Crime Law Soc Change (2011) 55:421–436
DOI 10.1007/s10611-011-9295-4

Developing a common law of animal welfare: offences against animals and offences against persons compared

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Published online: 30 March 2011

Abstract Most animal welfare/suffering cases heard by the courts focus only on the facts: did the defendant, as a matter of fact, do those things with which they are charged? Analysis of the 2010 Amersham horse cruelty case reveals that there is significant room for ambiguity and subjective interpretation within the statutes that underpin animal welfare law. To provide certainty and to allow the law to develop it is essential that cases such as Amersham are not only subject to a review of the facts, but also a full analysis of the legal principles contained within the relevant statutes.

Introduction

Although much of the preparatory work for this paper was undertaken in the spring of 2010, the subject-matter took on increased relevance in November 2010 when the UK's coalition government announced that many of the previous government's statutory protections scheduled to be afforded to animals would be postponed or abandoned [15]. For instance, the plans to introduce a ban on the use of non-domesticated animals in travelling circuses were postponed for at least 1 year [4]; a ban on the trimming of battery hens' beaks, due to take effect in January 2011, was replaced with a commitment by the government to 'work towards a ban in 2016' [5]; likewise, a previous commitment to ban the battery cage breeding of game birds was withdrawn [5].

While these steps might be seen as regressive and disappointing to many animal welfare groups, this article will seek to consider if, and to what extent, the courts can provide a means by which the treatment of animals can be ameliorated. If the courts can provide an alternative means by which the worst excesses of animal abuse can be prohibited, then over time, it may be possible to witness the incremental betterment of the conditions of animals, and/or the gradual phasing out of practices that harm animals, without necessarily requiring additional, and deeply politically motivated, action at a governmental level. Consequently it will be suggested in this

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paper that animal welfare organisations might wish to supplement 'traditional' means of effecting change—the lobbying of Parliament, and consider, to a greater extent, petitioning the courts so as to develop a 'Common Law of Animal Welfare'. If lessons can be learned from other strands of the law—the laws of negligence, contract, or (perhaps most germane for the present analysis) criminal law, it is that there is not always a need for Parliament to intervene and create new laws. This article will show that the law can grow and develop through the courts and judicial pronouncements, but there are, however, limits to this development. As will be shown, the evolution of the common law is not always a speedy process, and there is little consensus as to the limits of judicial activism: the boundary between legitimate interpretation and application of existing law and unconstitutional judicial law-making is often a slightly blurred one. Nevertheless, courts are prepared, on occasion, to push the boundaries so that laws can, and do, evolve beyond the confines of the original drafter's intent.

To evolve in this way, however, the common law depends upon judicial scrutiny and interpretation for its very life-blood. The appeals process, the hierarchy of the courts and the doctrine of precedent ensure that the law is sufficiently fluid and flexible to account for most eventualities, yet sufficiently definite and integrated to provide certainty.

The vast majority of animal welfare or animal suffering cases heard by courts are dealt with by a way of a review of the facts: did the defendant do that thing with which they are charged: yes or no? Rarely, if ever, will courts subject the legislation to a 'proper' legal analysis—that is to say, rather than focussing, almost exclusively, on whether the defendant, as a matter of fact, did or did not do the act or omission alleged, the legal analysis is to focus on the very nature and extent of the act or omission itself. A simple example might be thus: a defendant is charged with failing to take 'reasonable steps' to prevent the infliction, by another person, of 'unnecessary suffering' upon a dog, contrary to section 4(2)(c) of the Animal Welfare Act 2006. The fact-finding tribunal—the so-called 'lower courts', Magistrates and Crown Courts—will largely concentrate on whether the defendant actually omitted, as a matter of fact, to take reasonable steps to prevent the harm to the dog. Absent of any further guidance or judicial precedent the fact-finding tribunal will simply affix its own interpretation of reasonableness to the present set of facts. What they rarely do is to subject the concept of 'reasonableness' to any extended analysis beyond what is necessary in the immediate case. The lower courts will not, and cannot, enunciate guiding principles for future cases, so as to develop the law in a consistent fashion and build up a corpus of principle around the concept of 'reasonableness' under section 4(2)(c). This, it will be argued, has the effect of stifling the law's development and runs counter to the common law's tradition: by building up a corpus of principle the law can grow, constantly testing the boundaries of reasonableness, so that case-by-case the law incrementally develops and keeps abreast of social, political, scientific and moral change. Likewise, any *ad hoc* decision-making by lower courts, absent of precedent and guiding principles, might fail to meter out justice consistently.

Every year thousands of animal welfare/animal suffering cases reach the courts in England and Wales, and these are most often (although not exclusively) brought under the Animal Welfare Act of 2006 ('the AWA'). For example, in 2009 the

RSPCA brought 2,579 successful prosecutions for animal cruelty offences [12:6]. In the previous year a similar number of 2,574 prosecutions were brought [12:6], and 2007 resulted in a slightly lesser figure of 2026 [11:8]. Similarly Crown Prosecution Service statistics between 2007 and 2009 replicate this trend, albeit on a smaller scale, with an annual increase in the number of prosecutions being witnessed: in 2007 there were 35 prosecutions, increasing to 167 in 2008, to 226 in 2009, and in excess of 238 in 2010.[1]

Thus, there is clearly a great deal of court time be taken up in dealing with these matters and, occasionally these cases befit from a 'proper' legal analysis. This article will, therefore, extrapolate from these cases certain legal principles that could underpin any incremental development of the law so that certain harms against animals—those that are not deemed, at present, to necessarily fall within the AWA's reaches—might be prosecuted.

A case in point: *Gray and Others v RSPCA*[2]

Gray and Others v RSPCA was the trial of the horse breeding family at the centre of the so-called 'Amersham case' and, it is suggested, is a perfect case in point for two reasons. First, it shows the very real problem of 'subjective interpretation' that can take place when lower courts (or expert witnesses) affix their own interpretation of 'reasonableness', for example. Secondly it shows that the AWA can, when required to do so, negate the need for species or sector specific regulations. To substantiate this latter point, the horses in Amersham were 'farmed' animals: that is to say, they were not used in recreation, or sport, or even for companionship—they were bred to be slaughtered and to enter the food chain. For the majority of farmed animals the relevant regulations are found in the Welfare of Farmed Animals Regulations 1997.[3] Although farmed horses could be covered by the general provisions of the Regulations, unlike hens, calves and pigs, horses are not afforded the protection of their own explicit Schedule to the Regulations, which details the precise minimum standards to be applied in the farming of these creatures. For horses, therefore, the 'solution' requires that the provisions of less specific pieces of legislation (such as the AWA) could be interpreted in such a way as to do justice in the individual case.

The facts of 'Amersham' are particularly horrific and were widely reported by the print and television media, so only the briefest of summaries should suffice. The Gray family were the proprietors of Spindles Farm near Amersham, where from late 2007 to 2008 an RSPCA investigation unearthed an appalling case of animal neglect.[4] Over 100 horses were found barely alive on the farm in a filthy, disease-ridden and emaciated state. The bodies of dozens more dead horses were found littered around the farm yard.

The proprietor of the farm, James (Jamie) Gray (Snr), and four members of his immediate family were charged with numerous offences under sections 4 and 9 of

[1] Author's Freedom of Information Act requests to the Crown Prosecution Service, February 2010 and December 2010

[2] [2010] EW Misc 8 (EWCC)

[3] England, S.I. No (2007) 2078; Wales, S.I. No (2007) 3070 (W.264)

[4] See for further *Hughes and Lawson,* this issue

the AWA. The factual bases of the charges were that the Gray family had variously caused the horses unnecessary suffering by failing to provide adequate nutrition, veterinary treatment for obviously sick animals, and housing and environmental needs.

Section 4(1) of the Act makes it an offence to cause, or be likely to cause, an animal ('a vertebrate other than man'[5]) unnecessary suffering. Section 4(2) might be best described as the 'complicity offence' whereby those persons responsible for an animal (as defined, in a manner of speaking, by s.3) allow unnecessary suffering to be caused by another person. The relevant legal defences—that is to say, the situations in which suffering might be deemed to be 'necessary'—are listed in section 4(3). These are:

(a) Whether the suffering could reasonably have been avoided or reduced;
(b) Whether the conduct which caused the suffering was in compliance with any relevant enactment or any relevant provisions of a licence or code of practice issued under an enactment;
(c) Whether the conduct which caused the suffering was for a legitimate purpose, such as—
    (1) The purpose of benefiting the animal, or
    (2) The purpose of protecting a person, property or another animal;
(d) Whether the suffering was proportionate to the purpose of the conduct concerned;
(e) Whether the conduct concerned was in all the circumstances that of a reasonably competent and humane person.

Although the concept of 'necessity' is given some definition, 'suffering' is not. The Act and its accompanying Explanatory Notes do state that suffering entails either physical or mental harms,[6] but for a fuller analysis it is helpful, as Radford suggested (in response to similar deficiencies in the AWA's predecessor statutes) to 'piece together a body of guidance emanating from the higher courts as to the nature and application of the unnecessary suffering test' [9:243]. Notwithstanding, for a moment, the fact that most of the cases concerning a definition of suffering predate the AWA this endeavour yields some clues as to what suffering is, or is not. It is not 'mere' death—the painless killing of an animal will not, according to the Scottish case of *Patchett v MacDonald,*[7] suffice. Lord Cameron in *Patchett* did, however, suggest that the death of the victim dog, caused as it was by a shotgun blast to the head could irrefutably be absent of any suffering:

> In my opinion it is not necessarily to be inferred from these facts alone that no pain or suffering would be sustained in the interval between infliction of injury and death, any more than that the contrary is to be inferred….[8]

The temporal scope of suffering, whether it need be for an instant or for a more prolonged period, was also discussed by Lord Hunter in the same case, who stated

[5] Animal Welfare Act 2006, s.1
[6] Animal Welfare Act 2006, s. 62(1); Explanatory Notes, HMSO, 2007, at para.19
[7] (1984) SLT 152
[8] *Ibid*., at p.154

that the suffering, howsoever further defined, might be for even the briefest of times. In fact, the duration of suffering had been discussed over a century prior to *Patchett*, with the court in *Murphy v Manning*[9] offering the following observation on the suffering caused by the cutting off of the combs of fighting cocks:

> The fact that it is done quickly does not make any difference. Let anyone try to hold his hand over a flame for 2 seconds, and I think he would say that half a minute, not to say a minute, was a long time…

So, having established that there is no minimum duration of 'suffering', what exactly constitutes suffering? As Radford notes, suffering remains a concept that is more intuitive rather than measurable [9:243], but as stated earlier, the AWA and its Explanatory Notes do anticipate a psychological dimension as well as the infliction of physical pain and material discomfort.[10] The majority of the recently decided cases, however, including the Amersham case, centre around the notion of suffering being physical pain, neglect and discomfort.[11]

In addition to the 'positive act' suffering that the Amersham horses were subjected to, the Gray family were also charged with failing to meet the welfare needs of the animals. Section 9(1) is the relevant welfare provision of the AWA, whereby a person commits an offence "if they fail to take such steps as are reasonable in all the circumstances to ensure that the needs of the animal for which he his responsible are met". Section 9(2) goes on to provide a non-exhaustive list of the factors to be taken into account when determining what the needs of an animal are. These include:

a) a suitable environment
b) a suitable diet
c) the ability to demonstrate normal behaviour patterns
d) suitable housing—whether with or apart from other animals
e) the animal's need to be protected from pain, suffering, injury and disease.

When deciding the question of what is 'reasonable in all of the circumstances', s.9 (3) states that 'any lawful purpose for which the animal is kept' should be taken into consideration, as should 'any lawful activity undertaken in relation to the animal'.

It is clear that the judge in *Gray,* Mr Justice Tryer, was not prepared to accept the Grays' defence that their conduct was 'reasonable in the circumstances' and dismissed all bar two of the Gray's numerous appeals: James Gray (Snr) was sentenced to 26 weeks in prison, with a life ban on keeping equines imposed; his son James (Jnr) was subject to a supervision order for 18 month and banned from keeping equines for 10 years. Julie Gray, Cordelia Gray and Jodie Gray—the wife and daughters of James Gray (Snr) were given 150 hours of Community Service, as well as 10 year bans. All defendants also received fines and were subject to cost orders [14]. Although it was widely reported that James Gray (Snr) received a custodial sentence (once he was retrieved after absconding from the court [14]) this

[9] (1876–77) L.R. 2 Ex. D. 307
[10] Animal Welfare Act, s. 62(1)
[11] *Shepherd v Procurator Fiscal (Dornoch)* [2010] HCJAC 114; *Ward v RSPCA* [2010] EWHC 347 (Admin); *Burrington v RSPCA* [2008] EWHC 946 (Admin)

aspect of the case is, it is suggested, merely factually interesting. More legally important are the findings of Tryer J as to the applicable law, and in particular the manner in which the Gray's witness in chief was discredited.

John Parker JP, MA, Vet MB, FRCVS should have been an exemplary witness. Not only does his Royal College of Veterinary Surgeons biography boast an impressive range of qualifications and skills, he is, he boasts, a 'defence expert witness' [10]. Not according to Tryer J, however, who dismissed almost every aspect of Parker's testimony variously describing it as 'confused', 'confusing', 'contradictory', 'thoroughly blinkered and biased' and ultimately 'embarrassing'.[12] These criticisms aside there is an even more important issue to be dealt with.

Parker, in his testimony, considered much of Gray's treatment of the horses to be perfectly acceptable—admittedly not best practice, but in the circumstances it was reasonable. For instance, the feeding regime employed on Spindles Farm was claimed to be that of 'hunger stimulus' whereby a limited amount of food would be placed in the pens and 'cleared up' by the horses throughout the day. According to Parker this was the preferred method of feeding as it eliminated wastage. This was important as food, he noted, costs money and there is an economic balance to be struck. Likewise the bedding system operated at Spindles Farm was, for Parker, justifiable. The low-labour-intensity and economically balanced 'manure bed system of bedding'—whereby straw is simply deposited atop any faeces, would suffice: to remove the faeces more than once a year (or possibly twice a year, in particularly high density operations) would be an indulgence. Gray, however, and many other farmers could not afford such luxuries and thus the system employed at Spindles Farm was adequate, or to employ the language of s.9 of the AWA, it was 'reasonable in all of the circumstances' according to Parker.

There was no part of the practice adopted on Spindles Farm, said Tryer J, that could be described as 'reasonable' in *any* circumstances. The system of cleaning and bedding was 'deplorable' and resulted in most of the animals in the farm living their lives perpetually in faeces, and the system of 'hunger stimulus' implemented at Spindles Farm was not 'efficient' but 'deprivation'. To justify these manifest failures to implement any form of welfare whatsoever, Parker considered the Gray's business model: "they operate at a fairly basic level", he claimed, and to waste precious time and money on such indulgences when the horses would ultimately be "sent to market rather like potatoes" would not be economically viable. This was entirely wrong, according to Tryer J: "horses are not potatoes. They are creatures for whom Parliament has determined that they have basic rights." Parker, said the Judge, "was unable to acknowledge that there is a basic level of welfare below which no equine can be permitted to fall."

The 'importance' of *Gray*

Mr Justice Tryer's comments are very much welcomed and it is, of course, heartening to hear members of the judiciary talk in such strong terms about animal welfare cases. We must remember, however, that Tryer J is still only a relatively

[12] *Supra*, n.2, at pp.118–120

lowly District Recorder sitting in a local Crown Court. Much more resonant—and ultimately legally significant—would be similar comments from a Lord Justice of Appeal or member of the Supreme Court whose opinions have resonance beyond the immediate case and a precedential value that Tryer J's opinion does not. But why do we need precedent and interpretative guidance? After all are the findings of Judge Tryer so obvious and that any right-minded member of the judiciary could not possibly think otherwise?

John Parker, Justice of the Peace, probably would. As Chair of the Bench it is entirely possible that if left to his own devices his interpretation of the Animal Welfare Act would be radically different to that of Judge Tryer. And devoid of precedent to the contrary lower courts are allowed, indeed obliged, to bring to bear their own experiences, intuitions and principles to the case. There is every possibility that if Jamie Gray were brought before the Bench of Aylesbury Magistrates with Mr Parker as Chair then the man described as the worst animal abuser in Britain's history [3] may have been acquitted of all charges. It is, therefore, perhaps slightly unfortunate that James Gray has, at the time of writing in December 2010, not chosen to exercise any right of appeal, and in so doing allow the superior courts the opportunity to approve or reject Tryer J's opinion.

If comfort can be taken from the *Gray* case it is that Tryer J does show that judges, in these type of case are prepared to find an objective interpretation of 'reasonable in the circumstances' and one that does recognises a lower-end threshold. Despite the testimony of John Parker that the practices adopted by the Gray family were reasonable based on the family's 'basic' business model, and the implicit assertion that, because of the economics of businesses like the Grays', welfare could be compromised (although even Parker agreed that there were no excuses for neglect) depending upon the available resources. The message from *Gray* is, therefore, that judges are not prepared to allow ss. 4(3) and 9(3) of the AWA to act as justifications for practices, perhaps common within a specific sub-industry, on the basis that 'everyone in the industry does it' so that any given practice becomes either 'necessary' (or proportionate) or 'reasonable in the circumstances.' As Tryer J stated '…there is a basic level of welfare below which no equine can be permitted to fall.'

The assertion that there is a basic level of welfare below which no equine (or presumably any other animal covered by the AWA) can be permitted to fall does, however, beg the question as to whether those practices referred to in the introduction of this article might also fall foul of the AWA. It will be recalled that despite the postponement/abandonment of certain statutory measures to ban practices such as beak trimming, battery farming of game birds, the use of non-domesticated animals in travelling circuses, etc., it was asked whether there might be a role for the courts in dealing with these perceived ills. After all, it might appear at first blush that the 'painful mutilation of 20 million chicks per year' [2] by beak trimming, is capable of causing suffering, and given the justification for this practice—the prevention of feather pecking and cannibalism in the cramped conditions of battery cages—one might also ask if it is unnecessary when alternatives, such as truly free range eggs, are available [1]. On the question of whether alternatives do in fact exist, the Farm Animal Welfare Council (FAWC), upon whose advice DEFRA justified the postponement of the ban, thought not:

> until it can be demonstrated reliably under commercial conditions that laying hens can be managed without beak trimming and without greater risk to their welfare from feather pecking and cannibalism, the ban on beak trimming should not be introduced on its original date in December 2010 [7]

Noteworthy in the FAWC recommendation is the insertion of the phrase 'under commercial conditions'. FAWC are not saying that no alternatives exist: they are simply exerting that no alternatives exist that are commercially viable. In other words although the practice of beak trimming might cause suffering (if not, why would DEFRA restate that '[t]he Government is committed to banning beak trimming in the long term'?[4]) it is economically necessary—unlike the economically necessary (and unlawful) practices adopted at Spindles Farm.

As to the question of why the AWA might be an inappropriate piece of legislation to deal with such practices, a number of suggestions immediately spring to mind. First, one might reasonably point to the absence of a specific statutory instrument prohibiting this behaviour—after all if Parliament intended that laying hens were to be afforded explicit protections then Parliament would have enacted specific legislation, or the relevant minister would have been empowered to introduce specific regulations. There is, of course, some force to this argument: the democratic process does, and should allow Parliament to set the standards—but, correlatively, Parliamentary silence on any given matter does not mean an absence of law. For example, as noted earlier, the Welfare of Farmed Animals Regulations includes specific and explicit minimum welfare requirements for cattle, pigs, rabbits and laying hens but are silent on the welfare standards for farmed horses. Does this mean that the court in the Amersham case and other 'farmed horses' cases could not apply the provisions of an alternative piece of legislation? Clearly not.[13]

The second, perhaps more principled objection to the use of the AWA to prohibit industrial practices such as beak trimming is that it was never Parliament's intent for the Act to be used in this way. A terse response is simply 'perhaps not'. The slightly more lengthy response is that, as the remainder of this article will try to demonstrate, even if, at the time of its enactment, it was not envisaged that the AWA would develop its own jurisprudence and develop to cover many hitherto unforeseen eventualities, this should not prevent the Act's provisions from developing. There is nothing in legal principle or legal history to evidence that Acts of Parliament cannot take on a life of their own and expand into areas of life that the drafters of the legislation could not foresee. To demonstrate this phenomenon we shall now turn to the Offences Against the Persons Act of 1861.

A comparative analysis: the case of offences against the person

As a vehicle for comparison, and to demonstrate how a creatively interpretative approach to the Animal Welfare Act can allow this piece of legislation to take on a life of its own, through case law, the Offences Against the Persons Act of 1861

[13] *R v Ward* [2010] EWHC 347 (Admin)

(OAPA) is an ideal candidate. For the present analysis this Act is apposite for a number of reasons.

The first is that the law concerning offences against the person has grown beyond the narrow confines of the bare wording of the Act itself. Secondly, the very subject matter of the OAPA is, and ignoring for the moment the differences in species-application of both Acts, closely linked to the AWA, because both Acts concern physical harm short of death. Closely allied to this is the fact that like the AWA, the OAPA operates on a number of levels and creates a number of individual offences. As Herring has noted, perhaps the best way of describing the Act is that it creates a 'ladder' of offences, with the 'bottom rung' offences such as assault being the most minor, with major offences such as wounding with intent, or attempted murder being atop the ladder [8:313]. Thus, for instance, the main offences situated within the OAPA are listed and considered below. As a point of interest it is worth noting that the OPOA itself was, to a large extent, simply a codification of many of the existing common law and a product of many centuries of judicial decisions [6:279]. The AWA is, in these respects, quite similar: it creates various levels of offence, depending on the 'type' of animal, and is, itself, a consolidation of over a century of statute and case law.

Returning to the OAPA, Section 18 deals with wounding with intent, and states that:

> Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person, . . . with intent, . . . to do some . . . grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of …[an offence and liable on conviction on indictment to imprisonment for life][14]

The related section of the Act, section 20, deals with similar physical circumstances, but whereas a s.18 offence requires a specific intent (to cause the harm occasioned), the 'lesser' offence under s.20 simply requires:

> Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall [be guilty of an offence and liable, on conviction on indictment, to imprisonment for a term not exceeding 7 years].[15]

It is unlikely that during the mid 19th century the drafters of the OAPA, or the first judges into whose courtrooms defendants were brought would believe that, 150 years later, the provisions of the Act would, with little or no legislative amendment, be used to deal with a plethora of contemporary crimes. In order to demonstrate how the OAPA has adapted and shown tremendous versatility—and as an illustrative example of how many Acts of Parliament can develop their own jurisprudence beyond their temporal limitations, we shall now move to consider such diverse situations as assaults occasioning psychiatric injuries, stalking and harassment, and the spread of sexually transmitted diseases.

[14] As amended by Criminal Justice Act 1948 s 1(1); Criminal Law Act 1967 s 12(5)(a)
[15] *Ibid.*

As noted above, sections 18 and 20 deal with 'wounds' (helpfully defined by various cases as 'a break in the continuity of the whole skin'[16]) and 'grievous bodily harm' (as an aside, and to show that judicial definitions are not always *overly* helpful, it is noteworthy that the term 'grievous' has been interpreted to mean 'really serious bodily harm'[17]). The next rung of the ladder of offences under the OAPA, is that of actual bodily harm, contrary to section 47, which states that:

> Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable… [to imprisonment for a term not exceeding 7 years]

Again, a number of obvious questions spring to mind when considering section 47: what is an 'assault'? What is it to 'occasion' the harm in question? And what constitutes 'actual bodily harm'? Like the previously discussed sections 18 and 20, the answer to these questions is not found within the OAPA itself, but in the numerous cases spawned by these statutory provisions.

So, what is an assault? The answer, in short form, is that an assault can take two forms for the purposes of section 47: assault and battery (although as the courts have stated that "for practical purposes…'assault' is generally synonymous with the term 'battery'"[18]). The *actus reus* of the former is defined as "causing the victim to apprehend the immediate application of unlawful force to his body"[19] and the latter being defined as "the application of unlawful force."[20] Courts have, however, demonstrated a degree of creativity in their interpretation of what constitutes an 'assault' (in its strict sense) and have found that as well as the 'swing and miss' situations—whereby the defendant may attempt to strike the victim but fails—assaults can be carried out by words alone, provided, of course, that the necessary immediate apprehension is felt by the recipient of those words.[21]

If threatening words can constitute an assault in the type of situation envisaged in the consolidated appeals of *R v Ireland; R v Burstow* (for instance, "a man accosting a woman in a dark alley saying 'come with me or I will kill you'"[22]), is it possible for a lack of words to be deemed an assault? Can, for example, the makers of silent telephone calls be guilty of an offence of assault? The answer is, yes—provided, of course, that the requisite degree of fear has been instilled in the victim.[23] The *Ireland* and *Burstow* appeals do show, it is suggested, the House of Lords in a most creative light—by finding that, as a matter of law (and dependant on the facts of each individual case) the makers of silent telephone calls may commit the offence of assault (which may, or may not, dependent upon the level of harm caused to the victim, be charged under section 47, or the stand-alone charge of 'common assault'). In these cases the Lords managed, at a stroke, to turn an Act of Parliament, enacted 15 years prior to the invention of the telephone, into a relevant and contemporary

[16] *R v Brown (Anthony)* [1994] 1 A.C. 212, at p.231; *R v Morris (Paul)* [2005] EWCA Crim 609
[17] *DPP v Smith* [1961] AC 290
[18] *Fagan v Commissioner of the Metropolitan Police* [1969] 1QB 439, at p.444
[19] *Ibid.,* at p.444
[20] *R v Ireland; R v Burstow* [1998] AC 147, at p.161
[21] *Ibid.,* at p.162
[22] *Ibid.*
[23] *Ibid.*

piece of legislation, capable of dealing with one of the most pressing social issues of the time.

One residual question remains, namely, what was the harm envisaged by the OAPA and had the drafters of the Act envisaged the very 20th century phenomenon of psychiatric injury constituting an actionable harm? If not, how was it possible to sustain a charge, based upon silent telephone calls, under section 47, with its requirement that 'actual bodily harm' be occasioned? Clearly, for a 'common assault' the apprehension of physical violence would suffice, but for the more serious (in terms of sentencing) charge under section 47 some actual injury must be shown. In 1861, however, had the law yet recognised the existence of psychiatric injuries, and, more to the point, had it arrived at a settled opinion as to whether such injuries constituted an actual *bodily* harm?

The answer, perhaps unsurprisingly, is that at the time of the OAPA's enactment psychiatric injury was not universally accepted as a stand-alone bodily harm. Although the law reports in the latter years of the 19th century and the early years of the 20th century do contain accounts of cases, often decided in favour of the claimant, that would now be described as psychiatric injury cases, the language used by the judges is clearly not indicative of a wholesale recognition of psychiatric harm as a generally applicable head of damage. Instead this tranche of law was the almost exclusive domain of ladies of a certain disposition (often pregnant) who were held to have been struck down by a 'malady of the mind'. Often these cases only resulted in success for the claimant when accompanied by additional physical harms. [24] For instance, in *Victorian Railway Commissioners v Coultas*[25] the claimant suffered a miscarriage—although the claim was denied for ancillary reasons; in *Wilkinson v. Downton*[26] the claimant suffered "serious and permanent physical consequences"; in *Dulieu v White*[27] the claimant went into premature labour; in *Hambrook v Stokes*[28] the 'shock' was fatal; and in *Bourhill v Young*[29] the claimant's child was stillborn. It should be noted, however, that although the cases referred to above are entirely and exclusively civil damages claims, civil damages cases have, nevertheless, had a tangible impact on the development of the criminal law.[30]

Thus, despite the fact that psychiatric injuries were not, in 1861, likely to support a stand-alone criminal charge under the OAPA, psychiatric harms are now clearly established as an 'actual bodily harm' for the purposes of section 47 of the Act. And in arriving at this conclusion the House of Lords in *Ireland*, led by Lord Steyn, confronted the temporal scope of such Acts, concluding that:

> The proposition that the Victorian legislator when enacting sections 18, 20 and 47 of the Act of 1861, would not have had in mind psychiatric illness is no doubt correct. Psychiatry was in its infancy in 1861. But the subjective intention of the draftsman is immaterial. The only relevant inquiry is as to the

[24] For one of the few reported exceptions, see *Pugh v London Brighton & South Coast Railway Co* [1896] 2 QB 248
[25] (1888) 13 App Cas 222
[26] [1897] 2 QB 57
[27] [1901] 2 KB 669
[28] [1925] 1 KB 141
[29] [1943] AC 92
[30] *R v Ireland; R v Burstow, ibid,* at pp.156-157, per Lord Steyn

> sense of the words in the context in which they are used…the statute must be interpreted in the light of the best current scientific appreciation of the link between the body and psychiatric injury.[31]

We have seen, above, that the common law can act as a powerful definitional tool—it can give full meaning to words that are left ill-defined by statutes. It can also act as a powerful developmental tool—as the above analysis demonstrates the courts can ensure that even centuries old statutes can maintain a high degree of relevance. The story does not end there, though: the common law does not merely operate to 'fill in any gaps' when the law is otherwise silent on any particular issue. It is also sufficiently flexible to perform the occasional, but, significant *volte face* if and when required.

In recent years the issue of the reckless transmission of HIV/AIDS has been at the forefront of the criminal law, with much debate being engendered by the notion of informed consent in these situations.[32] The basic issue, however, of such cases—whether a defendant can be guilty of an offence under the OAPA for the transmission of a sexual disease—was first considered by the courts well over a century prior to the HIV/AIDS cases in *R v Clarence*.[33]

Clarence concerned that most fitting of Victorian sexually transmitted diseases, gonorrhoea, and the issue for the court was whether the defendant's conviction under sections 20 and 47 could be upheld. The defendant, the court was told, had infected his wife during sexual intercourse, and it was claimed by the Crown, had the wife known of the true state of affairs, she would not have consented to the act. Therefore, the prosecution case continued, the wife was the victim of an assault (non-consensual intercourse) which resulted in actual bodily harm (the disease). Although there was no singular *ratio decidendi*, the majority of the court was of the opinion that no assault had taken place and quashed the conviction. Perhaps more interesting than the outcome of the case is the recognition of the limits to judicial creativity expressed in the opinion of Wills J who observed:

> …such considerations lead one to pause on the threshold, and inquire whether the enactment under consideration could really have been intended to apply to circumstances so completely removed from those which are usually understood when an assault is spoken of, or to deal with matters of any kind involving the sexual relation or act.[34]

Although not without sympathy for the wife (the husband's acts were, stated Wills J, "wicked and cruel" and were, if nothing else, a rape) the fundamental question was whether the OAPA could be construed in such a way as to support the defendant's conviction:

> …such an extension of the criminal law to a vast class of cases with which it has never yet professed to deal is a matter for the legislature, and the legislature only. I understand the process of expansion by which the doctrines of the

[31] *Ibid.,* at pp.159–160
[32] *R v Dica (Mohammed)* [2004] EWCA Crim 1103
[33] (1889) L.R. 22 Q.B.D. 23
[34] *Ibid.,* at p.30

> common law are properly made by judicial construction to apply to altered modes of life and to new circumstances, and results thus legitimately brought about which would have startled our ancestors could they have foreseen them. I do not understand such a process, and I do not think it legitimate, when every fact and every circumstance which goes to constitute the alleged offence is identical with what it has been for many hundreds of years past. Whether further legislation in this direction is desirable is a question for legislators rather than lawyers…[35]

It is noteworthy that prior to *Clarence* certain lower courts—the tribunals of fact—had, on occasion, found sufficient room within the confines of sections 20 and 47 to find a number of defendants guilty of offences under these sections in somewhat similar cases. It should be noted, though, that the particularity of these cases would render any judgment confined to the particular facts of those cases. So, when no consent to the intercourse *per se* was given (or, as is perhaps unlikely on the facts, where the 12 year old victim did not 'resist sufficiently' to the intercourse so as to imply a lack of consent, but consent given in ignorance of the partner's infection),[36] or when consent to intercourse was impliedly given by a drugged 13 year old in ignorance of her uncle's infection,[37] then an assault conviction could be sustained. Underpinning *Clarence* was the now discredited principle that "a husband could not be indicted for rape of his wife."[38]

Despite Wills J's questioning, in *Clarence,* of the necessity for legislative intervention, the legislators did not, however, act to fill the lacuna of 'qualified consensual intercourse' (whereby, in the absence of rape—because of the consensual nature of the intercourse, but when the victim has not consented, or would not consent, to intercourse in full knowledge of the risks of infection). The issue was finally resolved in *R v Dica,*[39] in which the question was largely the same as in the Victorian cases: can the reckless transmission of a disease, through otherwise consensual intercourse and absent of rape, constitute an assault occasioning bodily harm, when the victim has not consented to the risks of transmission? Yes, it can, said the Court of Appeal:

> The effect of this judgment in relation to s.20 is to remove some of the outdated restrictions against the successful prosecution of those who, knowing that they are suffering HIV or some other serious sexual disease, recklessly transmit it through consensual sexual intercourse, and inflict grievous bodily harm on a person from whom the risk is concealed and who is not consenting to it.[40]

Thus, as the above *tour de force* through some of the principles of the OAPA has shown, courts can and do incrementally develop the law, so that ills such as the

[35] *Ibid.,* at p.33
[36] *R v Sinclair* (1867) 13 Cox CC 28
[37] *R v Bennett (1866)* 4 Foster and Finlason 1105
[38] Per Lord Justice Judge in *Dica, supra,* at n.33, at para.19; see *R v R* [1992] 1 AC 599 for the House of Lords' overturning of this principle
[39] *Supra,* at n.33
[40] *Ibid.,* per Lord Justice Judge, at para.59

making of silent telephone calls can be dealt with under an Act of Parliament that predates the telephone itself. Likewise, Acts of Parliament can be interpreted to give effect to changing social attitudes—as shown above, Victorian Britain had a distinctly different attitude to marital relations so that cases such as *Clarence* were entirely uncontroversial. Society, of course, moved on over the subsequent century and, as we have seen in *Dica*, so did the law.

So, again the question requires asking. Is it possible that the AWA could develop in such a way? Or does there remain a need for the specific statutory provisions, including those so recently abandoned or postponed, to afford protection to all animals?

Conclusion

As the eminent legal scholar, A.T.H. Smith wrote in 2004 "[i]f we can now anticipate that the courts will listen…to reasoned argument and respond positively to responsible criticism, the same cannot necessarily be said of their political counterparts" [13:980]. Within the sphere of animal abuse, it is suggested that Smith's observation is particularly apt. The purpose of the present paper has been to demonstrate that change, if it is needed, to animal welfare laws are not the sole province of Parliament, but can be affected by strategic and reasoned litigation. This is not to say that those bodies pushing for further improvements in animal welfare standards should abandon Parliamentary lobbying or political pressure—significant developments such as the Animal Welfare Act and the Hunting Act have, of course, been the result of such a process. Within these Acts there is, nevertheless, always room for improvement and refinement and has been demonstrated throughout this paper, improvements and refinements are what the courts can do if given the opportunity.

The problems should not, however, be underestimated. While the purpose of this article was to show that Parliamentary intervention is not always required and that, through the courts and judicial pronouncements the law can grow and develop, there are limits to this development. First and foremost is the time factor: it is an inescapable conclusion that judicial development takes time, and although there is likely to be a marked increase in the rate of development over the life span of the OAPA, incremental development is not necessarily a speedy process. Allied to this is the second difficulty, which concerns the limits to judicial activism.

It is difficult to obverse consensus, even amongst judges themselves, of where the limits to judicial activism lie and so the task of predicting whether any given case lies beyond the boundaries of legitimate judicial activity, or strays into the realms of judicial law-making can often be simply an exercise in wishful thinking or idle speculation. For instance in aforementioned *Clarence* it is clear that the court considered it, as a matter of policy, to be beyond their remit to classify as criminal the vast number of cases that had previously not been criminalised. Lord Bridge, by way of contrast, suggested in the seminal case of *McLoughlin v O'Brian* that:

> [t]o attempt to draw a line at the furthest point which any of the decided cases happen to have reached, and to say that it is for the legislature, not the courts,

> to extend the limits of liability any further, would be, to my mind, an unwarranted abdication of the court's function of developing and adapting principles of the common law to changing conditions.[41]

Clearly Lord Bridge is not suggesting that courts should have a free hand in enacting any law it sees fit—he is quite simply asserting that the courts should strive to test the boundaries. If compelled to engage in the idle speculation of deciding whether a ban on beak trimming, or battery cages for game birds, or the use of exotic creatures in circuses might, for instance, fall within or without the limits of legitimate judicial activism, the author would suggest the latter: an outright ban, even if supported by sufficient evidence, might be beyond the realm of judicial competence. A gradual and incremental development, on the other hand, whereby strategic litigation was used, in instances of the worst excesses of 'legitimate' beak trimming, or circuses or shooting pens could, at least begin the process of development. Courts can, however, only develop the law when suitable cases present themselves, and if those organisations and individuals wish for either (and to subvert a common phrase in animal rights/welfare discourse) 'no cages' or 'bigger cages' then, as stated at the outset here, perhaps a good place to start might be the courts as well as the lobbies.

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[41] [1983] 1AC 410, at p.441

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