2023 Rare Book Lecture Notes

THE WEIRD AND WONDERFUL WORLD OF ANIMALS AND THE LAW

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Thank you to our Dean, Matthew Harding, for his kind welcome. I'm proud to be part of the vibrant and diverse community of Melbourne Law School. The marvellous Carole Hinchcliff came up with the idea for this public lecture a year ago, so it's great to see it finally happen. And I'm so grateful to you all for coming.

This lecture is in part derived from my book written with Professor Jeremy Gans, *Guilty Pigs: The Weird and Wonderful History of Animal Law*, published last year by Latrobe University Press.

For those of you who know me by my academic reputation, this might be surprising. What is a specialist in the arcane world of contract remedies and trust law doing writing a book about animals? But those of you who know me well know that I'm interested in everything and anything.

[Click to second slide]

Jeremy and I were the erstwhile editors of a blog, called *Opinions on High*, which summarised cases by the High Court of Australia, the apex court of Australia. In 2015, the High Court decided *Knox City Council v Isbester*, a case involving a Staffordshire Terrier called Izzy who had been placed on 'death row' for her alleged role in a dog attack. Jeremy and I were fascinated by it and followed it as it progressed through the court.

"Gosh," said Jeremy, "we could almost write a book about this!"

"Actually, I've always wanted to write a book about animals and the law!" I said. One of my friends, Dave Bath, had been urging me to write a book of this nature for over ten years. We began to write the sections which later turned into parts of Chapter 4 and Chapter 7, and I put together a pitch. A former student approached a publisher for whom he had worked. The publisher rudely said that it was not interested. We were crestfallen and shelved the idea.

In 2019, academic publishing was in the news again. I got into an argument about this on Twitter with another academic, and noted that the publisher whom I'd approached about the Animals and the Law book had been dismissive. I noted in passing that this was a pity, because the book would have been great. Luckily for Jeremy and I, Chris Feik of Black Inc. read the tweet and his curiosity was piqued. He asked us to send him our pitch and sample chapter. We re-assembled our pitch and sent it through. Thus, our "pet project" found a home.

[Click to third slide]

So, let's tell you about Izzy, and explain the law along the way. In August 2012, the Edward family went for a walk in The Basin, with their Border Collie puppy. They saw three

Staffordshire terriers roaming the streets. Later the dogs set upon the puppy. While Emily Edward screamed, Jennifer Edward tried to loosen the jaw of the dog that had latched onto to the puppy's neck and ear. The local butcher and a passer-by pulled the Staffies away. Jennifer was left with a puncture and a rip on her finger, which prompted a trip to a medical clinic. The three Staffies belonged to Tania Isbester.

There are many different kinds of law—private law, public law, criminal law and evidence law. Some law is made by Parliament, some is made by judges who hand down decisions.

[Click to fourth slide]

This incident might have raised issues of *private law*. Private law—my speciality—is the area which deals with the legal rights and obligations humans have towards each other as private individuals. The areas which might have been relevant here were *tort* (wrongdoing) and *property law*. Note that Isbester owned Izzy. Hence, in tort, she might have been liable in negligence for failing to lock up her dogs with care. She might also have been subject to a tort called *scienter*, of medieval origins, which would have made her strictly liable, but only if she knew the dogs were dangerous. At that point at least, she did not.

The concept that we own another living creature is an unusual one, and as we will see, the law tends to struggle, because animals are not just a 'thing' like a table. But owning something means you control it, you can destroy it, you can sell it, you can do various things with it, and you can exclude others from it, subject to other laws. In this case, the *Domestic Animals Act 1994* empowered people to seize an unaccompanied animal – a statute passed by the Victorian Parliament.

Any discussion of private law is hypothetical. No one sued in tort. Although the Edwards complained to the council about the dogs, nothing was done, until a later incident. In June 2013, the other two dogs, Bud and Jock, attacked several dogs and their owners in two separate incidents, causing serious injury to other dogs and a dog owner. Jock was put down. That's when Knox City Council became involved, and also turned its mind to the 2012 incident. It is then that the *criminal law* and *evidence law* was engaged—Jeremy's speciality.

Section 29 of the *Domestic Animals Act 1994* makes it a crime for an owner of a dog to possess a non-dangerous dog which caused death or serious injury to an animal or a person. Jennifer Edward's torn finger qualified as a serious injury. In a plea bargain, Isbester pled guilty to 20 offences under s 29. The Council insisted that Isbester acknowledge Izzy was the dog who had bitten Jennifer Edward's finger (although it's really not clear that she was). The Magistrate sentenced Isbester to a 12-month good behaviour bond. The Magistrate didn't rule on what happened to Izzy, and the Council indicated to Isbester that it wasn't going to seek an order for Izzy's destruction… at least, not from the Magistrate.

This brings up a third area of law: *public law*, which deals with the powers and decisions of governments about the people they govern. *Constitutional law* decides the limits on government power; but this case raised *administrative law*: in making a decision about people—and a dog!—had the government behaved fairly in exercising its powers?

A panel of three local council employees decided that Izzy should be "destroyed". Isbester then sought "judicial review" of the decision. That's how the case made its way to the High Court of Australia. Both the Supreme Court of Victoria and the Victorian Court of Appeal decided

that there was nothing wrong with the way the decision had made. The High Court of Australia disagreed, on just one basis. One of the members of the panel who had decided Izzy's fate had also investigated the events of 2012. She had no actual bias against Izzy, and there was no suggestion that she had behaved improperly. The issue was one of "apprehended bias": simply that it might be perceived that she was biased, even though she wasn't. The decision was set aside, and the Council was ordered to make a decision again.

A lot of non-human animal law is an application of human law. The High Court only discussed Izzy herself only once, when it described Tania Isbester's particular interest in her dog's life:

> "Whether one describes an interest in a dog as a property right, or acknowledges the importance of a domestic pet to many people, the appellant is a person who may be affected by a decision which will require her interests to be subordinated to the public interest."

The judges' ambivalence about whether Izzy was just Isbester's property or something more came up over and over again. Strikingly it didn't matter either way in this case.

Izzy wasn't returned to Isbester, despite her pleas. A different panel decided Izzy should not be "destroyed", but she languished at various RSPCA offices in Victoria, South Australia, then Queensland. She was apparently very well behaved. Eventually a couple decided to adopt her. They got in contact when they heard Jeremy and I were reading this book, and sent me a photo of it. Apparently she is a Very Good Girl. The photo of her smiling was so beautiful that I burst into tears when I saw it.

[Fifth slide]

You might be wondering where the title of the book came from. I have an interest in medieval and early modern history. I'd known for a while of a very strange phenomenon, where thirteenth century courts in what is now North Eastern France prosecuted pigs for crimes. Later, this spread across Europe, and more animals were prosecuted: cows, horses, donkeys, sheep.

What happened in these cases? They arose when animals killed people (particularly, but not always children). In psychological terms, this is a 'moral event'—it creates a certain emotional response—when animals are either particularly heroic (saving lives) or particularly wicked (taking lives) they get treated more like humans. Hence pigs and other animals were put through full criminal trials. The pigs were imprisoned, legally represented, asked to confess, put in the witness box and sometimes sentenced to death. Sometimes, too, they were exonerated, as with the piglets who were let off for their youth.

Sometimes we treat things like people (think of when you shout at a malfunctioning printer!) and sometimes we treat animals like people. Goodwin and Benforado, a psychologist and a lawyer, gave people hypothetical newspaper articles, involving (among other things) a shark killing someone. The response depended on whether the victim was a child, or a pedophile. If the victim was a child, people responded in a punitive, and wanted that particular shark to die, and to suffer pain. This goes back to an eye for an eye, a tooth for a tooth—so we discuss Biblical about vengeance and the goring oxen being stoned when it causes for death. While most societies don't try animals like they are humans, there is a minority who do, from time to time.

[Sixth slide]

When King Solomon faced a dispute about who was the mother of a human baby, he threatened to kill it as a ruse to make the parties reveal their own relationship to it. Solomon wisely awarded the baby to the woman who immediately dropped her claim. But what happens when ownership of a dog is at issue? When Judge Edward Kimball was faced with a dispute over whether a dog was "Prince", owned by hat shop owner Keeley Moore, or "Buddy", owned by one Miss Helmick, he found a different, less alarming way to make use of the object of the dispute before him. A Washington newspaper reported as follows:

> ""And now call the dog," His Honor commanded the court officer. The animal had been held in confinement in Judge Kimball's private room while the testimony was being taken in the court room. In another moment the court officer returned leading the dog by the collar. Officer and animal approached the witness stand and suddenly the dog's ears rose and his nostrils quivered as he evidently caught a scent which was familiar and grateful to his keen senses. With a turn of his head and a swish of his tail the animal bounded to the chair where Mrs. Helmick sat and raising his forepaws to her knees, pressed his nose to her cheek and licked it, while the delighted animal continued to wag his tall with enthusiastic joy."

Kimball awarded the dog to Helmick, pronouncing the evidence 'unequivocal'. Moore later told the newspaper that he planned to appeal, arguing that 'no evidence was offered to identify the dog as the Helmicks' dog other than mere say so'. He was right. Indeed, while the Helmick family gave evidence under oath and were cross-examined, the dog wasn't. Alas for Moore, evidence law's hearsay rule, which bars a court from using unsworn words or conduct as a way to work out what a witness saw or heard, only applies to human witnesses, not non-human animals.

[Seventh slide]

Did you ever hear of the proposition that the Monarch of England owns all the swans? As it happens, the truth is even stranger. King Charles III could, if he wished, exercise his royal prerogative to claim all the unmarked mute swans of the genus *Cygnus Olor* in English and Welsh waters. It's the only time I've ever been contacted by the *New York Times*. I did suggest that if his Majesty wished to consult me, my fees were reasonable. Again, this prerogative dates back to medieval times, when ownership of swans became a rich man's status symbol.

In the thirteenth century, owners of swans started to place 'marks' on the swans' beaks (called in Latin *cigninota*) with the right to mark swans being granted by the King. In 1361, Thomas de Russham was given responsibility by the King for "the supervision and custody of all our swans as well as in the water of the Thames as elsewhere within our Kingdom." Thereafter, the King had an officer who was Master of the King's Game of Swans (also known as the Royal Swan-herd, Royal Swannerd, or Royal Swan-master). A declaration in 1405 to 1406 reiterated that only the King had the right to grant swan marks. Until that time, ownership of swans had been governed by customary law. The Swan-master was also responsible for keeping swans safe in inclement weather.

In 1482 and 1483, Edward IV's Act for Swans was passed to prevent unlawful keeping of swans by "Yeomen and Husbandmen, and other persons of little Reputation". The only people who could have swan marks or own swans were noble and rich people. Those who were disqualified

had to divest themselves of ownership, and if This was not done before Michaelmas, the King's Subjects who qualified for ownership of the swans were entitled "to seise the said Swans as forfeit; whereof the King shall have one Half, and he that [shall seise] the other Half." This is what is known as a 'sumptuary law': a law restraining someone from owning or consuming something based on social class, designed to enforce social hierarchies. In a show of wealth, 1247 Henry III ordered forty roasted swans for his Christmas celebrations at Winchester.

Formal registration of swan marks began around this time. Only the
monarch could claim unmarked mute swans, although the monarch also had several of his or her own marks. The marking, recording and disposal of swans was known as 'swan-upping', and was conducted by the Swan-master. People caught the swans, recorded the ownership of the birds and their offspring,
and placed markings upon their beaks. The Swan-master was to meticulously maintain the marks in an 'upping book'.

Once the marking of swans was established, the King formed special Courts of Swan-mote or Swan-moot, solely to settle disputes over swans. In 1592, some brave nobles decided to challenge Queen Elizabeth I for the ownership of unmarked swans at Abbotsbury Swannery. The court confirmed that unmarked swans belonged to Her Majesty, and explained that the ownership of cygnets was different to other baby animals: the ownership was split between the owner of the cob and hen, with any uneven number going to the person who owned the land upon which the nest was situated. Swan upping still happens to this day, but now the aim is conservation, and beaks are not marked.

No one is allowed to eat mute swans in Britain now, as they're protected as a 'wild bird' by the Wildlife and Countryside Act 1981 (UK) and it is an offence to kill, injure or take a wild bird, or to take, disturb or destroy the eggs of a wild
bird. King Charles III could presumably eat swan, but this is simply because he would have sovereign immunity, not because of any deeper principle. The King's prerogative does not extend to the Australian black swan (*Cygnus atratus*). Hence, although some small populations of black swans imported to England have flourished, the King has no right to them.
[Eighth slide]

In 2020, the winner of the Underwater Photography Guide was Sydney academic engineer, Gaetano Gargiulo, for this extraordinary picture of an octopus. There was only one problem, perhaps. Gargiulo had not taken the picture: the octopus had come out of its den and curiously played with the underwater camera. It was an octopus "selfie".

In our book Jeremy and I discuss the difficulty of the selfies taken by Sulawesi macaques, a species of monkey, and the dispute which arose when People for the Ethical Treatment of Animals (PETA) attempted to claim copyright in the photos on behalf of the monkeys. Ultimately the United States District Court for Northern California decided, first, that PETA could not represent the monkeys, because it could not know what they wanted, and secondly, the US Copyright Act contemplated conferring rights on human animals, not non-human animals. Such an argument wouldn't be possible in Australian Copyright law, which explicitly contemplates that authors are "persons".

But there was another issue Jeremy and I thought about. Was Gargiulo really the winner of the prize at all? He won a 7 nights liveaboard diving package for one to the Solomon Islands. But should that prize have gone to the octopus instead?

That turns on the law of contracts, which concerns promises people voluntarily make to Each other (such as the promise the competition organisers made to entrants and to their sponsors) in return for giving something of value (known as 'consideration'). It may also turn on any statutes or other laws that regulate competitions, including consumer protection law. Chances are, the legal position will be resolved by interpreting the contest's own rules, including specific ones (e.g. 'All photographers are eligible, including amateur, semi-pro, and professional' and 'You must have been in the water when taking the photo') and general ones ('All judges' decisions are final.') Of course, all of this will only matter if someone—a human someone, for reasons explained in Chapter 7–decides to sue.

Finally, there's a third difference—the elephant in the room, you could say: an octopus is very different animal to a macaque. Perhaps unsurprisingly, to anyone other than Jeremy and I, there weren't many cases involving octopuses, despite how intelligent they are. Our law is skewed by the sort of interactions that have ended up in court to date, something that is largely determined by human interests and desires. That leads me on to the final part of the discussion—matters which weren't discussed in the book.

[Ninth slide]

The case of 'Happy the Elephant' had not been decided when we finished the book. She is an elephant kept at Bronx Zoo. She was born in the wild in 1971, but has been kept in captivity since she was small. The Non-human Rights Project sought to make her a test case. There are laws governing the imprisonment of human animals: we can seek a writ of *habeas corpus* against governments who illegally or indefinitely imprison us. The Non-human Rights Project tried to argue that the writ of *habeas corpus* should extend to Happy, particularly given her autonomy and cognitive complexity, and that she should be moved to a more spacious enclosure. A majority of the New York Court of Appeals (5–2) decided in June 2022 that the writ only extended to human animals, not non-human animals, and that if personhood was to be extended to animals, it was a matter for the legislature. Wilson J and Rivera J dissented, and would have granted Happy some legal rights, even though she was an elephant.

[Tenth slide]

Conversely in Panama, in March 2023, the President of Panama passed legislation protecting endangered leatherback turtles. It gave the sea turtles the right to an environment free of pollution and other human impacts which cause physical or health damage to them. The most interesting part, however, was that the legislation specified that sea turtles, as living creatures, have rights, and that those rights can be enforced by people who can bring lawsuits on behalf of the turtles if their rights are violated. It's hoped that this will lead to better protection of the turtles.

What happens next in the Weird and Wonderful World of Animals and the Law? I'm not sure, but I'm sure that whatever it is, it will be interesting.

[Eleventh slide]

Thank you. Carole, Matthew, Media Team, Law Library, all of you.