



*Just what can they
'get away with'
legally speaking?*

HUNT SABS & THE LAW: PART 2

Having considered in the last issue of HOWL what sabs can and can't do from a legal perspective, it's now time to ask the same of those law abiding, upstanding pillars of the community, the hunting fraternity. This article will consider the Hunting Act 2004 (HA). What activities does the HA outlaw exactly? Does the HA work? Can it work? Will it even exist for very long? As I write this, the nation has just been blessed with a rabidly pro-hunting prime minister. Fortunately, the Tories probably do not have sufficient seats to repeal the HA in the present parliament in a free vote. Nevertheless, the political future of this country is not at all clear, and the HA is certainly looking a bit unsafe. However, we should not be too pessimistic about this because as any active sab knows, the HA is far from a panacea for hunted wildlife; indeed, you may decide after reading this article that repealing the HA would make not the slightest bit of difference to wildlife.

What Activities Does the HA Outlaw?

The HA is simple in principle; it makes it illegal to hunt a wild mammal with a dog. No problem then, you might think. The trouble comes in two main areas. Firstly, hunting is not fully defined in the HA, which merely states that hunting includes (but by implication is not limited to) engaging in the pursuit of a wild mammal with a dog. This means that it's up to the courts to determine the full definition of hunting through case law, and in doing so they must apply the ordinary English meaning of the word "hunting". The Oxford English Dictionary defines "hunt" as follows:

"hunt verb. 1 chase and kill a wild animal for sport or food. 2 try to find by thorough searching. 3 chase and capture someone."

Hunting a wild mammal, taking its ordinary English meaning, therefore includes searching for it. The most significant judgement to date on the



definition of hunting was that of DPP v Wright ([2009] EWHC 105 (Admin)). Anthony Wright, huntsman of the Exmoor Foxhounds, was convicted of illegal hunting on 4th August 2006 at Barnstaple Magistrates' Court after a private prosecution by the League Against Cruel Sports (LACS). However, he appealed to the Crown Court and his conviction was overturned. The Crown Prosecution Service (CPS) then took over from LACS and appealed to the High Court against the overturning of Wright's conviction, but their appeal was unsuccessful and his conviction remained overturned. Part of the appeal in the High Court considered the definition of hunting, specifically whether hunting included the search for a wild mammal. Although the court recognised that in the ordinary meaning of the word, hunting could include the search for a mammal, they decided based on the wording of the HA that the answer was in fact no, hunting did not include the search for a wild mammal for the purpose of the HA. Compared with the common sense approach applied by the magistrates' court to convict Wright, one can't help but feel while reading the intellectual wranglings of the appeal court judges that overturned his conviction that they started off with the conclusion that he was not guilty and worked backwards from there to justify it. Their deliberations also give the impression that they are attempting to undermine the HA by making it appear far more complicated than it actually is. As it stands now, however, hunting is very narrowly defined as engaging in the pursuit of a specific, identified mammal with a dog.

The second difficulty is that there are "exemptions" to illegal hunting whereby certain hunting activities (exempt hunting) are allowed under certain circumstances. Although these circumstances are well defined,



not only are the exempt activities themselves a form of abuse of wildlife that we would rather not see happen, but also they do cause some blurring of legal and illegal hunting, and allow illegal hunting to carry on, masquerading as an exempt activity. In relation to exempt hunting, there is also what is known as a "statutory defence" to a charge of illegal hunting. This defence is for a person to show that he or she reasonably believed their hunting was exempt. In other words, even if a person is hunting with dogs and their hunting is not exempt, they cannot be found guilty if they can show that they reasonably believed their hunting was exempt. This means that a person's state of mind is an important component of the offence.

The upshot of the above is that in order to find a person guilty of hunting a wild mammal contrary to the HA, a court must consider, in the following order:



1. Was the person hunting, and did that hunting involve one or more dogs? Note that the dogs do not have to be employed by or controlled by that person; under the HA, a person is hunting with dogs if he or she is engaging or participating in hunting that involves dogs, even if the dogs are employed or controlled by someone else. However, the hunting must be intentional rather than accidental.
2. If that person was hunting with dogs, was the hunting exempt, i.e. did it satisfy the conditions of one of the exemptions in the HA?
3. If the hunting was not exempt, did the person reasonably believe their hunting was exempt? If the answer to this is no, that person is guilty of hunting contrary to the HA.

In points 1 and 2, the burden of proof is on the prosecution, and the standard of proof is the criminal standard (i.e., beyond reasonable doubt). That said, if a defendant relies on the defence that his or her hunting was exempt, he or she must produce some sort of evidence that at least suggests it was exempt; that is, they must properly raise the question of whether the hunting was exempt and then the prosecution has to prove that it wasn't. In point 3 the burden of proof is on the defendant but the standard of proof is lower (i.e., the balance of probabilities).

Exempt Hunting

So what are these exemptions then? There are nine of them, although only four are relevant to hunt sabs in that they potentially provide loopholes to allow hunts to carry out illegal hunting under the guise of exempt hunting. I shall describe these four in some detail because this information is useful to hunt sabs. The exemptions are found in Schedule 1 of the HA, the full text of which can be found at www.statutelaw.gov.uk.

Exemption 1: Stalking and Flushing Out

This exemption allows people to use dogs to stalk or flush wild mammals out of cover in order to shoot them. There are several conditions that must be satisfied for this to be legal:

- It must be carried out for the purpose of protecting livestock, "game" birds, crops, etc. or for obtaining meat or for the purpose of a field trial by which the dogs are being tested for their ability.



- It must take place on land owned by the people doing the flushing or on which they have been given permission to do the flushing.
- A maximum of two dogs may be used.
- Reasonable steps must be taken to ensure that as soon as possible after being found or flushed out, the wild mammal is shot dead by a competent person, and the dogs used must be kept under close control so as not to prevent this from happening.

Exemption 2: Use of dogs below ground to protect birds for shooting

This is the so-called gamekeepers' exemption. Under this exemption, the purpose of using terriers is for flushing out (bolting) a wild mammal, which is then shot. Terriers may not be used for fighting or trapping a wild mammal underground for the purpose of digging that mammal out, as per traditional terrier work. Digging is not the purpose of terrier work, and is allowed only to rescue a terrier that has become trapped or otherwise has failed to emerge. If the fox fails to bolt, it must not be dug out, as the exemption only allows terriers to be used for flushing a wild mammal out. Exempt terrier work must satisfy the following conditions:

- It must be carried out for the purpose of protecting "game" birds or wild birds which are being kept or preserved in order to be shot.
- The terriermen must have written evidence that they own the land or written permission from the landowner. The terriermen must make this written permission immediately available to a constable who asks for it.
- They can only use one terrier below ground at any one time.
- Reasonable steps must be taken to ensure that the wild mammal is bolted as soon as possible after being found, and to ensure that it is shot dead by a competent person as soon as possible after being bolted. The dog used must be under close control so as not to prevent this.
- Reasonable steps must be taken to prevent injury to the dog.
- The terrier work must be carried out in accordance with the British Association for Shooting and Conservation (BASC) code of practice.

The last condition means that the BASC code of practice has the force of law, and that non-compliance with it is a criminal offence. It also

introduces another set of conditions, as per below.

- The terrier must be used to locate the wild mammal and cause it to bolt so that it can be shot, not to fight the wild mammal.
- Only "soft" terriers (those that stand off and bark at the wild mammal) rather than "hard" terriers (those that attack the wild mammal) may be used.
- Care must be taken to ensure the safety of those involved, and to prevent injury to the terrier and the wild mammal during the bolting process.
- The time spent by the terrier underground must be kept as short as possible.
- The terrier must be fitted with an electronic locator.
- If the terrier becomes trapped, it must be assisted (i.e., dug out).

There is also a BASC good practice guide, the purpose of which is allegedly, and bizarrely, to ensure the welfare of the terrier and the wild mammal. The good practice guide, not to be confused with the code of practice outlined above, does not have the force of law, but is recommended by BASC and the government in order to help ensure compliance with the gamekeepers' exemption.

The use of the gamekeepers' exemption is interesting. Many hunts employ terriermen who rely on it to carry out their terrier work. However, this raises some important issues regarding the legality of the hunts, and I would advise sabs to be aware of these issues, and to point them out to police as much as possible. For instance, the hunts are allegedly trail hunting or exercising hounds, and yet they employ terriermen. By use of the word "employ" I do not mean necessarily that the hunts pay the terriermen, but that the terriermen are there at the request and service of the hunt, and are called in by the hunt to deal with foxes that run to ground. Firstly, if the hunt is not hunting foxes, terriermen would be of no use to them. Secondly, from the terriermen's point of view, if the hunt is not hunting foxes, the terriermen are wasting their time because they are waiting for an "accident" to happen, i.e. they are waiting for the hunt "accidentally" to chase a fox to ground, which they can then bolt and shoot. They are also relying on this "accident" happening on land on which the landowner has game or wild birds (which have been caused harm by foxes) that he wishes to shoot, and on which they already have the written permission of the landowner to do their terrier work. Hmmm... it all seems a bit suspicious, doesn't it? The Association of Chief Police Officers (ACPO) agrees, and their Hunting Act Investigators' Manual lists (section 5.3) the presence of terriers and digging equipment as an indication of "illegal hunting posing as trail hunting." I have asked DEFRA for their view on the legality of hunts who routinely employ terriermen, but they simply replied quoting the gamekeepers' exemption word for word. However, I am aware of one police force that has disallowed terrier work on the basis that the terrier men could not rely on the gamekeepers' exemption given that they were part of the hunt, which was a trail hunt. The police considered that the terrier men could not be trail hunting one moment, and gamekeeping the next.

This certainly seems like a reasonable interpretation to me, and shows how, with a bit more enthusiasm and imagination, I believe the CPS could enforce the HA much more effectively. I know of one case in which a hunt chased a fox to ground and then called in terriermen to

dig it out. Sabs and the police were present at the dig out. When the sabs tried to prevent the dig out, they were arrested by the police for aggravated trespass. Terriermen entered a terrier into the earth, but the fox did not bolt; it was then dug out and shot. All this happened under the watchful eye of the police in a country where hunting with dogs is supposed to be banned. Now as it happens, this was unlawful because when the fox failed to bolt, the terrier men were legally allowed only to dig their terrier out, not the fox. Once the terriermen began digging for the fox, their hunting was no longer exempt because they no longer satisfied the conditions of the gamekeepers' exemption. However, I would argue that the hunt breached the HA when the terriermen entered their terrier into the earth, even if the subsequent terrier work had satisfied the gamekeepers' exemption. This is because the terriermen were part of the hunt. Had they been independent of it, and had they come across the fox in the earth themselves, then they could legally put a terrier down to make the fox bolt, assuming they had the necessary written permission. But they were not independent, and were called in by the hunt. Now, presumably the hunt would claim that their chasing the fox to ground was an accident, and had they simply left the fox alone, that would be believable by some. However, they didn't leave it alone; they called in their terriermen who put a terrier in the earth, thereby continuing the pursuit of that wild mammal with dogs by the hunt. The first part of the pursuit (by the hounds), could be an accident, but not the second part (with the terrier). It could clearly be argued in court that the huntsman was engaging in the pursuit of a wild mammal with dogs contrary to the HA when he called in the terriermen. The huntsman would not be able to claim the gamekeepers' exemption because taken as a whole, the pursuit of the wild mammal by the hunt (i.e. the pursuit first by the hounds and then by the terrier) did not satisfy its conditions. The pursuit has to be taken as a whole because the terriermen were part of the hunt and were acting on the huntsman's instructions. This would be a test case for the HA, and is just the sort of prosecution that needs to be brought if we are going to stop the arrogance of hunts that blatantly hunt wild mammals, flouting the law in front of an uncritical and unquestioning police force whilst paying lip service to an exemption in the HA.

Exemption 5: Retrieval of hares

A person can use a dog to retrieve a hare that has been shot if he has permission to be on the land.

Exemption 6: Falconry

Dogs may be used to flush a wild mammal from cover for the purpose of enabling it to be hunted by a bird of prey, if the person hunting has the permission of the landowner. In this case, there is no limit to the number of dogs that may be used. This exemption is widely used by hunts, who often go about their hunting in the normal way with a token bird of prey (normally an eagle owl) in a vehicle, which they will get out if anyone is watching. I know that doubt has been expressed by DEFRA as to whether hunting foxes could ever be classified as falconry given that the normal prey of an eagle owl is not foxes, and there is doubt as to whether an eagle owl could actually catch and kill a fox. As far as I am aware, no one has actually seen one of these eagle owls hunting foxes.

Does the HA work? Can it work?

The answer to these questions is no, and probably not in its present form.

That the HA does not work at present is blatantly obvious for anyone who attends a hunt and keeps up with the hounds. The hunts variously claim to be trail hunting, exercising hounds or carrying out exempt hunting. Yet the behaviour of most hunts is identical to their behaviour before the "ban" came into force. They still draw hounds through coverts, they still put up foxes and they still chase those foxes. Huntsmen still hunt their hounds on using the same horn and voice calls. Week after week, sabs witness foxes running through the countryside pursued by packs of hounds. This was of course the subject of the recent Lush campaign, which brought the issue out into the open. The only difference post "ban" is that hunts are more secretive and employ a variety of tactics to keep their "sport" hidden. These tactics range from simple old-fashioned violence, whereby hunt thugs attack anyone who goes near them who might be an "anti", to highly determined and organised groups of followers (who may also be violent) who act as stewards to keep sabs off private land, and the more subtle tactic of organised groups of supporters who act as spotters and report the location of sabs to the hunt so that it can avoid them, and so that it knows when it's safe to hunt. Another tactic often deployed is for the huntsman to hang back at a distance, out of sight of his hounds, when they go on cry so that he can claim it was an accident. HOWL 94 reported the recent death of six hounds of the Beaufort FH on a railway line. In newspaper reports, the hunt claimed to have been on a hound training exercise, and claimed not to know what happened but presumed that the hounds got onto the scent of a fox accidentally and crossed the railway line. Not much of a hound training exercise, was it? The hounds were out of sight and out of control and the huntsman didn't know what was happening. Huntsmen pride themselves on their control of their hounds. It is their job, and if the hounds "riot" they are able to control them. Furthermore, if the hounds had been under control initially but rioted and went after a fox accidentally, the huntsman would know that this had happened. Could the huntsman actually have known that they were after a fox and have been deliberately hanging well back so that he could claim it was an accident? Some might think so, but I couldn't possibly comment...





The reason for the lack of success of the HA is twofold. Firstly, there are the legal difficulties referred to earlier in this article: the definition of hunting and the exemptions, the most important of these being the former. As a result of the narrow definition of hunting in the HA and used by the courts, the HA simply doesn't ban a wide enough range of activities. To get a conviction, there must be an identified wild mammal being intentionally pursued by a person. To prove this, video evidence is essential. In the video, you would need to record the specific wild mammal being pursued. You would need to record the hunter engaging in the pursuit of the wild mammal, and show that hounds were employed in the pursuit. You would need to record the hunter's identity and evidence that his or her engagement in the pursuit was intentional. You would probably need to have no gaps in the video evidence. You would also need to record evidence that the hunting was not exempt, and that the hunter could not reasonably have believed his or her hunting was exempt. Proving a negative is of course very difficult. You would also need evidence of the time, the place and the date of the pursuit. Sabs spend a lot of time following hounds and see more of the hounds than anyone except the hunt staff, and yet it is rare for sabs to even see all of these things, let alone be able to capture it all on a video to a standard of criminal proof. No wonder there have been few convictions of illegal hunting.

The second problem is the lack of will to investigate illegal hunting on the part of the police and to prosecute it on the part of the CPS. Even with the problems just described, much more could be achieved by a willing police and CPS. We can all draw our own conclusions regarding the reasons for this lack of will, but I am often struck by the contrast between the enthusiasm and creativity (some might say fantasy) with

which the police and CPS prosecute hunt sabs and other animal rights activists on the one hand, and the indifference at best and legal protection at worst that they apply to hunts on the other.

What would the HA need in order to work? The HA will not work until it outlaws a wider range of activities than at present. Specifically, it must make illegal the search for a wild mammal in order to chase it. It is a ridiculous state of affairs that sabs and monitors have to follow hunts around day after day, often at great personal risk, while hunts draw covert after covert blatantly searching for a fox to chase, but with no prospect of a prosecution. Then when the hounds get on to a fox, the sabs or monitors are not able to capture that vital sequence of video evidence needed for a prosecution. This is a farce. A huntsman must be breaking the law as soon as he puts his hounds into a covert and starts to deliberately draw them through. That is the only way in which hunting can be stopped using the law. The question is, how do we make this illegal? Within the present legislation, this would be difficult.

One way would be for the CPS or LACS to bring prosecutions against hunts based on them only searching for a fox. It is difficult to record the evidence needed for a prosecution based on the pursuit of a specific animal, but it is not difficult to record evidence of hunts routinely and consistently taking their hounds from covert to covert and drawing those coverts. An expert witness could testify that the hunt was indeed searching for a fox because it was consistently taking the hounds to places where foxes were likely to be. If it was exercising the hounds or trail hunting within the law, and had no intention of chasing a fox, why would it be consistently taking the hounds to places where foxes were likely to be? Furthermore, this is exactly what the hunts did before the

“ban” when they were definitely searching for foxes. It would not be difficult to prove that the hunt was searching for a fox, or that it intended to pursue the fox if it found one; after all, it would be difficult for the hunt to claim that it intended to carry out exempt hunting if it had no bird of prey or if it was using more than two hounds, and it could hardly claim to be a group of wildlife photographers or birdwatchers. All that would be needed then is a judgement that the definition of hunting included the search for a fox with the intention to pursue it. This is not impossible, but given the recent High Court ruling described earlier, seems unlikely, and would certainly take appeal after appeal, possibly all the way to the House of Lords. Another way would be to accept that hunting did not include the search for a fox, but argue that a hunt that clearly was searching for a fox was committing the crime of attempted hunting. Attempt crimes were described in “*Hunt Sabs and the Law: Part 1*”, but basically the argument would be that the hunt was searching for a fox with the intention of pursuing it contrary to the HA, and that the search was so closely connected with the act of pursuing the fox that it was more than merely preparatory to it, and hence constituted the crime of attempted hunting. However, both these arguments, although logically quite reasonable, are unlikely to succeed in a system where many judges list hunting, shooting and fishing as their pastimes. Also given LACS’ lack of resources and the unwillingness of the CPS to prosecute hunts at all, such cases seem unlikely to be brought. A further possibility would be for sabs or monitors to record individual hunts chasing foxes on several occasions. Although on each individual occasion the hunt might claim that it was an accident, obviously there are only so many accidents a hunt can have before chasing a fox must be regarded as intentional so that taken together, the evidence amounts to intentional hunting. The amount of evidence required to build up a case like this, however, and the effort needed to do so, would be considerable.

A better solution would be to amend the HA to include a recklessness clause so that a person is guilty of hunting even if he or she does not intentionally pursue a wild mammal with dogs, but is reckless as to whether they do. Under such a clause, the huntsman of the Duke of Beaufort FH could probably be convicted over the incident that resulted in the death of six of his hounds on the railway line. Taking packs of hounds to places where foxes are likely to be and drawing them through might also be considered reckless. Alternatively, or as well, the definition of hunting in the Act could be amended to include the search for a wild mammal with the intention of pursuing it. Other ways would be to create additional offences such as going equipped to hunt with dogs, or searching for a wild mammal with the intention of hunting it with dogs. This would certainly clear up the mess that we have now, but politically speaking a revision of the HA is a remote prospect; indeed repeal seems far more likely in the present climate.

The LACS is in denial about the HA, claiming that it is working. They do not tell their supporters that hunting is probably as common now as it was before the “ban”. The HSA always tells it like it is. With the HA not working, and not likely to work in the foreseeable future, hunt sabs are as important now as they ever have been in saving our hunted wildlife. Go sab a hunt!

NOTE

"The HSA's legal officer is available, free of charge, to run legal workshops for sab groups anywhere in the country. These are highly recommended to improve sabs' confidence whilst out sabbing and improve group effectiveness. Please contact the HSA if you would like to have a legal workshop."

Disclaimer

Nothing in this article is intended to incite, encourage or condone illegal acts. The author is not a solicitor; the information contained in this article is for general information only and does not constitute legal advice. For legal advice, always seek the services of a trusted solicitor recommended by activists. See below

Legal Information for Activists

The following websites are good sources of legal information:
www.freebeagles.org
www.liberty-human-rights.org.uk

Recommended Solicitors

The solicitors below all regularly work with animal rights and other activists and are trusted.

Birds Solicitors

Tim Greene
1 Garratt Lane
Wandsworth
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SW18 2PT
020 8874 7433
Out of hours arrests: 07966 234994
Email: info@birds.eu.com
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Sonn MacMillan Walker Solicitors

Tim Walker
19 Widgate Street
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Website: www.criminalssolicitor.co.uk

Kellys Solicitors

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Bindmans Solicitors

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275, Gray's Inn Road, London, WC1X 8QB
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