were animals of which the appellants had ever been in charge.

Ownership

Higgins J found that her Worship had erroneously assumed that because the Brayshaws were the owners of the property, they had assumed responsibility for any feral cattle that grazed on it and were therefore “persons in charge” of the feral cattle. The Court observed:

Insofar as feral cattle were incidentally drenched and fed that did not necessarily involve an assumption of control. Only if the appellants took possession of such cattle, for example by removing them to another property, by removing them for sale or branding or marking them as theirs, would they thereafter be responsible for their welfare. In other words, it would only be if they took possession of such cattle so as to treat them as their own that the appellants could be said relevantly to have become the owners of such cattle.

Higgins J referred to evidence that some of the cattle had been drenched and some had been adequately fed. It was therefore concluded that unless the proportion of cattle that was neglected or inadequately fed was so great as to exclude the possibility that the neglected cattle were stray cattle for whom the Brayshaws were not in charge, it could not be proven beyond a reasonable doubt that the Brayshaws’ cattle had been neglected or inadequately fed.

Failure to provide adequate feed

Higgins J was satisfied that the Brayshaws had a responsibility to provide supplementary feed to the cattle, but only to an “adequate” not “optimum” standard. It was also held that Brayshaws had a duty to take reasonable steps to provide supplementary feed. However, there were “practical weaknesses” to this; the stray cattle not belonging to the Brayshaws likely accessed it and some of the Brayshaws’ cattle simply ignored it. Higgins J found that inadequate feeding could only have been established if the Brayshaws’ evidence that they provided supplementary feed was false, or if the amount of feed was so insufficient that the Brayshaws’ cattle “would not survive the winter save in such a state as they would need to be put down to end their suffering”. The Court found that such a conclusion was not available.

Neglect

Higgins J identified that it was undisputed that the animals had been drenched. As such, the fact that the animals suffered live fluke infestation could only have been attributed to the Brayshaws’ neglect of the animals if a need arose for a further drenching. Higgins J noted that the expert evidence indicated that after the first drenching the condition of the calves was “acceptable” and that no animals were suffering from liver fluke. As such, it could not be concluded that a failure to subsequently drench was “so imprudent as to constitute neglect”. While the lack of method involved in the drenching process may have been that some cattle escaped the drenching and became infested with liver fluke, there was nothing in the evidence to demonstrate that any animal belonging to the Brayshaws had an adverse effect from liver fluke. Therefore, although the drenching “was not done

as methodically as it might have been, there was no evidence that any such failure caused ‘pain’ from liver fluke infestation in any animal belonging to the [Brayshaws]”. Higgins J emphasized that this was not a case involving reasonable excuse as a defence to neglect, as neglect had not been made out.

Significance of the Case

Higgins J reinforced that the purpose of the Act is to impose a minimum standard that animal owners must comply with, rather than an obligation to keep animals in an ideal condition.

In addition, the case suggests that even though landowners are aware that stray animals enter their land and mingle with their own livestock, that they will not, without something more, be treated as “persons in charge” of those animals. Indeed, the RSPCA was justified in drenching all animals for liver fluke; however, it assumes a “wider duty of care to animals”.

13.10 *Joyce v Visser* [2001] TASSC 116

Prepared by Alysha Byrne

Court

Supreme Court of Tasmania

Facts

On 12th July 1999, Constables Williams, Tyson and Lucas entered the property of Joyce, the appellant, at Evandale with an RSPCA officer. Joyce was not present. On the property they located four dogs who were all chained by the neck. One of the dogs appeared to be dead. Constable Williams noted that there was no evidence of food or water for the dogs and that the area where they were kept was in a very poor condition.

A veterinary pathologist and a veterinary surgeon examined the four dogs. The pathologist found that the deceased dog was emaciated. The dog’s stomach was empty with evidence only of bile, mucus and pieces of grass. The pathologist concluded that the likely cause of death was emaciation; it would have taken weeks for the dog to reach this condition. The surgeon examined the remaining three dogs concluding that they were also emaciated and suffering from a moderate to heavy flea burden. It would have taken at least one month for the dogs to reach such a state.

Joyce was consequently charged under ss 7, 8 and 9 of the Animal Welfare Act 1993 (Tas), with eight charges relating to the animals under his care. Under s 7, Joyce was charged with having the care of animals and using a method of management, which likely resulted in unreasonable and unjustifiable pain and suffering. Under s 8, he was charged with omitting to do a duty, which caused unreasonable and unjustifiable pain and suffering to the animals. Under s 9, he was charged with omitting to do a duty, which resulted in the death of the animal.

The case was initially heard in a Court of Petty Sessions, and the Magistrate found all eight charges proved against the Joyce. He was sentenced to three months' imprisonment, and prohibited for a period of 10 years from having the care or charge of any domestic animals. Joyce appealed.

Issues

- Whether the Magistrate provided sufficient reasons for his Worship's decision
- Whether the Magistrate's finding was unsafe and unsatisfactory, given Joyce's psychiatric condition
- Whether the penalty imposed was excessive

Decision and Reasons for the Decision

Crawford J set aside the judgment, and decided to re-sentence Joyce after review of the case.

Adequacy of reasons for decision

Crawford J dismissed Joyce's claim that the Magistrate did not provide sufficient reasons for his decision. The Magistrate noted that the evidence against Joyce was overwhelming, and did not support Joyce's defence that he did not have the care, possession or custody of the dogs.

Crawford J referred to the evidence put forward by Constable Williams. Constable Williams recalled Joyce arriving at the property, whereby he claimed that the dogs belonged to him, that he had allegedly run out of dog food and that he had been feeding the dogs food scraps. In relation to the deceased dog, Joyce indicated that he knew the dog had died "a day or two or three before." In addition, the landlord of the property gave evidence that he was unaware of anyone, other than Joyce, caring for the dogs. Joyce's wife also told the Court that she had previously asked the appellant to put the dogs in a home, but he declined to do so, claiming that he wanted to keep the dogs. Accordingly, both Crawford J and the magistrate found that Joyce was in the care and charge of the animals.

Satisfactoriness of the decision

Crawford J also dismissed Joyce's submission that the Magistrate's finding was unsafe and unsatisfactory. Counsel for Joyce argued that before the Magistrate convicted Joyce, Joyce should have been psychiatrically assessed. However, Joyce did not make such a submission prior to the complaint being proved on the evidence. Thus, Crawford J concluded that the Magistrate was justified in his findings.

Penalty

Joyce also argued that the penalty imposed by the Magistrate was manifestly excessive. Joyce's counsel put forward that Joyce was 52 years of age and had his nine-year son living with him. He was on the pension, had no prior convictions and had received limited

schooling. The Magistrate found that despite these mitigating factors, the case deserved the application of a deterrent penalty, to demonstrate the law's intolerance of cruelty to animals. Crawford J agreed that the treatment of the animals was serious, observing that Joyce's "neglect of them was extremely cruel and uncaring". Notwithstanding this, his Honour determined that the penalty imposed was too severe in the circumstances. He stated that the Magistrate should have taken into account the absence of prior convictions and lack of substantial education. Crawford J adjourned the case to re-sentence Joyce, suggesting that "[a] short period of imprisonment, up to one month in all, would not have offended principle but I think three months did so". The subsequent sentencing decision does not appear to be reported.

Significance of the Case

This case demonstrates the breadth of the concept "care, possession or control" of an animal by a person. It also examined the reasonableness of convictions, and the need to take into account mitigating factors. However, in finding the original penalty too severe, it calls into question whether penalties in animal cruelty cases are too lenient. Notably, Crawford J identified that although this was one of the "worst cases of animal cruelty" to have come before the Magistrate, "it is not difficult to imagine worse cases involving deliberate acts of cruelty to animals, such as deliberate and extreme violence or torture". This factor, amongst others, impelled Crawford J to recommend that three months was an excessive penalty, suggesting that the law's conceptualisation of the severity of animal cruelty is contextualised according to the worst kinds of mistreatment, rather than to the suffering experienced by the animal in question.

13.11 *Pearson v Janlin Circuses Pty Ltd* [2002] NSWSC 1118

Antonia Quinlivan

Court

Supreme Court of New South Wales

Facts

Animal Liberation, the appellant, took action against Stardust Circus, the respondent, in relation to the treatment of one of their elephants. The elephant had been deprived of contact with other elephants for several years. In 2000, the circus authorised three elephants to be kept in close proximity to the elephant in question for a number of hours. The three elephants were then removed. It was argued that as a result of this act, the elephant was unreasonably, unnecessarily or unjustifiably abused, tormented, infuriated or inflicted with pain in contravention of s 5(2) of the Prevention of Cruelty to Animals Act 1979 (NSW) ('the Act').

At first instance, the trial judge found that Stardust Circus required intent and knowledge that an act would be cruel for it to be recognised as such under The Act; no act of cruelty was established due to a lack of *mens rea*. On appeal to the Supreme Court of New South Wales, it was determined that *mens rea* was not an element of a cruelty offence under the Act.

Issues

- Whether the offence in s 5(2) of the Act was one of strict liability

Decision and Reasons for the Decision

Windeyer J allowed the appeal, setting aside the decision of the Magistrate and remitting the matter to the Magistrate to be reheard according to law.

Windeyer J relied on the Supreme Court decision of Dowd J in *Bell v Gunter* (Unreported, Supreme Court of NSW, Dowd J, 24 October 1997) ('*Bell*') involving a prosecution for aggravated cruelty under s 6(1) of the Act. *Bell* was decided under s 6(1) of the Act, however, the reasoning was also applicable to offences under ss 5(1) and 5(2).

According to s 5(2) of the Act, "[a] person in charge of an animal shall not authorise the commission of an act of cruelty upon the animal."

Dowd J in *Bell v Gunter* relied on the second category of offences enumerated by Gibbs CJ in the High Court case of *He Kaw The v The Queen* (1985) 157 CLR 523. This category included offences which were not absolute, though were such that the legislative intention clearly excluded a requirement of *mens rea* to prove the offence. The doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. Dowd J ruled that a charge of aggravated cruelty falls into the second category of offences, and as such is one of strict liability. His Honour held,

The offences created, in my view, are created with the purposeful legislative intention of protecting animals, in most cases totally unable to protect themselves from a range of activities which contemplate certain circumstances in which the court would have to evaluate whether reasonable steps have been taken... the offences are such that the legislative intention seems clearly not to require a component of *mens rea* in the proof of the offence

Stardust Circus's notice of contention also failed. It claimed that as any infliction of pain occurred on the taking away of the elephants, which it did not authorise. However, the Court held that Stardust Circus authorised the entry of the entity which removed the elephants, and by extension, the authority to leave the property. Thus, the original authority given to the removing entity implied permission for the subsequent action, or assumed that it would take place.

Significance of the Case

This case clearly establishes that cruelty is an offence of strict liability. As such, *mens rea*, including intention or recklessness, is not a requirement of the offence.

13.12 *Song v Coddington & The Attorney General for the Commonwealth Intervening* [2003] NSWSC 1196

Prepared by Alexandra Jackson

Court

Supreme Court of New South Wales

Facts

On 25 April 2011, a consignment of 1,137 live goats was due to depart Sydney International Airport on a cargo flight bound for Abu Dhabi in the United Arab Emirates. The transport of live goats internationally from Australia required an export permit which could be granted by an authorised officer. Song, the plaintiff, was a veterinary officer employed by the Australian Quarantine Inspection Service and was an authorised officer for the purposes of granting export permits. Song examined the goats at Sydney International Airport after they had been loaded into eight, three-tiered wooden crates for air transport. He then issued the relevant export permit and signed a Certificate of Health for the goats.

Once the crates had been loaded onto the aircraft, RSPCA officers, including Coddington, the defendant, conducted an inspection of the goats, which revealed that they were overcrowded and that many of the animals could not stand upright in the crates without their horns or bodies touching the top of the crate.

Various persons associated with the proposed export were prosecuted for offences under the Prevention of Cruelty to Animals (General) Regulation 1996 (NSW) ('The Regulation'). Song was convicted of some eight offences, each under clause 5(1) of the Regulation which provides:

A person must not:

- (a) carry or convey a large stock animal in a cage or vehicle, or
- (b) being a person in charge of a large stock animal, authorise the carriage or conveyance of the animal in a cage or vehicle,

unless the cage or vehicle is of a height that allows the animal to stand upright without any part of the animal coming into contact with the roof, ceiling or cover of the cage or vehicle.

In this clause, a reference to a large stock animal is a reference to an animal that belongs to the class of animals comprising cattle, horses, sheep, goats, pigs and deer.

Song appealed against his conviction on the grounds that clause 5(1) did not apply because he was neither a "person in charge" of the goats, nor had he "authorised" the carriage or conveyance of the goats.

The State and Federal Attorneys-General decided to intervene because of the possible constitutional implications of the case.

Issues

- Whether Song was a “person in charge” of the goats for the purposes of the Regulation

Decision and Reasons for the Decision

James J allowed the appeal and found that Song was not a “person in charge” of the goats for the purposes of the Regulation and thus had not contravened clause 5.

Coddington submitted that Song’s power to grant an export permit also included a power to refuse one, and that because of this power the Song’s actions went beyond merely exercising a function to issue permits. It was alleged that he had acted as a “person in charge” of the goats who had control over what happened to them. It was further alleged that the combination of this power and the fact that Song visually inspected the goats in his role as veterinarian constituted “supervision”. The concept of “supervision” was important as s 4 of the Prevention of Cruelty to Animals Act 1979 (NSW) expanded the concept of a “person in charge” to include “a person who has the animal in the person’s possession or custody, or under the person’s care, control or supervision.”

James J rejected this argument and instead considered the dictionary definitions of “supervise” and “control.” He found that a proper construction of the term “a person in charge” necessitated the person having the ability to “do something by way of control over what was occurring at the time, well exceeding what Dr Song was doing in the performance of his functions.” For these reasons, James J held that a “person in charge” refers to “a person’s ability and authority to take positive steps to effect the immediate physical circumstances of the animal.” His honour contrasted this with “passive permitting or detached observation”, which is what he believed characterised the relationship between Song and the animals.

Following the Court’s determination that the regulation did not apply to Song, James J found it unnecessary to consider whether he authorised the carriage or conveyance of the goats, as both elements were required to make out a contravention of cl 5.

Significance of the Case

This case exemplifies a narrow interpretation of what constitutes a “person in charge of an animal”. This approach significantly limits the class of people who can be prosecuted for animal related offences.

13.13 *Turner v Cole* [2005] TASSC 72

Prepared by Marta Nottidge

Court

Supreme Court of Tasmania

Facts

Turner, the applicant, kept a number of horses on his property at Garden Island Creek. On 12 May 2003, an RSPCA Inspector visited the property while Turner was absent. After seeing two thin horses, the RSPCA Inspector made a video of the horse in the worst condition and left a card prompting Turner to contact him. On 15 May 2003, the RSPCA Inspector spoke with Turner about the state of the horses and advised that they required veterinary attention. Turner responded by indicating that he was competent to care for the horses.

On 19 May 2003, the RSPCA Inspector visited Turner's property again, collecting footage and photographs of the poor condition of the horses. Two days later he returned with another RSPCA Inspector and two police officers. During this visit, Turner was informed that the RSPCA intended to seize the animals. Turner asserted that he had been giving the same care to the horses that a veterinarian would. Turner asked the group to leave the property and chased the horses away. Despite this, the weaker horse was caught; the animal collapsed and was unable to get back on his or her feet. After receiving veterinary advice over the phone, the RSPCA Inspectors shot the horse. The body was taken away immediately for an autopsy.

The results of the autopsy revealed that the animal was in a poor condition, had faeces caked down both hind legs as a result of severe diarrhoea that would have lasted over six to eight weeks. The autopsy report also indicated that horse should have received veterinary treatment to determine the cause of the diarrhoea and that the horse should have been treated.

On 3 May 2005, a Magistrate convicted Turner of omitting to do a duty which resulted in serious disablement of an animal under s 9 of the Animal Welfare Act 1993 (Tas). Turner was fined \$4,000 plus costs and precluded from possessing more than 20 horses for five years.

Turner appealed.

Issues

- Whether Turner was denied procedural fairness
- Whether the illegally obtained evidence was incorrectly admitted and used
- Whether Dr Pyecroft was qualified to give expert evidence about horses
- Whether the prosecution evidence as to the horse's disablement should have been excluded
- Whether the penalties were manifestly excessive

Decision and Reasons for the Decision

The appeal was dismissed.

Procedural fairness

Turner argued that he was denied procedural fairness as he was not provided with the witness statements, autopsy report and photographs prior to the hearing, and he had the opportunity to view the footage only once. Blow J rejected this claim, finding that the Magistrate afforded Turner sufficient opportunity to view the relevant documents and Turner was not required to cross-examine expert witnesses until weeks after the first day of the hearing. That Turner saw the footage only once did not amount to a breach of procedural fairness as defendants in the Magistrates Court are usually not provided with transcripts and are given one opportunity to hear the evidence.

Admissibility of evidence obtained by the RSPCA

Blow J identified that RSPCA officers have a number of statutory powers authorising their engagement in activities that would be otherwise unlawful without permission. These powers include: entering and searching premises without a warrant if the inspector holds a belief that an offence against an animal has been or is being committed; entering premises to inspect an animal; taking photographs and making videos if such a belief exists; euthanising an animal if the animal is suffering; asking for the opinion of a veterinary surgeon about the extent of an animal's suffering; and, disposing of the carcass of an animal that has been killed.

As the prosecution did not adduce evidence to establish that the inspector had been statutorily appointed as a police officer, Turner claimed that the evidence had been procured through unlawful trespass. Blow J held that notwithstanding the inspectors' "non-appointment", there was no basis for concluding that the evidence was unlawfully obtained (given the statutory powers).

Expertise of Dr Pyecroft

With respect to Dr Pyecroft's qualifications Blow J held that "[b]ecause of his training, study and experience, he was undoubtedly entitled to give expert evidence as to the condition of the horse".

Evidence of the horse's disablement

The RSPCA provided evidence to the effect that they believed the horse required attention, that they made reasonable attempts to capture the horse, that the horse collapsed after being captured and that they had no choice but to shoot the animal. Blow J found that it was open to the Magistrate to accept this evidence.

Turner claimed that the prosecution's evidence concerned a period of time to which the charge was not related. Blow J found that the Magistrate was entitled to "infer from the prosecution evidence that [Turner] had omitted to do his duty in respect of the horse during the period to which the charge related". The prosecution's evidence was not lacking in probative value such that it would cause the Magistrate to hold a reasonable doubt.

Appropriateness of penalties

Blow J found that the fine was not excessive given that Turner had previously been convicted of cruelty to animals and had the ability to pay the fine. The order preventing him from the possession or care of more than 20 horses for five years was deemed appropriate considering this was a “serious case of neglect”.

Significance of the Case

This case highlights the statutory powers vested in the RSPCA to enable it to intervene in situations involving neglect of animals. It also exemplifies the relevance of evidence law as it applies to unlawfully obtained evidence to animal protection.

13.14 *Richardson v RSPCA* [2008] NSWDC 342

Prepared by Marta Nottidge

Court

New South Wales District Court

Facts

Richardson, the appellant, was a woman in her sixties who lived alone on a 150 acre property in Bolivia, 30 km south of Tenterfield, northern NSW. She had a number of chronic health problems and her only income was her disability pension. Richardson had approximately 50 head of cattle on her property, consisting of cows, calves and a bull.

RSPCA Inspectors had visited the property several times and had noticed that some of the animals were in poor condition. On 21 June 2006, RSPCA officers provided Richardson with a management plan and made a number of recommendations in relation to the cattle, including that they should be fed protein, energy and roughage and that the number of animals should be reduced. On 26 October 2006, the Inspectors visited the property again and observed that the cows were still in poor to average condition, had very little natural feed and were not being hand fed.

On 7 November 2006 two inspectors attended the property and spoke with Richardson about the deteriorating condition of the cattle. Richardson indicated that she had had been in hospital as a result of chronic illnesses and the person she had left in charge had failed to take care of the cattle. She also disagreed that the cattle were not sufficiently fed.

On 22 November 2006, two RSPCA Inspectors, an RSPCA investigator and two veterinarians attended the property and removed 21 animals who were in an emaciated condition. Richardson was charged under s 8(1) of the Prevention of Cruelty to Animals Act 1979 (NSW) (‘the Act’) with 17 counts of failing to provide an animal with proper and sufficient food and under s 5(3) for failing to provide veterinary treatment to cattle who were infested with cattle lice.

Ms Richardson was found guilty of the charges at Local Court. A fine of \$9000, costs and a good behaviour bond were awarded against Richardson.

Issues

- Whether Richardson breached s 5(3) of the Act through a failure to provide veterinary treatment to the animals
- Whether Richardson breached s 8(1) of the Act through a failure to supply sufficient feed to the animals
- Whether the penalty awarded was appropriate
- How costs should be awarded

Decision and Reasons for the Decision

The Court allowed the appeal with respect to the finding of guilt pursuant to s 5(3) of the Act. However Ms Richardson's appeal regarding the 17 matters pursuant to s 8(1) of the Act was dismissed. The Court also awarded costs to the RSPCA for the Local Court proceedings in the sum of \$12,681.

Breach of s 5(3)

Norrish QC DCJ found that it could not be established that Richardson's failure to treat the animals for lice was a breach of s 5(3) of the Act as "whether in fact the need for treatment at the points of time pleaded was 'necessary' would be a matter of complete speculation on the part of a tribunal of fact if no relevant opinion had been expressed by someone qualified to do so." Further, Richardson provided evidence to the effect that she was to have the cattle treated for lice the following week. As such, while the prosecution had established the factual matter pertaining to the lice infestation, it "failed to establish beyond reasonable doubt the relevant need required under the section and... a failure to meet that need by" Richardson.

Breach of s 8(1)

Norrish QC DCJ held that there was sufficient evidence to suggest that Richardson was responsible for the state of the cattle, that the condition of the cattle was consistent with a lack of access to sufficient and proper feed and that no other person contributed to their condition. Further, there was no basis for finding that it was not reasonably practicable for such feed to be provided. The prosecution established that there was no honest and reasonable mistake of facts that would exculpate Richardson. As such, the counts pertaining to s 8(1) stood.

Appropriateness of penalty

Considering Richardson's personal characteristics, Norrish QC DCJ held that it was appropriate to affirm the good behaviour bond. The fine was not appropriate given that Richardson's "capacity to pay fines is extremely limited if not non-existent". Further, Norrish QC DCJ varied the limitation placed by the Magistrate on the number of cattle Richardson could own, basing the revised figure on expert evidence.

Costs

Norris QC DCJ varied the costs order, guided by the principle that costs awards should be “just and reasonable”. This was a total of \$12,681.

Significance of the Case

This case exemplifies the prevalence of neglect as a form of cruelty. It demonstrates that ill health or lack of financial means is not a defence to an animal cruelty offence. It also confirms that the legal test of what amounts to cruelty is an objective one to be determined by the Court. Although Norrish QC DCJ recognised that “the presence of lice is not good for... animals”, this did not, in the Court’s opinion, amount to an ailment necessarily requiring treatment.

13.15 *Morris v Department of Environment and Climate Change* [2008] NSWLEC 309

Prepared by Tiffany Lasschuit

Court

Land and Environment Court of New South Wales

Facts

Morris, the applicant, a commercial kangaroo shooter, was charged with the killing of 128 eastern grey kangaroos. Morris only held a licence to kill red kangaroos. Moreover, he was not permitted to shoot grey kangaroos in the zone in which he was operating. When confronted by National Park and Wildlife Service (‘NPWS’) officers in August 2007, he admitted to the elements of the offences.

The case was first heard by the Local Court Magistrate at Lightning Ridge on 12 December 2007. Morris was found guilty of two charges, namely the killing of protected fauna and contravening the restrictions of his licence. The Magistrate fined him a total of \$10,640 including costs. Morris appealed against the severity of fines imposed upon him at the Local Court. He sought special consideration based on his age, limited literacy skills, dependence on a pension, and various major health issues, which restricted his work and earning capacity. Morris expressed that he felt pressured to cull the kangaroo population in compliance with the requests of the farmers who retained him. He claimed that these demands frequently conflicted with the conditions of his licence. Morris was also very critical of the way NPWS supervised the culling of kangaroos and stated that the offences were universally regarded as almost impossible to detect.

Issues

- Whether the fine imposed was excessive

Decision and Reasons for the Decision

Sheahan J ordered the appeal be dismissed.

Sheahan J discussed how the entire system of NPWS regulation depended on compliance with the licensing regime, and how sustainability of the species was a key objective of public policy. In addition, he pointed out that courts must have regard to the “strong terms” in which Parliament expresses its intention.

Sheahan J also noted that Mr Morris had killed approximately 1700-2000 kangaroos in one year and that the volume of illegal killing was substantial, leading to considerable environmental harm. His Honour stated that the Magistrate had followed appropriate processes in sentencing an offender of low financial means. Although Sheahan J acknowledged that the fine would impact on Mr Morris’ family budget, Sheahan J stated that the payment of fines “cannot be viewed as an optional domestic expense, nor as a normal cost of running a business”.

Significance of the Case

The case identifies the way in which commercial shooters may be pressured by landholders to shoot species of kangaroos that are not authorised by their licence.

It also acknowledges the importance of licence conditions to the maintenance of kangaroo population levels. The case characterises such a goal as a matter of “public policy”. In addition, Sheahan J acknowledged that culling offences are almost impossible to detect and that the system of regulation depends entirely on compliance with the licensing regime.

13.16 *Dart v Singer* [2010] QCA 75

Prepared by Vuu-Cindy Dang

Court

Queensland Court of Appeal

Facts

On 31 July 2008, RSPCA inspectors seized 113 dogs, one cat, 488 rats, 73 mice, 12 guinea pigs and 11 birds from Dart and Hajridin, the applicants. The animals were kept in unsanitary and inappropriate living conditions.

The applicants were charged with breaching their duty of care to the animals under s 17 of the Animal Care and Protection Act 2001 (Qld) (‘the Act’) and in late 2008 the applicants pleaded guilty. The Magistrate did not record a conviction and both applicants were fined \$12,500 and were ordered to pay a costs order of \$57,161.30. The Magistrate placed Dart and Hajridin on probation for two years, made a disposal order and made an order that the applicants not purchase or otherwise acquire or take possession of a dog or rat for trade or commerce for a period of two years.

Dart and Hajridin appealed and this was heard by the District Court on 11 June 2009. Judgment was handed down on 11 December 2009. The costs and fines were reduced; however, the appeal was otherwise dismissed.

The application to this Court concerned the presence of any legal requirement preventing the RSPCA dealing with the animals the subject of the disposal order. Dart and Hajridin sought a stay in proceedings to prevent the RSPCA from engaging in such conduct.

Issues

- Whether the RSPCA could deal with the animals the subject of the disposal order
- Whether the penalty awarded was inappropriate

Decision and Reasons for the Decision

The appeal was dismissed.

RSPCA power

Section 182 of the Act conferred upon the Magistrate the power to make the disposal order. The Court held that absent provisions placing restrictions upon how an animal should be dealt with after the transfer in custody, “the effect of the order was that the property in the animals immediately vested pursuant to the orders”.

In requesting the stay in proceedings, the Court noted that Dart and Hajridin made no reference to the statutory source of the Court’s power to make such an award. However, in considering whether a stay or other relief would be available, the Court turned to make an assessment of their prospects of success on appeal.

Dart and Hajridin argued that the powers of the RSPCA were limited by the agreement between the RSPCA and the State of Queensland stating that the latter would assume responsibility for commercial livestock. Dart and Hajridin argued that they kept the animals for a business, and that they were therefore commercial animals.

The Court held that the agreement did not have such an effect. It was not an instrument of appointment of an inspector or a regulation. It was not signed by the chief executive or given to the inspectors, nor did it evince an intention to limit the powers of the inspector under The Act. The Court identified that a purpose of the agreement was “to enable the RSPCA to maintain a role in the enforcement of animal welfare legislation”. Further, it was held that the agreement was more concerned with the geographic regions in which the RSPCA, on the one hand, and the State Government, on the other, would act; thus, the provisions of the agreement dealt “not with limitations on the power of inspectors, but with identifying the relative roles of the organisations”. That one entity was to have “primary responsibility” for one class of animals did not suggest a limitation on the powers of the other entity; this would offend the purpose of the agreement.

Due to the absence of any limitation on the powers of the inspectors, it was held that Dart and Hajridin had no real prospects of success.

The Court rejected any argument that the RSPCA inspectors acted fraudulently; it could not be established that it knew of the existence of the agreement and that they believed it to have the effect contended for by Dart and Hajridin.

The stay on this basis was refused.

The penalty

Dart and Hajridin adduced no evidence of significant financial hardship which would flow from compliance with the orders.

Dart and Hajridin claimed that the animals were valuable. However, the Court held that there was nothing to suggest that, in the event that they were successful, monetary compensation would be inadequate.

The RSPCA argued that its ability to place the dogs into voluntary care reduced its expenses.

A stay on this basis was similarly refused.

Significance of the Case

This case exemplifies complexities resulting from responsibility being shared between the RSPCA and government. Interestingly, the law's recognition that animals have a market value advanced their interests; such a principle enabled the RSPCA to deal with the animals as necessary, as Dart and Hajridin could receive monetary compensation if on appeal, it was held that the RSPCA acted without power.