

# Legal update: the case of the boiled frogs

**Peter Jenkins** joined the conference panel, adding his legal expertise to the issue of 'duty of care'. This brought up a delegate's metaphor concerning 'boiling frogs'. Peter adds this lighthearted response!



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Management gurus are deservedly fond of the pithy metaphor, the eye-catching phrase to power up a neat argument, such as tankers all-too-slowly changing course. Another evident favourite is that of frogs that gradually boil, but only if the water is slowly heated by degrees, rather than all at once. But who is actually boiling all these frogs? How can this barbaric practice be stopped? And, crucially, what recourse do frogs have under the current law for compensation? As this investigation reveals, the law has a long way to go in supporting frogs who wish to sue for long-term harm suffered in the course of the boiling process.

Firstly, it is clear that handlers do owe a duty of care to frogs, confirmed in the well-known Leaper case some 10 years ago. This duty operates both at the level of the individual frog handler and at the level of corporate handlers, who may be dealing with thousands of frogs at any one time. What this duty actually consists of is, however, open to fierce controversy.

## The law on boiling

The law, it must be said, is not against the boiling process per se. Hot water has obviously been around

since time began and occurs in many natural states, such as geysers and hot springs, as well as in domestic, industrial and laboratory contexts. What is at issue is the long-term damage that can be caused to frogs, not by boiling alone, but by breach of the handler's duty of care. This has proved a difficult point for many non-lawyers to grasp. Boiling alone is not necessarily seen as harmful; in fact, the law is reluctant to interfere with the historic right of frogs to choose to be boiled, within certain broad limits set down by health and safety law. The RSPCA, charged with monitoring overall frog welfare, has suggested safe levels and will occasionally intervene, but generally prefers to take a more 'hands-off' educational and monitoring approach on this issue.

Clearly, boiling is an extremely emotive issue, and it is striking how concern over suing for compensation has rapidly become front-page news. The *Daily Mole*, for example, is not alone in railing against the 'fevered casino atmosphere of Britain's compensation culture', with large payouts made to frogs in some recent high-profile cases. There is growing concern about the ill effects of boiling at all levels of society, including even frogspawn and tadpoles, through the impact of testing and the move towards a system based on a National Pond.

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## Law and frogs

So what is the view of the law on all this? One immediate hurdle is that the law does not recognise the everyday concept of a 'boiled frog' as such. It prefers the more pedantic, if precise, terminology of Long-Term Frog Damage Attributed to Heated Water Caused by Breach of Handler Duty of Care.

Common sense, if not medical diagnosis, suggest that boiling frogs is not good for them. However, the law does not see boiling as intrinsically harmful to frogs or other amphibians (with one important exception: there is special legislation concerning salamanders, dating back to Medieval times, under the influence of the powerful alchemist lobby).

Boiling is, unfortunately, a fact of life. What is necessary for the victim to prove, is that on the balance of probabilities, the damage was caused not by the boiling as such but (and this is clearly a high bar to leap over) by breach of handler duty of care within the boiling process.

## Case law on boiling

The successful Leaper case illustrates this very well. The frog as claimant needs, effectively, to be boiled twice in order to succeed in suing their handler. To return a frog to the very same heated pot after they have had to be removed from it, is clearly negligent on the part of the handler. That is, unless some real support measures are put in place, such as rest-periods, accurate thermometers and carefully graded increases in temperature.

The success of this breakthrough case some 10 years ago opened the feared floodgates for a wave of successful claims. More recently, the Apple Court judged in four conjoined cases that new guidelines needing setting. It confirms in a robust judgment that boiling is not inherently damaging to health; damages are payable only on proven breach of handler duty of care; and that frogs are normally assumed to be fit for their chosen and historic role, unless the individual amphibian has made it known in a clear and unambiguous manner that they are suffering ill-effects from the process of prolonged immersion in heated water.

## Individual responsibility to inform handler

Critics of the ruling have pointed out that this places too high a responsibility on the very individual whose welfare is being put at risk. Boiling, it is well known, can cause drowsiness and impaired judgment over time. The over-heated individual may well be the last to realise what damage they are actually experiencing until it is far too late. On the other hand, simply jumping out without medical evidence or going through the proper grievance

procedures is unlikely to make for a strong case at a later Amphibian Tribunal, as any solicitor will quickly point out.

Proving handler breach of duty of care is not an easy task. An individual may complain of boiling, but this may well not be judged excessive in comparison with other frogs or with other boiling centres. Only evidence of unreasonable levels of boiling will be decisive here. Provision of adequate measures for confidential frog welfare will also generally provide a strong handler defence against future liability in the longer term.

## The case of the bullfrogs

Little known outside specialist circles, the case of the bullfrogs has proved to be a critical testing ground for litigation on handler duty of care, brought as a class action by 2,000 individuals suffering long-term heat damage, allegedly caused on active service in various hotspots throughout the globe. Bullfrogs have not attracted a great deal of public sympathy for their case, partly because of the noise level associated with their sub-species, but also, it has to be said, the sense that theirs was a deliberate choice at some stage in the evolutionary process to specialise in the role of bullfrogs, a Darwinian cul-de-sac if ever there was one.

The court's ruling runs to some 400 pages and deals in great detail with the claim for damages. At one level, the answer is clear. Bullfrogs do not owe each other a duty of care on active service. Neither can the Monarch, on principle, be sued by a bullfrog. Bullfrogs are owed a duty of care, but their case failed to establish damage caused by a breach of this duty in a wide range of critical steps, ranging from the initial selection of bullfrogs, training, supervision and post-boiling support.

This wide-ranging judgment is likely to become the reference point for many cases affecting not just bullfrogs but all claims based on damage through boiling in the foreseeable future. This case brings a note of pessimism to the discussion about the hurdles facing future litigants on this issue. After all, if the bullfrogs have failed on this crucial point, how are other species likely to succeed? ■

*The author wishes to point out that no living metaphor has been harmed in the researching and writing of this article.*

### And finally...

Japanese residents in the Isahaya Bay wetlands, Southern Japan, lost their battle against land reclamation yesterday when the court ruled that mudskipper fish and fiddler crabs had no rights to bring cases to court. (Something fishy here? Ed.) *The Guardian* 16/3/05