VETS AGAINST LIVE EXPORT

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***Western Australia Police v Botha* (2015) Magistrates Court of Western Australia [Magistrate Taverner; KR 2136 – 2143 of 2014]**

SUMMARY

This case came about as a result of charges brought by RSPCA (WA) in relation to alleged ill-treatment of cattle at Moola Bulla Station in the north of Western Australia (the Kimberley). The events the subject of the charges happened in July 2012. The majority of the charges related to alleged ill-treatment of the animals by virtue of dehorning – that is, the cutting of horns, without anaesthesia or pain relief, very close to the skull. Other charges related to animals being struck by 'nose tongs'. The evidence of the alleged cruelty was recorded covertly by someone who was assisting with the gathering and restraining of the cattle prior to and during the procedures.

The defendants (Nicolass (Nico) Francois Botha and the company which owns and runs the station) were convicted on one of the counts. However, the case raises several very interesting issues, including:

- the way in which the law allows animals to be raised and treated in northern Western Australia by way of exemptions from the operation of the cruelty provisions of the *Animal Welfare Act 2002* (WA);
- admissibility of expert evidence from veterinarians who are not cattle experts;
- the use of illegally or improperly obtained evidence; and
- the preparation of animals for live export.

It is worth noting in passing that Mr Botha was notably outspoken about the impact of the 5 week ban on export of live cattle to Indonesia, claiming that he would be forced to kill animals because of the ban.[1] Interestingly, his lawyer made comments during the trial which suggested that was not necessarily so.[2]

[1] He said 'animals are going to die in the paddocks in huge numbers, we are not talking hundreds we are talking thousands'. He was reported as saying he would be forced to cull 3,000 cattle because of the ban. *Pastoralist's worst nightmare realised* Farm Weekly 7 July 2011. He was reported as saying he would be forced to cull 3,000 cattle because of the ban. See

It is also worth noting that at the time of this case being heard, RSPCA (WA) was (and still is) the subject of a parliamentary inquiry in Western Australia. The inquiry was initiated by Shooters and Fishers MP Rick Mazza, and has been described by some as 'a political witch hunt'.[3]

PREAMBLE

This case is informative not only because it deals with an issue of cruelty in a rangeland farming context, but also because it gives an insight into the attitudes of at least a sector of farmers who use animals, not only into animal cruelty, but also into the way in which attempts can be made to skew and manipulate evidence. In this case, those attempts related to attacks on the RSPCA's advocacy role, particularly concerning live export, and on the strength of expert evidence. The expert evidence issue is interesting, because it highlights the difficulty of 'proving' cruelty and also illustrates how those who are defending themselves against charges of cruelty will seek to limit evidence to that which relates directly to the particular situation under consideration. Thus, here, there was a lot of emphasis placed on the concept that the animals in question were 'northern' animals, ranging freely (that is, virtually feral), such that experts who did not have direct, practical relevant experience of these sorts of animals in this situation were said not to have any expertise which could be relied on.

From an animal law point of view, one of the most remarkable things about this case is that, even though it concerns dehorning, and the question of when cruelty is allowable by virtue of not being unnecessary or unreasonable, it makes no reference to *Ford v Wiley*,[4] the leading case on this aspect of cruelty. This is even more remarkable, given that *Ford v Wiley* concerned dehorning of cattle, dealing with many of the factual and evidentiary matters relevant to this case.

DETAIL

Background

Nico Botha and his company (SAWA) at the relevant time operated cattle stations in the Kimberley, producing beef cattle for live export. The total area of the stations is about 1.6 million acres, running about 45,000 cattle.[5] Botha's company bought the stations from the receivers of the previous owner (Great Southern) in 2011. He noted they were "a bit run down" at that point.

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http://www.farmweekly.com.au/news/agriculture/agribusiness/general-news/pastoralists-worst-nightmare-realised/2218017.aspx

[2] Transcript page 303 (cross-examination of Dr Enoch Bergman): "you're aware that…period of time was preceded by the live export ban [yes]…you accept…cattle may have been processed and been held to be marketed in another year?". And at page 398, Nico Botha said that as a result of the live export ban (which he claimed lasted 3 months), he had to "put them aside…".

[3] see Labor WA leader Mark McGowan's statement at http://www.markmcgowan.com.au/RSPCA.

[4] (1889) 23 QBD 203.

[5] Although note that at Transcript page 424 Botha says "we mustered through the yards…60,000 cattle…".

Stay Order – questioning the evidence of an animal behaviour specialist,[6] and a veterinarian who has experience of 'southern cattle'; allegations of improper purpose because of the opposition of RSPCA to live export

The stance of the RPSCA against live export

The defence sought to impugn the case by alleging that RSPCA (WA) was opposed to live export, by reference to the position of RSPCA Australia. It noted that 'the RSPCA' is a 'private body' which does not have 'the same regulatory supervision and the same policy supervision' and was not 'formally responsible to any government department'.[7] The prosecution questioned this by drawing a distinction between the position of RSPCA Australia, and the position of the prosecutor. That latter person was an inspector appointed under the *Animal Welfare Act 2002* (WA). As such, that person had to fulfil the duties of an inspector and was entitled to exercise powers of an inspector. As pointed out by the prosecution, it would be an improper exercise of prosecutorial discretion were an RSPCA inspector to decline to bring charges because of the ramifications for the industry.[8] The position of the defence was the opposite. The clear implication was the charges were brought with the improper motive of seeking to harm the live export industry.

The attack on the RSPCA's evidence included the remarkable assertion that a statement on an RSPCA website exhorting members of the public to provide images or videos of possible cruelty would 'encourage or embolden people in the animal welfare or animal rights or animal activists industry (sic) to solicit and disseminate illegally…obtained videos…', with a request for the magistrate to take this into account in considering whether or not to admit the relevant video evidence.[9] The defence went on to say that because (in its view) the 'RSPCA' was a private person, which was not accountable in the 'usual ways' to Ministers or Parliament, or to 'prosecutorial policy and guideline' (sic) that is was 'even more important in circumstances like this that an example is being set with respect to the admission of illegally obtained evidence'.[10]

A further attack on the evidence was based on the assertion that, because of the 'great controversy surrounding animal husbandry practices', 'this type of illegal recording subjects the workers to embarrassment and widespread opprobrium, especially in the social media, even if the charges are dismissed.'[11]

The evidence of a veterinary behavioural scientist

The attack on the relevance of Dr Lindsey as an expert witness leaned heavily on the assertion that she had no direct experience of 'northern' cattle (with all that implies) and that although she had high level veterinary behavioural qualifications, her main area of practice was with small animals. The magistrate was unswayed by the arguments of the defence. He

[6] The stay application was also based on the claim by the defence that the prosecution had tried to 'hide' veterinary witnesses because their opinions would not assist the prosecution's case.
[7] Transcript page 71.
[8] Transcript page 48.
[9] Transcript page 85.
[10] Transcript page 87.
[11] Transcript page 90.

held that Dr Lindsey's membership in veterinary behavioural science qualified her as an expert.[12]

The magistrate, having rejected the attacks on the expert witness evidence, also rejected the attack against the RSPCA on the basis of bias, and refused to grant a stay of the proceedings.

Evidence

The video evidence was obtained by a helicopter pilot who had been involved in mustering cattle, and was also required by the station operator to assist in operations on the ground, including getting cattle into crushes so they could be dehorned. After obtaining the footage, the first thing he did was take it to a police officer. Even though the footage was arguably taken illegally or improperly (and certainly without consent), and the Police were aware of this, the person who took the footage was never prosecuted. That in itself is interesting.

The pilot gave evidence that while he was involved in helping with gathering the cattle, he observed actions by cattle handlers such as poking animals in the eye, being beaten with implements and cutting horns very short.

The evidence was that, in animals older than 6 months, horns had been cut off too close to the skull, with resultant pain and distress. Part of the justification for doing that was the animals were intended for live export. The *Australian Standards for the Export of Livestock* specify that the horns of cattle must not exceed 12cm in length.

The expert evidence was that dehorning too far down the horn towards the skull exposed the cornual process, which contains nerve endings, such that the procedure was painful, and also likely to result in ongoing pain, bleeding, possible flystrike and infection and possibly even death in the long term.

Dr Carol Petherick gave evidence to the effect that restraint of cattle prior to dehorning was itself highly stressful (at least as judged by measures of cortisol). The gist of her evidence was that cattle so restrained would be so stressed that the act of dehorning itself would not cause any significant perception of pain, which would in essence be masked by the stress of handling and restraint. However, the magistrate took the view that dehorning of all the subject animals did cause pain.

Dr David Morrell, a veterinarian involved in the live export trade, gave evidence to the effect that the dehorning procedure was acceptable in the circumstances.

Mr Botha gave evidence that one of the animals was dehorned in order to make it acceptable for live export. Dehorning of the other animals was said to be done because of problems in mustering feral cattle; Mr Botha's position was dehorning was "better done once than twice". The other 3 animals were destined to be released back into the herd, and were dehorned (rather than just having the tip removed) so that they would not have to be mustered again for some time. This turned out to be a key distinction.

[12] Transcript page 150.

The law

One of the defence veterinary witnesses summed the situation up well: '*if you convict this person over cruelty, then you will be convicting many people in the industry…If this is…cruelty, then I would be saying a lot of activities in the Kimberley are cruelty. This is not cruelty in accordance with industry practice*.'[13]

The subsection of the *Animal Welfare Act 2002* ("the Act") relied on in the charges was subsection 19(3)(j), which provides that a person in charge of an animal is cruel if the animal is caused unnecessary harm. "Harm" is defined in the interpretation section as including injury, pain and distress evidence by severe, abnormal physiological or behavioural reactions. The WA Act is unique so far as that detailed definition is concerned.

There are defences available under the Act. Section 23 provides that an act done in accordance with a generally accepted animal husbandry practice will not constitute an offence if done in a humane manner. Section 25 provides it is a defence for a person to prove he or she was acting in accordance with a relevant code of practice. Regarding the latter defence, regulations made under the Act in effect adopt the "Cattle Code"[14] as such a code. The Code says (para 5.8) that all horned cattle should be dehorned as young as possible that dehorning domesticated cattle should be confined to the first muster and preferably under 6 months of age. Paragraph 8.3 of the Code refers to 'feral animals' and contemplates cattle older than 12 months being dehorned under 'exceptional circumstances'. An example of such circumstances is range management of older previously unmustered cattle in extensive operations.

The magistrate's verdict

The magistrate took the view that the 3 cattle which were aggressively dehorned and said to be destined to return to the herd came under the part of the Code which contemplates 'exceptional circumstances' in relation to the management of feral cattle. For that reason, the defence available under section 25 of the Act applied. However, the animal said to be destined for live export was dehorned close to the skull. It should have been tipped. "The decision to do otherwise indicated an indifference to the animal's welfare".[15]

COMMENTARY

This case illustrates graphically how the law in northern Western Australia is geared to protect the interests of cattle farmers who keep animals which are virtually feral, on enormous ranges, making them extremely difficult to manage in a humane fashion. The primary reason for keeping these animals under these conditions is to supply the live export market in south east Asia. The 'exception' allowable under the Cattle Code, and thereby the *Animal Welfare Act* basically means that what would be unacceptable cruelty regarding aggressive dehorning elsewhere in Australia is thereby made acceptable under the law. There is another aspect of the Western Australian *Animal Welfare Act 2002* which validates

[13] Dr David Morrell; transcript page 24.
[14] Primary Industries Standing Committee Model Code of Practice for the Welfare of Animals – Cattle, 2nd Edition (2004).
[15] Reasons, para 102.

what would otherwise be unacceptable cruelty on these large scale extensive cattle stations. The other primary example is section 26, which has the effect of allowing a farmer to keep cattle in such harsh conditions providing the animal is able to “sustain” itself. This again is completely unacceptable, as it basically allows animals to be starved to the point (see below) where they are severely emaciated, but providing they can stay alive, there is no breach of the Act.

Gibb River Road, Kimberley August 2014 (Photo: S Foster)