

## 3.2 Unnecessary Suffering

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### 3.2.1 Introduction

The term ‘unnecessary suffering’ has long been used to define the legally unacceptable ways in which animals are treated. Its evolution and use in law are described in this chapter.

### 3.2.2 A legal definition

For nearly 200 years in the UK there existed an offence of cruelty to animals. When the legislation was first enacted, the idea that men be prohibited from treating animals in any way they chose, and that any treatment they meted out could be labelled ‘cruel’, had little sympathy in many quarters. By contrast, the correctness of such a prohibition is now widespread. Although the relevant legal offence in most jurisdictions has changed to one of ‘causing unnecessary suffering’, many people, including the media, still refer to this offence as ‘cruelty to animals’. Some organizations with the aim of promoting animal welfare still contain the word cruelty in their title. Cruelty is defined in the *Oxford English Dictionary* as ‘a cruel act or attitude; indifference to another’s suffering’. In laws relating to animals it has been defined in reference to the necessity of any pain or suffering caused. The Royal Society for the Prevention of Cruelty to Animals and the Royal Commission publication on regulating vivisection in 1876 makes the point that under statute ‘man may not *cruelly* inflict pain – that is, he may not cause unnecessary pain; for cruelty is the infliction of *unnecessary* pain’ (RSPCA and Royal Commission, 1876). The accusation of cruelty carries with it emotive images and assumptions, both historical and cultural, and is largely subjective, depending on the viewpoint of the accuser. While the concept of cruelty to animals is still widely used in popular culture, the legal offence

has been replaced by one which is capable of better and more precise definition by the courts.

Using the term ‘unnecessary suffering’ rather than ‘cruelty’ to define what constitutes unacceptable and criminal behaviour means that two important aspects of the offence must be proven. First, it must be established that an animal has been caused to suffer by an act, or failure to act, of somebody. Unless it can be demonstrated that suffering has occurred, then no offence has been committed. In the UK there are separate offences to cover circumstances in which animals are likely to suffer unless steps are taken to improve their situation. Second, the issue of necessity must be addressed. Before the UK Animal Welfare Act of 2006 the ‘necessity’ of any suffering caused was the subject of some debate within courts. Given the varied and complicated position of animals within society, what people consider necessary in pursuance of their aims or that which is required by their responsibilities can vary greatly. The result of much legal argument has been distilled into five main considerations:

- (a) whether the suffering could reasonably have been avoided or reduced;
- (b) whether the conduct which caused the suffering was in compliance with [any other legislation];
- (c) whether the conduct which caused the suffering was for a legitimate purpose, such as – (i) the purpose of benefiting the animal, or (ii) 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.<sup>i</sup>

Use of the terms ‘reasonably avoided’, ‘legitimate purpose’ and ‘proportionate’ all serve to demonstrate the intended meaning of the term ‘unnecessary’ when linked to animal suffering. A motorist who injures an animal because it runs out in front of their car could

<sup>i</sup> Animal Welfare Act 2006. Section 4(3).

not reasonably have avoided causing the injury. Choking a dog who is attacking a child would be legitimate to protect the child. Failing to seek veterinary attention for a seriously sick animal because of concerns about fees or euthanasia would not be considered the conduct of a reasonably humane person.

In some cases there will clearly be a balancing act between the intentions of someone in relation to an animal and the actual outcome. How much chastisement is acceptable, for example, when trying to train an animal in desisting from unwanted, potentially dangerous, behaviour? At what point do the initial good intentions of an animal hoarder become unacceptably lacking in insight? There also exist certain, somewhat anomalous, situations, which permit treatment of animals in one set of circumstances and prohibit them in another. Despite a specific prohibition on the administration of poisonous substances to all 'protected' vertebrates, there is lawful authority to poison animals which are seen as pests. The humanness of the destruction for rats and mice living as 'pests', for example, is not required to be of the same standard as that required for those living under the control of man.

### 3.2.3 The legal test

Because a person's intentions can sometimes be key in deciding how to judge their actions, the law considers intent in certain types of offence. With some offences, such as speeding in a car, the motivations or attitude of the person responsible are irrelevant. The deed was done and penalties are issued. This is known as strict liability. In other situations the state of mind of an accused is crucial in deciding their culpability, in law this is known as *mens rea* (meaning 'a guilty mind'). When proving that someone is guilty of murder, the proof must include evidence that they knew what they were doing would bring about the death or serious injury of another person. Since there is no way to measure or directly observe the state of someone's mind, this is known as a subjective test, since it requires interpretation and subjective judgement by the court.

A third type of test has also been used when judging defendants, which takes into account the circumstances of the accused, but compares their actions with that of a reasonable person in the same situation. This is known as an objective test. When using an objective test a person's behaviour is judged not by what they know but what they *ought* to know, using the 'reasonable' person as a benchmark. Ignorance or extreme beliefs cannot be used as a defence in these situations, since stupidity or wilful disregard for the consequences of one's actions should not be rewarded by impunity.

The offence of causing unnecessary suffering has generally been viewed as one which requires an objective test. The application of strict liability would be inappropriate since, as outlined above, the infliction of suffering on an animal may in some circumstances be caused by people who are not blameworthy and so would not deserve prosecution or censure. The use of a subjective test would potentially make the case extremely difficult to prove, since assumptions would have to be made about the defendant's knowledge and beliefs and the defence could more easily argue that lack of insight or education were relevant mitigating factors. Any further discussion about the nature of the test to be applied to offences of causing animals unnecessary suffering has been clarified in the UK by the wording of the legislation 'he knew, or ought reasonably to have known, that the act, or failure to act, would have that effect or be likely to do so'.<sup>ii</sup> In addition, the explanatory notes issued by the government which accompany the Act state that: 'The effect of [paragraph (b) above] is to introduce an objective mental element. It will not be necessary to prove that a defendant actually knew his act or failure to act would cause suffering'.<sup>iii</sup> The word 'humane' is also used in the legislation and implies that some degree of compassion or sensitive feeling towards animals is expected when measuring the behaviour of the 'reasonable' person.

<sup>ii</sup> Animal Welfare Act 2006. Section 4(1)b.

<sup>iii</sup> Explanatory Notes on Animal Welfare Act 2006. 2007, p. 4, para 19.

### 3.2.4 Animal suffering

Identifying animal suffering can, at times, be a slippery task and lacking in an overall consensus. Again, precise definitions of a word can become imprecise when tested against the reality of animal existence. Human suffering is incapable of direct observation or measurement, even given our abilities for language and shared experiences; animal suffering is even more complicated. There are scientific definitions of animal suffering, for example: ‘Suffering should not be equated with stress. Suffering occurs when the intensity or complexity of stresses exceeds or exhausts the capacity of the animal to cope, or when the animal is prevented from taking constructive action’ (Webster, 1994, p. 38). Numerous attempts have been made to define and assess the welfare of animals scientifically, and many would place suffering at the negative end of a spectrum of welfare states. When that line, between poor welfare and suffering, is crossed, however, is still a matter for conjecture in each situation. Some scientists have simplified the nature of suffering by just associating it with feelings and emotional states: ‘a set of negative emotions such as fear, pain and boredom, and recognized operationally as states caused by negative reinforcers. It may or may not be accompanied by subjective experiences similar to our own’ (Dawkins, 2008). Similarly, it is ‘an unpleasant state of mind that disrupts the quality of life. It is the mental state associated with unpleasant experiences such as pain, malaise, distress, injury and emotional numbness (e.g. extreme boredom)’ (Gregory, 2004, p. 1).

In whichever way suffering in animals is described, their feelings and emotional state are the ultimate issue. That pain, hunger or thirst can cause suffering would rarely be in dispute, but the law is clear that mental distress will also qualify as suffering. When providing information to a court about whether suffering has occurred, there may be demonstrable physical evidence of a painful condition, disease or malnutrition. On the basis of the physical evidence, a logical inference of unpleasant feelings can be made. Where the evidence is based on more anthropomorphic

assumptions of an animal’s mental state, given its situation or behaviour, some more subjective interpretation for the court, or argument by analogy, is required from an expert witness. This person is usually a veterinary surgeon, but other experts with relevant training or experience may also be qualified to give an opinion to the court.

Science can never ‘prove’ that an animal is or is not suffering, because we can never really access the private world of another’s mind. But what science can be used for is the collection of evidence from which to make inferences (much like those made by the clinician who uses symptoms to make a judgement about a disease).

(Mason and Mendl, 1993, p. 312)

When considering whether an animal’s condition or situation has caused it to suffer, there is often some discussion about whether severity or duration are instrumental to the conclusion. It should be remembered that ‘such criteria do not apply to offences based on causing an animal unnecessary suffering, where *any* unpleasant emotional response may amount to suffering’. And that ‘factors such as severity and duration *are* taken into account, but in relation to the question of necessity rather than suffering’ (Radford, 2001, p. 272). Ultimately, it is for the court to decide, not experts or advocates, whether suffering has occurred and whether that suffering is considered to be unnecessary.

### 3.2.5 Animal killing

Another important dimension of unnecessary suffering is a specific exemption for killing animals. Provided that animals are destroyed in ‘an appropriate and humane manner’,<sup>iv</sup> there is no offence caused under animal welfare legislation. Because animals have a legal status as property, there may be an offence of killing an animal which belongs to someone else without their permission. But owners are entitled to kill, or cause to be killed, their

<sup>iv</sup> Animal Welfare Act 2006. Section 4(4).

own animals, whatever other parties might perceive to be the potential ‘cruelty’ of the act. The catchphrase ‘death is not a welfare issue’ is borne out by the law and it then remains a matter of ethical and physiological debate, dependent on the situation and method of killing used.

### 3.2.6 Conclusion

Personal interpretations and opinions of what constitutes unnecessary suffering will vary widely. The aim of the legal process is to examine the detail of each case and apply tests as objectively and uniformly as possible.

## References

- Dawkins, M.S. (2008) The science of animal suffering. *Ethology* 111(10), 937–945.
- Gregory, N. (2004) *Physiology and Behaviour of Animal Suffering*. Blackwell, Oxford, UK.
- Mason, G. and Mendl, M. (1993) Why is there no simple way of measuring animal welfare? *Animal Welfare* 2, 312.
- Radford, M. (2001) *Animal Welfare Law in Britain*. Oxford University Press, Oxford, UK.
- RSPCA and Royal Commission (1876) *Vivisection*, 2nd edn. Smith, Elder & Co., London, UK. Introduction, p. iii.  
Available online at: <https://ia600302.us.archive.org/18/items/vivisection00unkngoog/vivisection00unkngoog.pdf> (accessed 8 January 2016).
- Webster, J. (1994) *Animal Welfare: A Cool Eye towards Eden*. Blackwell Science, Oxford, UK.