Is common law the key to upholding an animal's right not to suffer?

*By Nichola Donovan **

During the last decade, Australia has endured a steep decline in animal rights – both human and non-human. Yet, while the erosion of human rights has been the focus of deep lament by our legal community, the dire situation of Australia's animals has been largely ignored. Over time, Australia's formerly free-range farms have undergone a radical intensification, with most of our 'farm' animals now enduring life in cramped stalls, cages or feedlots; while some suffer the final indignity of live export.

Only if you are a practitioner of Orwellian doublespeak, will the 'Codes of Practice for the Welfare of Animals' seem aptly named. For the sake of minimal economic benefit, these Codes – compliance with which effectively confers immunity from anti-cruelty laws – permit the systematic abuse of farm animals: allowing them to be closely confined in stalls, cages or feedlots for almost their entire lives; and to suffer routine mutilations (such as teeth-clipping and castration) without anaesthetic or pain relief. It seems to be the same callousness that marked our federal leaders' dealings with vulnerable people in Australia, Guantanamo, and Nauru over the last decade; that is reflected in our State and Federal Legislatures' failure to protect millions of Australian livestock from undue harm. Minimising the suffering of animals that are used for food is a natural step on Australia's path to civilisation, so it is worth considering how we might uphold an animal's right not to suffer.

A glimmer of hope for human rights has resulted from the election of a new Federal Government (despite its dubious record on such matters in opposition). Can the animal rights movement capitalise on this spirit of reform, by taking a leaf out of the human rights history book? The backwardness of our major-party politicians in relation to animal rights – exemplified by the endorsement of a draconian pig Code by all States and Territories in April 2007 – inspires reflection on the utility of the common law, as a tool for achieving significant legal reform. In this regard, it will be instructive to review the role that the common law has played in the development of human rights, to gauge its potential usefulness in the sphere of animal rights. It may also be helpful to sample some contemporary cases in international animal law, to learn by example, and to receive a hint of things to come…

The abolition movements of Britain and the United States provide key examples of cases which acted as catalysts for social and legislative change: uprooting the ancient tradition that 'slaves exist to serve'. In R. v. Knowles, ex parte Somersett (Kings Bench, 1772) Lord Mansfield issued a writ of habeas corpus in relation to a negro slave from Virginia, held in irons aboard a vessel on the Thames, bound for Jamaica. Although he merely ordered: "the Black must be discharged" – and confined his (oral) reasons to the principal that a slave should not be made to leave England against his will – Mansfield was popularly feted with having first declared slavery unlawful throughout England. British abolitionists, encouraged by Mansfield's judgment, and the popular sentiment it stirred, pushed for legislative change. In 1792, the House of Commons voted for "gradual" abolition, and in 1807, the trade in new slaves from

Africa was formally outlawed in Britain, despite the weight of economic argument to the contrary.

85 years after Somersett's Case, in the 1857 case of Dred Scott v. Sandford, 6 out of 8 justices of the United States Supreme Court concurred with Chief Justice Taney's view that the drafters of the American constitution viewed all African Americans as:

> "beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect."

Consequently, the Court ruled that neither Mr Scott, nor any other African American was entitled to the rights conferred by American citizenship under the Constitution, and concluded that the United States' Congress did not have the power to prohibit slavery in any federal territory. This decision produced a result opposite to that which the Court had intended; effectively marshalling opposition to slavery within the United States. In 1858, Abraham Lincoln delivered his powerful 'House Divided' speech and by 1861 the American Civil War had commenced. When it ended, in 1865, the 13th Amendment to the Constitution was enacted, to abolish slavery throughout the United States. Unfortunately, Mr Scott died from tuberculosis in 1858, about a year after his emancipation was purchased by the sons of his original master. He did not live to see the long-term consequences of his infamous case.

Similar examples of judicial conservatism, acting as focal points for social and legislative progression, may be drawn from the history of Australian feminism, and from the history of child protection. In 1892, the South Australian Supreme Court ruled that a woman who had left her husband due to domestic violence, was not entitled to a maintenance order. The Court found that only in circumstances where a woman had been abandoned by her husband, could an order for spousal maintenance be enforced. Public disapproval of this case resulted in State Parliament's enactment of the *Married Women's Protection Act 1896* (SA), which empowered magistrates to make orders for the protection and maintenance of married women (and their children). Another example of such a case from South Australia's Supreme Court derives from 1992. While presiding over a marital rape case, Justice Bollen issued the following instruction to the jury:

> "There is, of course, nothing wrong with a husband, faced with his wife's initial refusal to engage in intercourse, in attempting, in an acceptable way, to persuade her to change her mind, and that may involve a measure of rougher than usual handling."

Public faith in the judicial system was called into question as a result of this statement, and the attendant media frenzy which queried the whole judicial culture. The Keating Government responded by establishing an Australian Law Reform Commission inquiry into 'Equality before the Law' and by committing significant resources to judicial education on gender issues.

In relation to the history of child protection, it is not without irony that the case of young Mary-Ellen, a ten-year-old girl from New York, draws to mind. Mary-Ellen was brought before a New York court in 1874 under the provisions of animal cruelty

legislation – there being no law against child maltreatment in existence at the time. She had suffered abuse and neglect from her adoptive parents, and her lawyer argued that she deserved protection in law, on account of being a member of the animal kingdom. She was successfully ordered into care, and her case achieved popular acclaim, prompting the formation of the New York Society for the Prevention of Cruelty to Children.

With regard to the development of human rights through common law, we may deduce that although judges are seldom more progressive than their contemporary parliaments, the long-term repercussions of judicial decisions – particularly if they coincide with budding social movements – can be enormous. Let us now consider some contemporary cases in animal rights, that have tried to push legal boundaries.

In August 2003, Judge Elizabeth Laporte of the US Federal Court ruled favourably on an injunction sought by the National Resources Defense Council to restrict the use of Low Frequency Active Sonar (LFAS) by the US Navy (National Resources Defense Council & Ors v U.S. Navy – "the LFAS Case"). In about July 2002, the National Marine Fisheries Service (US) granted a permit to the US Navy to test and train with LFAS in 75% of the world's oceans. LFAS generates extremely loud 'pings', between about 120 and 240 decibels (at source), generally too low for human ears to detect, but audible over hundreds of thousands of square miles of ocean, at any one time. The noise of a jet engine (at source) is around 120 decibels, but due to a logarithmic scale, 240 decibels is one billion times greater in volume than 140 decibels, and sound travels faster and farther in water than in air. Scientists allege that LFAS causes embolisms and tissue ruptures in the supersaturated blood and tissues of marine mammals, by activating the growth of microscopic bubbles (similar to 'the bends' in humans). It is also thought to cause haemorrhage by acoustic resonance. The US Navy previously accepted blame for the March 2000 stranding of 17 cetaceans (including 3 types of whale and 1 dolphin) in two ocean channels in the Bahamas, where naval exercises using LFAS had been undertaken. The terms of settlement of the LFAS Case were finalised in October 2003. They restrict the US Navy's use of LFAS to specific areas along the eastern seaboard of Asia (around North Korea and China), including portions of the Sea of Japan, the East and South China Seas, and the Philippine Sea. Within those areas, the Navy must observe year-round, seasonal, and coastal exclusions to protect migratory species and sensitive coastal ecosystems.

A similar action to the LFAS Case was filed in a US District Court in Hawaii in May 2007. The Ocean Mammal Institute is seeking to prevent the US Navy from using high-intensity, mid-frequency active sonar (MFAS) in antisubmarine exercises in Hawaii's waters, which are a winter breeding ground for thousands of endangered humpback whales (Ocean Mammal Institute & Ors v Robert Gates & Ors). The US Navy has acknowledged in its own Environmental Assessment that MFAS will reach whales at levels up to 215 decibels – at least a hundred thousand times more intense than the levels under which cetaceans stranded themselves in the Bahamas in 2000 – and that the sonar will, at a minimum, probably significantly alter or cause the abandonment of the whales' migration, surfacing, nursing, feeding, or sheltering behaviors. At time of writing (December 2007), this case is ongoing.

Cetacean Community v George Bush & Donald Rumsfeld ("the Cetacean Case") represents an interesting, if inauspicious, parallel to the LFAS Case. In September

2002, Hawaiian attorney, Lanny Sinkin, filed suit seeking to compel the defendants to prepare an environmental impact statement for the use of low frequency active sonar (LFAS) during threat and warfare conditions. Unlike the LFAS Case, Mr. Sinkin sought to build upon previous cases in which the legal standing of some animals was accepted, by lodging the case in the name of the animals, themselves. However, in 2003 a District Court judge granted the defendants' motion to dismiss the case, finding that the plaintiffs lacked legal standing. In October 2004, the plaintiff's appeal to the Federal District Court was unanimously dismissed by a panel of 3 judges. The joint decision was delivered by Judge William Fletcher, and states:

> "We are asked to decide whether the world's cetaceans have standing to bring suit in their own name under the Endangered Species Act, the Marine Mammal Protection Act, the National Environmental Protection Act, and the Administrative Procedure Act. We hold that cetaceans do not have standing under these statutes.…If Congress and the President intended to take the extraordinary step of authorising animals as well as people and legal entities to sue they could and should have said so plainly."

This judgment 'clarified' a 1998 decision by 3 judges in Palila v. Hawaii Department of Land and Natural Resources ("Palila IV") by finding that judicial comments thought to have granted 'standing' to the Palila bird, were 'obiter dicta' or as Judge Fletcher stated: "…in context … little more than rhetorical flourishes." Thus, the Appeal Court in the Cetacean Case effectively overruled 2 earlier decisions by single judges of district courts, which had held – in purported reliance on Palila IV – that the Endangered Species Act granted standing to certain animals [Marbled Murrelet v. Pac. Lumber Co. and Loggerhead Turtle v. County Council of Volusia]. However, in a concession to animal rights advocates such as Mr. Sinkin, Judge Fletcher noted:

> "It is obvious that an animal cannot function as a plaintiff in the same manner as a juridically competent human being. But we see no reason why Article III [of the US Constitution] prevents Congress from authorizing a suit in the name of an animal, any more than it prevents suits brought in the name of artificial persons such as corporations, partnerships or trusts, and even ships, or of juridically incompetent persons such as infants, juveniles, and mental incompetents."

As a reversal of fortune on the issue of standing, the Cetacean Case presents a valuable lesson to all animal rights advocates: to beware the risk of judicial backlash, by carefully weighing that risk against anticipated long-term gains, throughout the course of the litigation. Similarly, it was once suggested by a human rights lawyer involved in the Tampa Case of 2001 [Ruddock v. Vadarlis] that the full legislative backlash that comprised the 'Pacific Solution', might have been avoided, had the case never been commenced. In hindsight, it seems that the Howard Government's urgent desire to pass legislation that would retrospectively legitimise its actions towards the Tampa asylum-seekers – thereby negating any risk posed by the logic of Chief Justice Black's dissenting judgment (or Justice North's original judgment) should the High Court grant leave to appeal – helped to generate a xenophobic storm in Australia, to which Labor succumbed, on the eve of an election. Avoiding a judicial and/or legislative backlash while simultaneously advocating a just cause, may not always be possible; but it would be hard to overestimate the long-term positive example of pro

bono lawyers who mounted cases such as Tampa, which provided an outlet for reasoned opposition, during a dark period in Australian politics.

The lack of legal 'standing' for animals, is perhaps the most obvious instance of speciesism in law: an animal is devoid of legal rights for no other reason than its species. It is also the key obstacle that will need to be overcome if our social and ethical progress is to be reflected in law. Intellectually impaired humans are given full legal standing through appointed guardians; but non-human animals of equal (or greater) intellectual, emotional and physical capacity, are not. By recognising the standing of an animal whose interests are affected by human actions, we will probably open the door to judicial interpretation of the (internationally accepted) 'Five Freedoms' for animals: freedom from hunger and thirst; freedom from discomfort; freedom from pain, freedom from injury and disease; freedom to express normal behaviours; and freedom from fear and distress. Notably, these stop short of conferring any absolute right to life. Given the very gradual development of human rights for slaves, women, children and the intellectually impaired, since they were granted standing, it is unlikely that more extensive legal rights for animals will develop, anytime soon. The door to legal standing for animals is not a floodgate.

Since standing is likely to be critical to the future of animal law, it is worth noting another case that has recently knocked at its door. In February 2007, Dr. Martin Balluch of Verein Gegen Tierfabriken (the 'Association Against Animal Factories') applied for an Austrian guardianship order in relation to Hiasl, a 26 year-old chimpanzee, who had been abducted from his home in the jungles of Sierra Leone in 1982. Hiasl's mother was killed by poachers in Sierra Leone before he was sold to a laboratory, near Vienna, for the purposes of HIV/hepatitis research. However, in April 1982, The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) entered into force in Austria, making the importation of wild chimpanzees unlawful. Upon his arrival in Austria, Hiasl was duly seized by Austrian customs officers, and placed with a human foster family. During the following years, the Laboratory paid a fine for illegally importing Hiasl and also successfully sued for return of their 'property'. However, public protests convinced them to give up their claim, and Hiasl moved to a sanctuary when he was 10. In January 2007 Hiasl's sanctuary declared bankruptcy. A private benefactor donated about 5000 euro to Hiasl and to Dr. Balluch (as co-beneficiary) on the proviso that they both decide how the money be spent. Hiasl is not competent to make that decision. He requires a guardian to do this, on his behalf, before the funds can be accessed. Hiasl's status as a chimpanzee was not disclosed in the original application, but some 50 pages of expert evidence attesting to the legal personhood of Hiasl (and all other chimpanzees) was subsequently filed in support. This includes reports by eminent scientists who believe that chimpanzees and humans are so closely related, they ought be classified within the same genus.

In an unreported decision, on 18 April 2007 Judge Barbara Bart of Modling District Court, Lower Austria rejected the guardianship application of Dr. Balluch, ruling: that pursuant to the Austrian law of guardianship, no psychological illness or mental handicap could be discerned in Hiasl; nor was there any evidence of imminent harm, that a guardian might help to prevent. Judge Bart avoided ruling on the legal personhood of Hiasl, noting that to do so would merely be academic, in the circumstances. However, she did signal that she was convinced on this point. Dr.

Balluch appealed to the Provincial Court in Wiener Neustadt, Austria, which dismissed the appeal in late-September 2007, finding that neither Dr. Balluch nor Hiasl had standing, because (ironically) only a ‘guardian’ would have such standing. At time of writing, this case is proceeding on appeal to the Austrian Supreme Court in Vienna.

Common law is one of three key elements that should be included in any broad strategy for the advancement of animal rights. It should be complemented by a community awareness campaign, and by the legal and moral education of politicians and bureaucrats. Animal rights advocates of every persuasion may take some comfort from the history of human rights, which demonstrates that even the most intransigent hurdles may be overcome, with time and effort. Advances in communications mean that our world is adapting much faster to social change, than in previous decades, and that developed countries like Australia are less likely to experience the lags in legal development that were commonplace in previous centuries. Nevertheless, we must learn practical patience, to avoid becoming disillusioned and faltering in our commitment to the animals that so desperately need our help.

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