

One Billion Crimes? Farm Animal Welfare Law in the United Kingdom

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There was an animal welfare incident involving a mother pig. A week before giving birth, she was put into a crate too narrow to turn around in. Confined to that spot for weeks, held in place by metal bars, it was where she had to eat, sleep, dung, urinate, give birth, and nurse her piglets.

Yet there has been no prosecution; nor will there be, because there was nothing unusual about treating the mother pig this way. The conditions complied with the government's code of practice for the welfare of pigs ("This Code is intended to help all those who care for pigs to practise good standards of stockmanship to safeguard pig welfare."). The conditions even complied with higher Red Tractor Assurance Scheme standards for pigs ("These comprehensive standards underpin our industry's strength and credibility, securing its future as a world-leader in pig welfare, stockperson competency and biosecurity").

More than one billion farm animals are reared in Britain each year, the great majority of them in intensive, factory-like conditions. This raises moral issues – but does it raise legal issues?

What legislative scheme applies?

England, Scotland, Wales, and Northern Ireland each has its own legislative scheme. These schemes are similar, but not identical. Scotland, for example, has some distinctive rules regarding fish because of the scale of its wild fish and aquaculture industries. References in this article are to the English scheme.

The overarching statute governing conditions for animals on farms is the Animal Welfare Act 2006. Broadly speaking, it does three main things.

The first thing it does is create several general offences. These include knowingly causing an

animal to suffer where "the suffering is unnecessary"¹, and failing to take "such steps as are reasonable in all the circumstances" to meet an animal's needs "to the extent required by good practice"². In determining whether "the suffering is unnecessary," the Act lists some potentially relevant factors. These include "whether the suffering could reasonably have been avoided or reduced," whether the conduct complied with any relevant regulations or codes of practice, and whether "the suffering was proportionate to the purpose of the conduct concerned."

Although the offences are set out in skeletal form, the second thing that the 2006 Act does is provide for flesh to be put on the bones. It allows this to be done through the making of regulations to "promote the welfare of animals" and which may create further offences³. Of most significance is The Welfare of Farmed Animals (England) Regulations 2007. These regulations go into much more detail than the 2006 Act, and the schedules at the end contain species-specific provisions for pigs, meat chickens, laying hens, cattle, calves, and rabbits. Originally, many of these provisions gave effect to European Directives on farm animal welfare. There are further statutory instruments covering other aspects of animal farming. These aspects include mutilation⁴, transport⁵, and killing⁶. The 2006 Act also allows codes of practice to be created "for the purpose of providing practical guidance"⁷. These go into more detail. To illustrate, the pig-specific schedule in

1 Section 4

2 Section 9

3 Section 12

4 Mutilations (Permitted Procedures) (England) Regulations 2007

5 Welfare of Animals (Transport) (England) Order 2006

6 Welfare of Animals at the Time of Killing (England) Regulations 2015, Mandatory Use of Closed Circuit Television in Slaughterhouses (England) Regulations 2018

7 Section 14

the 2007 regulations is 6 pages, whereas the code of practice for pigs is 54 pages. Failing to comply with the codes of practice is not an offence, but is potentially evidence that suffering is unnecessary or that animals' needs are not being met.

The third thing that the 2006 Act does is provide for inspection⁸ and enforcement. Statutory enforcement is by way of improvement notices⁹, and prosecution by local authorities¹⁰. Sentencing powers on conviction include imprisonment¹¹.

When is suffering necessary?

Some requirements in the regulations and codes of practice are unambiguous, for example on the minimum frequency of feeding. Whether they are breached is a legally straightforward question of fact. Yet there are other aspects of farming on which the regulations and codes of practice are ambiguous or silent. Most notably, the 2007 regulations do not cover fish¹², so there are no detailed requirements as to how they are kept. This makes it necessary to go back to the more general provisions in the 2006 Act, and to consider whether any suffering is unnecessary and whether the needs of the fish are being met.

Judicial discussion of when suffering is unnecessary predates the 2006 Act. The leading case is *Ford v Wiley* (1889) 23 QBD 303, regarding the prosecution of a farmer who had the horns of his oxen sawn off. This caused the oxen extreme and prolonged pain, "like cutting through the quick of a man's finger." But it also increased the value of the oxen. The sawing was held to be unnecessary, with the court in effect asking (i) whether the ends justified the means, and if so (ii) whether those ends could reasonably have been obtained without the suffering. At pages 209 to 210 and 215, Lord Coleridge LCJ explained:

"There is no necessity and it is not necessary to

8 Section 28

9 Section 10

10 Section 30

11 Section 32

12 Paragraph 3

sell beasts for 40s. more than could otherwise be obtained for them; nor to pack away a few more beasts in a farm yard, or a railway truck, than could otherwise be packed; nor to prevent a rare and occasional accident from one unruly or mischievous beast injuring others. These things may be convenient or profitable to the owners of cattle, but they cannot with any show of reason be called necessary. That without which an animal cannot attain its full development or be fitted for its ordinary use may fairly come within the term "necessary," and if it is something to be done to the animal it may fairly and properly be done. What is necessary therefore within these limits, I should be of opinion may be done even though it causes pain; but only such pain as is reasonably necessary to effect the result. . . There must be proportion between the object and the means. . . If the suffering inflicted is necessary, as I have tried to explain it, it may be inflicted; if not, it is "unnecessary abuse of the animal," and we have neither the moral nor the legal right to inflict it, a conclusion not of sentimentalism but of good sense."

Unnecessary suffering on farms has led to some convictions. In *R. (on the application of Gray) v Aylesbury Crown Court* [2013] EWHC 500 (Admin), a horse trader and members of his family were convicted after over 100 horses and ponies were found dead, dying or starving. In *R. v Woodward (Robert)* [2017] EWHC 1008 (Admin), two directors and three employees of a slaughterhouse were convicted after an undercover investigation filmed them abusing sheep. In *R. (on the application of Highbury Poultry Farm Produce Ltd) v Telford Magistrates' Court* [2020] UKSC 39, a case that went all the way to the Supreme Court on a different point, a company that owned a slaughterhouse was convicted when chickens were put "into the scalding tank (where [their] feathers would be removed) while still alive".

In all these examples, though, the conduct was supposedly an aberration from industry practices. It has been more challenging to secure convictions where a widely used system makes suffering inevitable. In the unreported case of *Roberts v Ruggiero* QBD, 3 April 1985, raising calves in veal crates was held to be lawful, although regulations subsequently banned

the practice. In *RSPCA v Secretary of State for the Environment, Food and Rural Affairs* [2008] EWHC 2321, it was lawful in an emergency to kill chickens by turning off the fans in their shed, thereby suffocating them or roasting them alive. And, in *Compassion in World Farming Ltd v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWCA Civ 1009, it was lawful to restrict feed for parent chickens selectively bred to be permanently hungry.

But widespread suffering might still be held unnecessary despite being part of an established system. There is no comparison with, say, medical negligence law, where conduct in accordance with a body of recognised professional opinion is generally lawful. (And, even in that area of law, a judge can still find that such a body of opinion is neither reasonable nor responsible.) There is no reason for judges to be deferential in farm animal welfare cases. Unlike doctors, intensive farmers are not professionally obligated to avoid unnecessary suffering. They will have objectives that conflict with reducing suffering, especially reducing costs, and these objectives may cause them to act illegally.

Ultimately, though, cases will be highly fact-sensitive. The practices most open to challenge will be those where (i) there is no express provision for them in the relevant regulations and codes of practice, (ii) there is evidence of great suffering, often from undercover investigations, and (iii) there are realistic alternatives. It is not hard to find such practices. For example, in *R (The Humane League UK) v Secretary of State for Environment, Food and Rural Affairs* [2023] EWHC 1243 (Admin) permission was granted for a recent judicial review regarding the use of fast-growing chicken breeds. Although the challenge was unsuccessful, an appeal is currently in progress. These birds no longer resemble wild chickens, their under-developed legs often buckling under the weight of over-developed breast muscle.

When is secondary legislation illegal?

The regulations and codes of practice are weak. Take the minimum space requirements. Laying hens in enriched cages must have 750cm² of space per hen (smaller than a page

of a tabloid newspaper), 600cm² of which must be “usable” (smaller than a sheet of A4)¹³. Adult pigs weighing 85-100kg must have 0.65m² (meaning that 6 pigs can be confined to a pen the size of a table tennis table)¹⁴.

Regulations like these protect intensive farms far more than they protect animal welfare, potentially making poor conditions difficult to challenge. This is because compliance with even weak regulations, like the minimum space requirements, is potentially relevant to whether suffering is necessary. Second, under the 2006 Act it is necessary to establish that a defendant knew, or ought to have known, that their act or omission would cause suffering¹⁵. Intensive farmers may be able to argue that they reasonably assume conduct complying with the regulations does not cause suffering.

Challenging the supporting regulation can be a necessary prerequisite for establishing that a practice is unlawful. Where regulations are inconsistent with the primary legislation to which they owe their existence, the challenge can be by judicial review. The relevant ground of judicial review will be illegality. Many of the challenges to established practices have been by way of judicial review, like in the ventilation shutdown case of *RSPCA v Secretary of State for the Environment, Food and Rural Affairs*. That case challenged the lawfulness of including ventilation shutdown as a permitted method of killing for the purposes of disease control.

Once again, whether a particular challenge to regulations succeeds will be highly fact dependent. To the reasonable reader, though, there seems an inescapable disjunct between the words of the 2006 Act and the regulations. Does keeping six pigs in an area the size of a table tennis table satisfy their “need for a suitable environment,” and leave them “able to exhibit normal behavioural patterns?” Is it necessary to put six pigs into that space, rather than four, or one? When considering whether such conditions can sensibly be called necessary or be said to meet an animal’s needs, it is difficult not to think of the famous words of Lord

13 The 2007 regulations at sch. 4, para. 2

14 The 2007 regulations at sch. 8, para. 43

15 Section 4

Atkin in *Liversidge v Anderson* [1942] AC 206: "I know of only one authority which might justify the suggested method of construction: 'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less.'"

How can the law be enforced?

Regarding inspection, article 53 of retained Regulation (EU) 2017/625 requires that, "the frequency of official controls should adequately address risks to human, animal and plant health, land and animal welfare." But a report by the Animal Law Foundation and Animal Equality found that between 2018 and 2021 just 3% of farms get inspected each year, one third of these inspections identifying regulatory breaches¹⁶. Just half the farms that are the subject of a complaint get inspected. Prosecution rates seem to be low too, with only one in every three hundred complaints leading to a prosecution. In 2019 and 2020, the number of CPS prosecutions for offences under the 2007 regulations was zero.

If an inspection or prosecution body has a blanket-policy of inaction in relation to particular offences, it could be judicially reviewed for fettering its discretion. In practice, though, the low rates of inspection and prosecution may be more to do with under-funding of local authorities. Courts will afford public bodies considerable latitude on those matters. In *Compassion in World Farming Ltd v Secretary of State for the Environment, Food and Rural Affairs*, one challenge was to DEFRA's failure to adopt a policy of prosecuting intensive farmers who kept breeder chickens hungry. This challenge was emphatically rejected: "The court would rarely, if ever, order a public authority to prosecute and certainly not in the present case"¹⁷.

Once again, though, the outcome will turn on the facts. If there was a refusal to investigate or take any other enforcement action despite clear evidence of unlawful conduct, for example video footage from an undercover investigation, then the chances of a judicial review succeeding would be improved. The argument would be that the public body is effectively

shutting its eyes to the evidence. An alternative to judicial review would be a private prosecution. The RSPCA regularly brings private prosecutions in England, although generally in relation to companion animals. In Scotland, it is much harder to bring a private prosecution and almost all prosecutions are public.

Prosecution is not the only way of putting the lawfulness of farming systems before a court. For example, shareholders in a company can bring a shareholder derivative action under section 260 of the Companies Act 2006. Such an action could be brought on the basis that directors are breaching their statutory duties by adopting unlawful farming practices. The statutory duties include a duty to promote the success of the company (a duty that requires them to have regard to "the desirability of the company maintaining a reputation for high standards of business conduct")¹⁸. Although there do not seem to be any reported examples of this sort of action being used to challenge farming practices in the UK, there are examples of the equivalent provisions being used in the United States. For example, last year two Costco shareholders raised an action against its directors on account of the mistreatment of chickens reared for the rotisserie. The action was ultimately dismissed, but – repeating the familiar refrain – success or failure in these cases will always be highly fact dependent.

Are there any other legal means to challenge suffering?

Intensive animal rearing brings environmental, health, planning, and food safety risks, each having its own legislative scheme. In addition, common law causes of action like nuisance could be engaged on the right facts.

Perhaps the most promising avenue for challenge, though, is stopping intensive animal farmers misleading consumers about the way they rear their animals. This avoids having to establish that the conditions are unlawful. It is important when 77% of the public think the UK has "very high" or "generally has high" animal welfare standards on farms¹⁹.

¹⁶ The Enforcement Problem, October 2022

¹⁷ Paragraph 47

¹⁸ Section 172 of the Companies Act 2006

¹⁹ YouGov, September 2020



The first step is generally complaining to the Advertising Standards Authority, which applies the UK industry code on Broadcast Advertising, as well as the code on Non-broadcast Advertising, Sales Promotion and Direct Marketing. The Advertising Standards Authority has shown itself willing to rule against misleading claims about animal welfare. One example involved an advert with Heston Blumenthal and a farmer discussing the benefits of "outdoor bred" pigs against a backdrop of fields and straw²⁰. Blumenthal asked, "So, Phil, what is it about outdoor bred pigs that makes the meat taste so good?" The farmer replied, "I think it's got to be the environment they're living in: plenty of fresh air, cereal-based diet and of course a comfortable bed." He neglected to mention that, after being weaned as piglets, the "outdoor bred" pigs spent the rest of their lives indoors in cramped pens. Another example is a ruling against the claim that "Red Tractor Pork is high welfare pork"²¹.

If the Advertising Standards Authority's ruling goes against the complaint, there are also regulatory provisions. The Consumer Protection from Unfair Trading Regulations 2008 prohibit misleading actions and omissions²². The Competition and Markets Authority generally enforces these regulations, but consumers now have the option of doing so directly²³.

Conclusion

Farm animal welfare is a developing area of law and a developing area of social concern. While it is not the place of the courts to legislate, they do not need to. A prohibition on unnecessary suffering is already written into law. But it is not given meaningful effect by the regulations and codes of conduct, or reflected on intensive animal farms. Selective, creative, and persistent litigation is needed to close the gap between words and reality.

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²⁰ Waitrose Ltd, 20 October 2010

²¹ Agriculture and Horticulture Development Board t/a lovepork.co.uk, 29 August 2012

²² Paragraphs 3, 5 and 6

²³ Part 4A