



Animal Cruelty: The Law in New York

The American Society for the Prevention of Cruelty to Animals (ASPCA)
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I. Introduction

The successful investigation and prosecution of animal cruelty cases in New York State presents unique challenges for police, peace officers, district attorneys and judges alike. The location of our anti-cruelty laws itself creates substantial confusion. Cruelty to animals is a crime in New York. But unlike other crimes, it cannot be found in the Penal Law. Instead, the cruelty provisions, along with other sections of law governing treatment of animals, are grouped together in the Agriculture and Markets law, an unfamiliar area in the everyday work of most law enforcement officials.

Further complicating the matter, the police are not the only ones with authority to investigate animal cruelty complaints. Police, both local and state, have the power as well as the obligation to pursue all alleged crimes that come to their attention, including those involving cruelty to animals. (see **CPL sec. 150.20; Agriculture and Markets Law sec. 371**).

Peace officers employed by county societies for the prevention of cruelty to animals (SPCAs) are also empowered to investigate, apply for, and execute search and arrest warrants and participate in prosecutions of alleged animal abusers. This dual authority can create uncertainty as to who should be dealing with animal abuse complaints in a particular jurisdiction. At times, local practices may fall out of sync with the dictates of the law.

In November 1999, a new law took effect in New York that made severe cruelty to companion animals a felony offense. This latest legislative development the ability to prosecute serious, intentional abuse as a serious crime, with heightened criminal sanctions makes it that much more crucial for law enforcement personnel to be fully versed in all facets of animal cruelty law.

And there is another reason that our criminal justice system sees the need to take animal cruelty more seriously: the connection between animal abuse and violence toward other vulnera-

ble victims particularly women and children is now firmly established.¹ Indeed, most serial killers have a history of abusing or torturing animals, often before moving on to human victims.

Questions are frequently posed to the ASPCA about what exactly constitutes cruelty, torture, and proper sustenance. When is it justified to kill or harm an animal? When is neglect enough to sustain a cruelty conviction? Who should investigate cruelty complaints, the police or the SPCA? How do you get the accused to post security to cover the cost of caring for seized animals while the cruelty case is pending? What added proof requirements are necessary to convict under the felony cruelty law? When do you need expert testimony to establish the requisite elements of the case? What are the court's options in sentencing a convicted abuser?

This training manual will try to answer these and other commonly raised questions and will also hopefully provide a useful guide to law enforcement professionals involved in the investigation and prosecution of animal cruelty cases in New York.

II. Investigation of Cruelty Complaints: Police and Peace Officers

Animal cruelty is an area of the law where not just one but two separate branches of law enforcement have the authority to investigate. If we didn't know better, this fact might lead us to believe that additional investigative resources means that cruelty complaints get prompt and thorough attention in New York State. Sadly, this is not always the case. The duality of authority to investigate animal cruelty sometimes has the opposite effect. The police believe the SPCA should investigate. The SPCA, which is often overwhelmed, relies on police intervention.

The police are charged with the responsibility of investigating crime, conducting searches and making arrests (in compliance with statutory and constitutional rules). Police authority extends to all types of offenses. In the area of animal cruelty, peace officers also have the author-

¹ To read about the animal cruelty and human violence link, see Cruelty to Animals and Interpersonal Violence, edited by Randall Lockwood and Frank Ascione (Purdue University Press 1998); Child Abuse, Domestic Violence and Animal Abuse, edited by Frank Ascione and Phil Arkow (Purdue University Press 1999). The animal cruelty/human violence connection is also recognized by New York law, which requires animal cruelty investigators to report any evidence of child abuse they discover while performing their duties. See Social Services Law section 413.

ity to do many of the things the police can do. It is important to remember that the authority of peace officers to enforce anti-cruelty laws does not lessen the responsibility of the police to do the same.

Just who is and who is not a peace officer in New York State is determined by reference to Criminal Procedure Law sec. 2.10, which provides an extensive list of those individuals who can be peace officers (assuming they receive the training required by sec. 2.30). CPL. Sec. 2.10(7) provides that officers or agents of a duly incorporated society for the prevention of cruelty to animals can be peace officers.

SPCA peace officers have many of the same powers as the police when it comes to apprehending people suspected of animal abuse. It is important to know what these powers are, how they are the same and how they differ from the powers of the police.

Power to Make Arrests With Warrants

Under the Criminal Procedure Law, the authority to obtain or execute an arrest warrant (a document that compels a defendant charged with cruelty to appear in court to answer charges) rests with the police. **CPL Art.120.** Sections 371 and 372 of the Agriculture and Markets law gives SPCA peace officers power to execute arrest warrants for violations of Article 26.

Arrests without Warrants

Police Power to Make Warrantless Arrests

Both police officers and SPCA peace officers have the authority to make arrests without a warrant under certain circumstances. The police can arrest a suspect for any offense meaning violations where there is reasonable cause to believe the suspect committed the offense in the officer's presence. **CPL sec. 140.10.** Police can arrest a suspect for a crime a misdemeanor or a felony where there is reasonable cause, whether or not the offense was committed in his presence. For petty offenses (violations), the police may arrest suspects who have committed these low-level offenses within their geographical area of employment. (within the county in which the

offense is committed or the adjoining county, if in close pursuit of a fleeing suspect). **CPL sec. 140.10.**

For crimes, the police can go outside their geographical area to arrest. Nor is it relevant where the crime was committed. The police can pursue a fleeing suspect outside the state and still effect a lawful arrest.

A warrantless arrest can be affected at any hour of the day or night, and the police can use force if necessary in defense of a person or property. **CPL sec. 140.15, Penal Law sec. 35.30.** The police can also enter premises where they believe the suspect is in order to arrest him. **CPL sec. 140.15.**

Procedure Following Warrantless Arrest by Police

After a warrantless arrest, the police must without unnecessary delay bring the defendant before the court and file the appropriate accusatory instrument with the court. **CPL sec. 140.20.** Alternatively, the police can serve the defendant with an appearance ticket and release him. The appearance ticket directs the accused to appear in court on a specified time and date to answer the charges. **CPL sec. 150.20.** If there is no judge available, a desk officer at the police station or jail can fix bail and then, if it is posted, can issue and serve the defendant with an appearance ticket. **CPL sec. 150.20.**

If the suspect arrested is a juvenile, the police must notify his parents or custodian of the arrest and the place where the juvenile is being held.

Fingerprinting Requirements

After arrest, or after a defendant appears in response to an appearance ticket, the police must fingerprint him for all offenses covered under CPL sec. 160.10 (this includes all felonies, including felony animal cruelty). As a practical matter, all defendants charged with any offense against an animal can, and should, be fingerprinted. Photographing the defendant and taking his palm prints is also authorized under sec. 160.10 and should be done in every case.

Warrantless Arrests by SPCA Peace Officers

Peace officers also have the power to make warrantless arrests, but under more limited circumstances than police officers. Generally, peace officers can make arrests when they are acting pursuant to their special duties. A peace officer acts pursuant to his special duties when making an arrest when the arrest is for:

(a) an offense defined by a statute that such peace officer, by reason of the specialized nature of his particular employment or by express provision of law, is required or authorized to enforce; or

(b) an offense committed or reasonably believed by him to have been committed in such manner or place as to render arrest of the offender by such peace officer under the particular circumstances an integral part of his specialized duties.

CPL sec. 140.25 (2) (a) (b).

A peace officer acting pursuant to his special duties may arrest a person for any offense (meaning a violation) when he has reasonable cause to believe that such person has committed the offense in his presence. He may arrest a person for a crime (a misdemeanor or a felony) when he has reasonable cause to believe that the person has committed the crime, whether or not in his presence.

Peace officers also have authority to make certain arrests while they are not acting pursuant to their special duties. Within the geographical area of his employment, a peace officer can arrest a person reasonably believed to have committed an offense in his presence. A peace officer may also arrest a person he reasonably believes to have committed a felony, whether in his presence or not.

And even outside the geographical area of his employment, a peace officer can, anywhere in the state, arrest a person for a felony when he has reasonable cause to believe that such person has committed the felony in his presence, if the arrest is made during or immediately after the alleged felony or during the suspect's immediate flight. **CPL sec. 140.25 (4).**

The geographical area of employment of a peace officer is defined as follows:

(a) for peace officers employed by a state agency, the entire state;

(b) for peace officers employed by an agency of a county, city, village or town, the county, city, village or town, and also anywhere, at the particular time, where he is acting in the course of his particular duties or employment;

(c) for peace officers employed by private organizations, anywhere in the state where he is, at the particular time, acting in the course of his particular duties or employment.

CPL sec.140.25 (5)(a)(b)(c).

A peace officer may make a warrantless arrest at any time of the day or night. He, like a police officer, may use force when necessary to defend a person or property. **Penal Law Article 35.** He may also enter premises where he has reasonable cause to believe the suspect is to affect his arrest. **CPL secs. 140.27, 140.15.**

Procedure Following Warrantless Arrest by Peace Officers

After making a warrantless arrest, a peace officer must without unnecessary delay bring the defendant or cause him to be brought before a local criminal court and file or cause to be filed an appropriate accusatory instrument. **CPL sec. 140.27; 140.20, 100.50.** The arrested person must be fingerprinted and photographed. This is required for all felonies, including the felony animal cruelty law. It is also required for certain misdemeanors. **See CPL sec.160.10.** Even where not required, fingerprinting is permissible for all misdemeanors, and therefore should be done in all animal-related cases.

For certain offenses (including animal cruelty charges), if an appropriate court is not available promptly, the peace officer must bring the defendant to an appropriate police station or county jail, where the rules governing police procedures after arrest must be followed. **See discussion herein at p.6; CPL sec. 140.20 (3).**

Instead of arresting the defendant, the peace officer may, if he is authorized by law to do so, issue an appearance ticket and release the defendant. **CPL sec. 140.27 (4) (a).** Section 371 of the Agriculture and Markets Law gives an agent or officer of a duly incorporated society for the prevention of cruelty to animals power to issue an appearance ticket pursuant to CPL sec. 150.20

for any violation of Article 26 of the Agriculture and Markets Law.

Authority Under Agriculture and Markets Law

Several sections of the Agriculture and Markets law dictate the powers and responsibilities of police and peace officers in animal cruelty cases. Section 371 provides that police **must**, and SPCA agents and officers **may**, issue appearance tickets, summon or arrest and bring before the appropriate court, any person violating a provision of Article 26.

SPCA agents or officers are also empowered to lawfully interfere to prevent an act of cruelty against an animal in their presence. In addition, sec. 371 gives SPCAs authority to file a complaint claiming a violation of any law relating to or affecting animals and may also aid in presenting the law and facts before such court, tribunal or magistrate in any proceeding taken.

Note that sec. 371 does not limit SPCAs to bringing charges under the Agriculture and Markets law, but rather gives them broad authority to file complaints under any relevant provision dealing with animals.

Section 372 provides that when a complaint is filed and the court determines that there is reasonable cause to suspect that there has been or is about to be a violation of any law affecting animals in a particular building or other location, the court must immediately issue a warrant to any person authorized to make such arrests to search the relevant premises, arrest the suspect and bring him before the court.

Peace officers are authorized to make arrests for any offense involving animals and therefore can execute such a search and arrest warrant. So too, of course, can the police. Whoever executes such a warrant must of course be mindful of constitutional rules governing lawful searches. This area of law is itself sufficiently complex to warrant its own training manual. Some basic rules, however, can be mentioned here. A search warrant dictates the location that can be searched (the designated house, apartment, office building, not the neighbor's apartment, etc.). Items in plain view can be lawfully seized. Common areas (places like hallways in an apartment building) can generally be searched assuming the language of the warrant is sufficiently broad (e.g. if it says

Apartment 5b a hallway search would be questionable, although plain view rule still applies).

Peace officers are also authorized to do searches without warrants, again as long as constitutional rules are followed. **CPL sec.2.20 (1) (c)**. Except where there are exigent circumstances (e.g. the crime is being committed right now, the suspect is trying to destroy evidence or flee the premises with it) peace officers should be safe rather than sorry and obtain a search and arrest warrant. Getting the court to find reasonable cause will go a long way toward preventing a dismissal or suppression of evidence during pretrial proceedings.

There are also specific situations delineated in the Agriculture and Markets law where peace officers (and police) have the power to seize animals. Section 373 provides that SPCAs may lawfully take possession of lost, strayed, homeless or abandoned animals found in public places.

They may seize animals on private premises as well when, for more than twelve consecutive hours, the animals have been confined or kept in a crowded or unhealthy condition or in unhealthful or unsanitary surroundings or not properly cared for or without necessary sustenance, food or drink. **Section 373 (2)**. But before seizing an animal on private property, the peace officer must file (or cause to be filed) a complaint making out just and reasonable grounds. If the court finds such grounds, it must immediately issue the warrant authorizing entry on, and search of the premises.

These rules do not affect the authority to seize unlicensed dogs under section 108 of the Agriculture and Markets law.

Note that when a person is arrested for any offense, and he has an animal in his possession or in his vehicle, the police or peace officer may take possession of the animal and put it in a safe place, or turn it over to the police or sheriff of the county where the arrest is made.

III. Photographing and Documenting Evidence

Photographs

Establishing and documenting the nature and severity of an animal's injuries, as well as

its living conditions, are important to all cruelty investigations, but take on added significance with the felony cruelty law. The following tips should help investigators preserve this crucial evidence and ensure its most favorable presentation at trial and during pretrial proceedings.²

Photos of the Animals

Pictures of the animals at the scene (or as close as possible in time to when they are removed from the scene) are of paramount importance. So too are the quality, clarity and accuracy of these photos. Use a 35mm camera; make sure there is adequate lighting, and to play it safe, take numerous pictures. Polaroids are good for initial photos, such as those you would use to get a search warrant. But for all other pictures, you need high quality equipment.

When more than one animal is involved, photograph each separately, both in its entirety (its whole body) and close-up, making sure you shoot each body part with observable injuries. Clearly identify each animal (with a number or name and the date and location). It can be done as simply as having someone hold a card with this information (written large and legibly with a wide-tip marker) next to the animal while the photos are taken.

In addition to the obvious injuries or signs of starvation (e.g. cuts, bleeding, sores, skin conditions, protruding ribs), look for and photograph other signs of neglect, such as matted fur, uncut or overgrown nails, or goop seeping from the eyes. These things can cause infection or can prevent the animal from being able to maintain appropriate body temperature. Photographing them can help the prosecutor establish a pattern of neglect or general lack of care.

Also, keep in mind that cruelty investigators need to work closely with the veterinarian on the case to be sure that evidence is properly preserved for testing or examination. For example, if a necropsy (an autopsy done on animals) is going to be performed on a dead animal, the body should not be frozen, as this could effect the quality of the evidence derived from a post-mortem examination.

² These tips are derived in part from Ten Top Tips For Good Photography, Videography by Geoffrey L. Handy (Animal Sheltering, Jan-Feb 1996)

(**Note:** Legislation passed in June 2003, but not yet signed by Governor Pataki when this manual went to print, amends section 6714 of the education law to grant veterinarians immunity from liability when they in good faith report suspected companion animal cruelty that they discover while performing their professional duties. This provision of law will provide an important tool to assist law enforcement in the prompt and effective investigation of animal cruelty and animal fighting cases. The law will become effective immediately upon the Governor's signature.)

Photograph the Entire Scene, Not Just the Animals

Unsanitary, filthy or dangerous living conditions are important evidence in a cruelty case. Take pictures of the feces on the floor, the garbage strewn around the room, the overturned or empty food and water bowls, or the lack of available shelter in the yard where the dog lives. Keep in mind that before you have a search warrant, you can still photograph anything you can see in plain view without going onto private property. Once you have a warrant to search the premises, you can photograph whatever is in plain view on the premises where the animal is living.

Use All Your Senses

There is often important evidence that you cannot photograph because you cannot see it. Rather, it is evidence that you can smell and hear. If the dog or the entire house has an overpowering stench of feces or urine, describe it in writing when you experience it. Include how it made you feel (e.g. It was so overwhelming, I thought I would vomit. I had to leave the room. My eyes watered. etc.) If there are animals crying or whimpering or howling, use audio to tape these sounds and/or write down what you hear, in detail. (The puppy cringed and cried out when I tried to lift her out of the cage, as though she was in pain. The dogs were howling the whole time we were there. Their voices sounded hoarse, as though they had been at it for a long time.)

Note things like a lack of electricity, or whether it is too hot, too cold or inadequately ventilated. Remember that these things cannot be seen in a photograph, but they are important evidence of neglect or mistreatment.

Bring the Veterinarian With You

The testimony of a qualified veterinarian is essential to a cruelty prosecution. Therefore, whenever possible, bring a qualified veterinarian (a large animal vet for a horse, a small animal vet for a cat) to the scene with you. He or she should examine the animals and the living conditions and record those observations immediately. Then, after the animals are transported to the veterinarian's office for treatment, the veterinarian should document all treatments and observations, particularly those that indicate discomfort, fear or pain (lack of mobility, sleeplessness, crying, etc.).

Behavioral signs of abuse are also important evidence in a cruelty case. The treating veterinarians, investigators, and whoever has custody of the animal pending disposition of the case should observe and document any symptoms of abuse things such as cowering when approached or when a hand is raised near the animal, shaking, growling, cowering only when men (or women, or men wearing hats, etc.) come near, or trembling or wincing at being touched or when quick movements are made nearby. A description of these behaviors each time they occur, as well as a record of their frequency and duration, will supply important evidence to the prosecution.

Before and After Photos

Additional photographs of the animals should be taken and properly identified at the veterinarian's office and at all subsequent stages of healing, recuperation or weight gain. These, of course, must be clearly marked with the animal's name or identification number, the date and location (e.g. BEFORE — 6/01//99 Buffy, #120, 40 lbs.; AFTER 6/14/99 Buffy, #120, 49 lbs. After 14 days of normal feeding 4 cups per day).

Know Your Jurisdiction

You should be familiar with the judge likely to hear the case. Know what he or she expects (e.g. certification from the film developer that the photos were not altered). 8x10 prints are a good

idea so that the pictures are big enough to be seen in court. To help lay a proper foundation in court to use the photos as evidence, it's also a good idea to have an investigator in the photos.

Caution: If you use audio, make sure there are no inflammatory or inappropriate comments on the tape that may jeopardize the case. This means the audio should be limited to what you observe. Adding your own comments can render the evidence inadmissible.

IV. Animal Cruelty — Bring All Appropriate Charges

Section 353 of the Agriculture and Markets law is the main anti-cruelty provision under New York law. It is important to mention, however, that there are several other laws that also deal with the mistreatment of animals. Familiarity with all of these provisions is essential to effective investigation and to ensure that all relevant charges are brought against the perpetrator. For example, a person who has allegedly beaten a dog that he has trained and used in fighting contests should be charged under section 353 (misdemeanor cruelty) or section 353-a (felony cruelty) (depending upon the nature of dog's injuries, the nature of the defendant's behavior, and his mental state) **and also** under section 351, which makes training or causing an animal to engage in fighting **a felony**, punishable by up to four years in prison.

A neighbor who tosses meat laced with rat-poison over the fence to a dog he considers a nuisance, thankfully causing the pooch only minor digestive problems, should be charged not only with misdemeanor cruelty, but also under section 360, which prohibits the unjustified administering of any poisonous or noxious substance to an animal. This crime is a misdemeanor, punishable by up to one year in jail and/or a fine not to exceed \$1,000.

The owner or caretaker of an animal who dumps the animal on a street or at another location away from its home should be charged with cruelty under sec. 353 (neglecting to furnish the animal with necessary food, water or sustenance) and with abandonment under sec. 355 of the Agriculture and Markets law, which is also a misdemeanor.

A person who injures an animal that belongs to someone else can be charged with criminal mischief under Penal Law sec. 145.00, 145.05 or 145.10, in addition to cruelty under sec. 353

or 353-a of the Agriculture and Markets law. Criminal mischief involves intentional damage to property regardless of its value (misdemeanor), reckless damage to property in excess of \$250 (also a misdemeanor), intentional damage to property in excess of \$250 (E felony) or intentional damage to property in excess of \$1,500 (D felony). Animals are considered personal property under the law and therefore harming them can be a crime under the criminal mischief provisions of the Penal Law.

When an act of cruelty occurs inside a building, a charge of burglary may be appropriate (in addition to a cruelty charge under sec. 353 or 353-a of the Agriculture and Markets law). Burglary in the third degree (**Penal Law sec. 140.20**) is when a person enters or remains unlawfully in a building with the intent to commit a crime therein. If the defendant enters or stays in a building without permission or after permission has been withdrawn for the purpose of harming an animal, a burglary charge should be brought against him.

Charging under all applicable sections of law is of obvious value to the prosecution, since failure to sustain the proof on one offense still leaves a separate, distinct ground on which a conviction can be based. Also, conviction of multiple counts may warrant added sanctions in the mind of the court at the time of sentencing. This manual contains a list and brief summary of other sections of the Agriculture and Markets law, as well as animal-related offenses contained in other laws that can be utilized to bring the full spectrum of appropriate charges in animal cruelty cases. (see pp.42-51 herein)

Cruelty is a Continuing Offense

Just as it is important to charge a defendant with all applicable sections of law, it is also important to remember that animal cruelty under section 353 is considered a continuing offense. **People v. Minton, 170 Misc.2d 272 (Crim. Ct. Bronx Co. 1996)**. This means that a defendant may be guilty of cruelty because of a series of acts, none of which, by itself, may be sufficient to constitute a crime, but each when combined with the others, makes out the offense. For example, tying a dog outdoors on a short leash, beating and kicking the dog once a week,

depriving him of shelter during a severe storm, and of water on several other occasions, are, when taken together, part of a continuing offense under section 353. **People v. Minton, 170 Misc.2d 272. See People v. Keindl, 68 N.Y.2d 410 (1986).** Of course, depending upon the surrounding circumstances, each of these acts might, standing on its own, constitute a violation of section 353. You don't necessarily need a series of abusive events to have a successful prosecution. Each case should be determined on its own factual merits.

V. Misdemeanor Animal Cruelty — Section 353

As already mentioned, section 353 is the focal point of animal abuse cases brought in New York. Some of the language of the statute is quite archaic, due to the fact that the law is derived from an 1881 penal code provision, which was recodified into the Agriculture and Markets Law in 1965, and has remained largely unchanged since that time.³ Despite its awkward language, section 353 classifies a wide range of behaviors as constituting animal cruelty. Section 353 provides in relevant part:

A person who overdrives, overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame, and whether belonging to himself or another, or deprives any animal of necessary sustenance, food or drink, or neglects or refuses to furnish it such sustenance or drink, or causes, procures or permits any animal to be overdriven, overloaded, tortured, cruelly beaten, or unjustifiably injured, maimed, mutilated or killed, or to be deprived of necessary food or drink, or who willfully sets on foot, instigates, engages in, or in any way furthers any act of cruelty to any animal, or any act tending to produce such cruelty, is guilty of a misdemeanor, punishable by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or by both.

Section 353 Applies to Any Animal

Perhaps the most striking aspect of section 353 is the range of animals it protects. It prohibits cruelty to any animal. Animal is defined in section 350 (1) as including every living creature except a human being. Therefore, prosecution under section 353 is not limited by the type of animal that has been mistreated. While most cruelty cases you

³ An amendment to section 353 in 1985 raised the maximum permissible fine from \$500 to \$1,000.

encounter may involve animals such as dogs, cats, horses and cows, a cruelty conviction in New York has been based on the decapitation of three live iguanas. **People v. Voelker, 172 Misc.2d 564 (Crim. Ct. Kings Co. 1997).**

Cruelty and Torture Include Affirmative Acts and Omissions

Agriculture and Markets law section 350 (2) defines torture or cruelty as including every act, omission, or neglect whereby unjustifiable physical pain, suffering or death is caused or permitted. The language of section 353 also makes clear that both affirmative acts and the failure to act can constitute animal cruelty. Depriving an animal of necessary food, water or sustenance is a clear act of omission. But section 353 goes even further. A person who causes, procures or permits any animal to be overdriven, overloaded, tortured, cruelly beaten, or unjustifiably injured, maimed, mutilated or killed, or to be deprived of necessary food or drink...or in any way furthers any act of cruelty...or any act tending to produce such cruelty, is guilty of a misdemeanor. In other words, behavior we may generically consider neglectful or only an indirect cause of injury or death can form the basis for a misdemeanor animal cruelty conviction.

For example, a defendant who failed to provide a gelding in his care with sufficient food for three months, and who was aware that the horse had lost weight, was guilty of cruelty under section 353. **People v. Arcidicono, 79 Misc.2d 242, 243 (App Term, 2d Dept 1979).** A conviction for cruelty was also upheld when state troopers discovered animals with no bedding, standing shivering and uncovered in one to two feet of manure inside a barn whose door could not be closed, and whose only water source was frozen solid. **Mudge v. State, 45 N.Y.S.2d 896 (NYC Court of Claims 1944).** Permitting a limping horse to work without supplying necessary medical attention has also constituted a violation of section 353. **People v. O'Rourke, 83 Misc.2d 175 (Crim Ct. New York Co 1975)** (omission to provide necessary medical care constituted neglect and violated sec.353). **See People v. Koogan, 11 N.Y.S.2d 49 (2d Dept.1939)** (permitting horse with open sores to be hired out was torture and cruelty).

Just as failure to provide necessary medical care may constitute animal cruelty, so can

other omissions that result in harm to, or death of an animal. Failure to provide an animal with necessary shelter one of the most frequent complaints registered with police and SPCAs across the state is the type of omission that can warrant a cruelty investigation and prosecution. While lack of shelter cases often arise in conjunction with other acts of neglect or cruelty such as failure to provide an animal with adequate food, water or medical attention each of these grounds standing alone can be sufficient to warrant a cruelty prosecution.

Necessary Sustenance

Section 353 makes it a misdemeanor to deprive, cause or permit any animal to be deprived of necessary sustenance, food or drink. Food and drink are terms not generally the subject of much controversy. However, the requirement that animals be provided with necessary sustenance adds an important wrinkle to the statute. While the term is not defined in the Agriculture and Markets Law, it clearly refers to something other than food or drink. Otherwise, there would be no reason to mention it in the cruelty provision. According to Webster's 3rd New International Dictionary, sustenance means food, nourishment, to be supplied with the necessities of life.

What precisely are the necessities of life? There is little doubt among us humans that we require something beyond just food and water. Our needs are physical a warm, dry place to sleep where we are protected from the elements, and exercise so that our muscles do not atrophy. But our most basic needs also have an emotional or psychological component interaction with others, companionship. In the realm of essential human needs these are perhaps only the tip of the iceberg.

What about non-human animals? Like us, their survival depends on adequate food and water, shelter from the elements and from predators, and enough freedom of movement so that their muscles do not cramp or atrophy. Certainly these are as much a necessary of life for a dog as they are for us. And recent developments in the fields of veterinary medicine and animal behav-

ior tell us that animals have emotional needs as well.⁴ How else do we explain separation anxiety? Depression upon the death of an animal or human companion?

A dog without adequate shelter may well suffer from frigid cold and blistering heat. A dog that is chained to his doghouse every hour of every day of his life without exercise or contact with others can suffer as well. In addition to physical suffering, these animals may endure a type of psychological harm as well, stemming from a deprivation of their needs as pack animals: the need to interact and to socialize with others. (See **Appropriate Shelter For Dogs Left Outdoors** , pp.36-37 herein).

While cases of emotional or psychological harm to an animal may be more difficult to prove, they are certainly within the purview of section 353.⁵

Criminal Liability Does Not Require Ownership of the Animal

Affirmative acts can form the basis for a cruelty conviction regardless of whether the defendant owns or has any responsibility for the animal that was injured or killed. Section 353 expressly prohibits harming or killing any animal whether belonging to himself or another.

When it comes to omissions or neglect, the defendant need not own the animal to be answerable under section 353. However, he must have been responsible in some way for the animal's care. For example, the person in charge of feeding a gelding that suffered severe weight loss

⁴ Exploration of the emotional and psychological needs of animals has become a popular area of study providing a growing body of literature on the subject. **See generally, The Dog Who Loved Too Much: Tales, Treatments and the Psychology of Dogs**, Dr. Nicholas Dodman (Bantam, 1996); **The Dog's Mind, Understanding Your Dog's Behavior**, Dr. Bruce Fogle (Howell Book House 1990); **Animal Happiness**, Vicki Hearne (Harper Collins 1994); **Dogs Never Lie About Love**, Jeffrey Moussaieff Masson (Third Rivers Press 1997); **When Elephants Weep: The Emotional Lives of Animals**, Jeffrey Moussaieff Masson and Susan McCarthy (Delacorte Press 1995); **Animals as Teachers and Healers; True Stories and Reflections**, Susan Chernak McElroy (Sage Press 1996).

⁵ It is important to note that section 353 prohibits not only harming or killing animals, but also behavior that endangers the welfare of an animal, such as depriving it of food or water, or furthering any act of cruelty or any act tending to produce such cruelty. To establish these components of the cruelty law does not require proof of harm, but rather relies on evidence that the defendant's conduct endangered the animal or created a risk of harm.

and malnutrition necessitating euthanasia was guilty of cruelty pursuant to section 353 for failure to provide proper sustenance, even though he did not own the horse. **People v. Arcidocono, 79 Misc.2d 242, 243 (App Term 2d Dept 1974).**

Note that section 353 does not require any formal custody arrangement to hold a person accountable for cruelty to an animal in his care. However, investigators play a critical role in helping prosecutors prove that the defendant was responsible for taking care of the animal, and that he or she is also the person who caused the injury, harm or neglect. To ensure that this critical evidence is established, investigators should determine right away who was responsible for the care of the animal at the time the neglect happened, as well as when and where the injury or harm occurred.

Section 353 Does Not Require Proof of Malice or Intent

An important aspect of the misdemeanor cruelty provision relates to the mental state of the perpetrator. Section 353 does not expressly require proof of a particular mental state. That is, the statute does not require that a defendant intentionally, recklessly or negligently committed any of the proscribed acts. However, where criminal sanctions are imposed, there is a presumption against laws that impose strict liability that is, liability without proof of a guilty state of mind. Unless there is an express legislative intent to impose strict liability, the provision will be construed to have a mental culpability requirement. **Penal Law sec. 15.15(2); People v. Arcidicono, 75 Misc.2d 294, 296 (Dist. Ct. Suffolk Co. 1973); aff d, 79 Misc.2d 242.** As with all elements of a criminal offense, the prosecution bears the burden of establishing the mental state or mens rea beyond a reasonable doubt.

Because section 353 does not expressly require proof of a specific mental state, and because there is no legislative intent to make cruelty a strict liability offense, the prosecution will have to prove the least onerous mens rea that the defendant knowingly committed an act of cruelty. This does not require proof that the defendant was aware of the likely result of his behavior that it would cause an animal injury, suffering or death. Rather:

A person acts knowingly with respect to conduct or to a circumstance described by a statute defin-

ing an offense when he is aware that his conduct is of such nature or that such circumstance exists.

Penal Law sec. 15.05 (2).

Because it is generally impossible to determine precisely what is in another person's mind, mental states are most often proven through circumstantial evidence through examination of the defendant's behavior, his statements, the nature and severity of the injuries suffered by the animal, and any other circumstances surrounding the alleged commission of cruelty. **See generally, People v. Roque, 108 Misc.2d 965, 967 (Sup Ct. New York Co. 1981)** (knowingly may be shown circumstantially and requires evidence that the defendant had awareness of his own conduct or the existence of specific acts or circumstances).

Justification

The defendant's behavior must be unjustified to be considered cruelty under section 353. However, justification is not specifically defined in the cruelty provision or elsewhere in the Agriculture and Markets Law. Section 353 does expressly exempt from its coverage scientific tests, experiments, or investigations that use live animals, as long as those procedures are done at labs or other institutions approved by the state commissioner of health for that purpose. The commissioner is also required to make rules governing that approval process, and to inspect such facilities and revoke approval if the rules are not followed.

The concept of justification is defined in the Penal Law, where it is recognized as a defense that must be disproved by the prosecution beyond a reasonable doubt, like every other element of a criminal offense. **See Penal Law Art. 35; People v. White, 162 A.D.2d 297 (1st Dept. 1990); People v. Green, 98 A.D.2d 908, 909 (3rd Dept. 1983).** However, the defendant must first come forward with evidence that his behavior was reasonable under the circumstances. **See Penal Law sec. 35.15; People v. Hamel, 96 A.D.2d 644 (3rd Dept. 1983); But See, People v. Rogers, 183 Misc.2d 538 (2000)**(term unjustifiably in cruelty statute does not refer to defense of justification but rather sets a boundary between acceptable infliction of physical

pain, suffering, maiming, mutilation or death, and when a person's conduct exceeds such boundary)

Article 35 of the Penal Law explains when acts are justified, either because they are authorized by law, or because they are done in defense of oneself, another person, or one's property. Familiarity with these sections of the law will help in assessing whether particular behavior may have been legally justified. Section 35.05, the general justification provision, provides in relevant part that conduct that would otherwise constitute an offense is justifiable and not criminal when:

1. Such conduct is required or authorized by law or by a judicial decree, or is performed by a public servant in the reasonable exercise of his official powers, duties or functions; or
2. Such conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.

Penal Law sec. 35.05.

The remaining sections of Article 35 deal with the use of force in defense of people or property. Common to all of these provisions is that the use of force is justified only when the actor's belief that such force is necessary is a reasonable one. For example, a person may use physical force upon another person when he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by such other person. **Penal Law sec. 35.15 (1)**. Use of force is not justified, however, when the defendant provoked another to use physical force or when the defendant was the initial aggressor (unless he withdrew from the encounter, effectively communicated that withdrawal, but the other person persisted in the use of imminent use of unlawful physical force). **Penal Law sec. 35.15 (1) (a) (b)**.

As a general rule, the defendant is only justified in using the same degree of force as he

reasonably believes is used or threatened to be used against him. For example, deadly force will only be justified when the other person is using or threatening the imminent use of deadly force. **Penal Law sec. 35.15 (2).**

As mentioned earlier, the defendant's belief that force is necessary must be a reasonable one. This is an objective rather than a subjective standard. It is not enough that the defendant truly believed he was in danger of imminent harm.⁶ It must be shown that, under all of the circumstances, a reasonable person in the defendant's position would have believed as he did that the use of force was necessary. **See People v. Goetz, 68 N.Y.2d 96 (1986); People v. Baker, 155 A.D.2d 398 (1st Dept. 1989); People v. Rodriguez, 94 Misc. 2d 645 (Crim Ct. Bronx Co. 1978); People v. Gibaldi, 75 Misc. 2d 811 (Dist Ct. Suffolk Co.1973).**

Behavior involving harm to animals that might otherwise constitute cruelty could be justified if it is done in compliance with a specific law lawful humane slaughter or hunting in accord with the Environmental Conservation Law and attendant regulations, for example. **See People v. Voelker, 172 Misc.2d 564, 568 (Crim Ct. Kings Co. 1997).** But in less clear situations such as a claim of self defense or defense of another cruelty cases should be analyzed on a case-by-case basis, with careful consideration of all surrounding circumstances. Also, keep in mind that a claim of justification is one that will not be resolved until evidence is presented on both sides at trial. It is an extremely fact-sensitive issue (e.g. did the defendant provoke or instigate an attack by the animal he is accused of hurting or killing?). Therefore, a seemingly meritorious cruelty prosecution should not be abandoned based simply on a possible justification defense.

Ultimately, as our courts have so aptly noted, the justification of an act is to be determined based on the moral standards of the community. **See People v. Voelker, 172 Misc. 564** (decapitating live iguanas on film constituted animal cruelty under section 353).

⁶ The defendant is, of course, required to establish that he actually that is, subjectively believed he was in imminent danger. He must then, in addition, show that his belief was objectively reasonable under all of the circumstances.

Sentencing Under Section 353

Violation of section 353 is a misdemeanor, which is punishable by up to one year in jail and/or a fine not to exceed \$1,000. A period of probation is also a common sentence for a conviction of misdemeanor cruelty. If probation is imposed for a conviction of section 353 it must be for a period of three years (see penal law sections 55.10 [2] [c], 65.05 [3] [d] for an unclassified misdemeanor with an authorized sentence greater than three months, the period of probation must be three years).

As part of a probationary sentence, the court is authorized to impose conditions that it deems reasonably necessary to insure that the defendant will lead a law-abiding life or assist him in doing so. Penal Law sec. 65.10 (1). Conditions of probation can include an order that the defendant avoid injurious or vicious habits, undergo available medical or psychiatric treatment, participate in an alcohol or substance abuse program or an intervention program approved by the court after consultation with the local probation department or such other public or private agency as the court determines to be appropriate. Penal Law sec. 65.10 (2)(a)(d)(e). In addition, the court has the power to require that the defendant comply with any other reasonable condition, as the court shall determine to be necessary or appropriate to ameliorate the conduct which gave rise to the offense or to prevent incarceration of the defendant. . Penal Law sec. 65.10 (5).

In animal cruelty cases, perhaps the most important condition of probation that the court can impose is a condition that the defendant be prohibited from owning, living with or having contact with companion animals during the probationary period [see Agriculture and Markets Law sec. 374(5) (c)]. If, at any time during his three-year probationary sentence, the defendant violates this or another condition of his probation, the court can impose the maximum sentence permitted by law (in this case, one year in jail).

Following a conviction for animal cruelty, the court is also authorized to order that the defendant forfeit animals that are the subject of the conviction. Agriculture and Markets Law sec.

374 (5)(a).

VI. Felony Animal Cruelty: Agriculture and Markets Law Section 353-a

On November 1, 1999, a new law took effect in New York: the long-awaited and overdue felony animal cruelty provision. The result of much negotiation and compromise, the law is far from ideal. It covers only companion animals, and prohibits only what is defined as aggravated cruelty. Despite these limitations, the law is a significant step in the struggle to stop intentional animal abuse and to send a clear message to abusers that our criminal justice system will treat severe animal cruelty as the serious crime that it is.

Because severe cases of animal cruelty now carry felony consequences, careful and comprehensive investigation and prosecution take on added significance. The defense will be ready to pounce whether it's a questionable search or weak evidence concerning the severity of the animal's injuries. The law enforcement team police, peace officers and the district attorney must be ready as well, with solid evidence, a spotless investigation and expert medical testimony.

Section 353-a of the Agriculture and Markets Law, the Aggravated Cruelty provision, provides as follows:

Sec.353-a. Aggravated cruelty to animals.

1. A person is guilty of aggravated cruelty to animals when, with no justifiable purpose, he or she intentionally causes serious physical injury or death to a companion animal with aggravated cruelty. For purposes of this section, aggravated cruelty shall mean conduct which (i) is intended to cause extreme physical pain; or (ii) is done or carried out in an especially depraved or sadistic manner.

2. Nothing contained in this section shall be construed to prohibit or interfere in any way with anyone lawfully engaged in hunting, trapping, or fishing, as provided in article eleven of the environmental conservation law, the dispatch of rabid or diseased animals, as provided in article twenty-one of the public health law, or the dispatch of animals posing a threat to human safety or other animals, where such action is otherwise legally authorized, or any properly conducted scientific tests, experiments, or investigations involving the use of living animals, performed or conducted in laboratories or institutions approved for such purposes by the commissioner of health pursuant to section three

hundred fifty-three of this article.

3. Aggravated cruelty to animals is a felony. A defendant convicted of this offense shall be sentenced pursuant to section 55.10 of the penal law, provided, however, that any term of imprisonment imposed for a violation of this section shall be a definite sentence, which may not exceed two years.

Section 353-a Applies Only to Companion Animals

Unlike the misdemeanor cruelty law, which covers any animal, the felony cruelty provision addresses itself only to companion animals, a term whose definition (amended as of November 1, 1999) is contained in Agriculture and Markets law, sec. 350.

Companion animal or pet means any dog or cat and shall also mean any other domesticated animal normally maintained in or near the household of the owner or person who cares for such other domesticated animal. Pet or companion animal shall not include a farm animal as defined in this section.

An important change from the former definition is that the term companion animal now includes all dogs and cats, regardless of where they live or whether they are owned, stray, abandoned or feral. The earlier definition covered only dogs and cats that were normally maintained in or near the household of the owner or person who cares for [them]. The new law makes clear that where a dog or cat lives, or whether it is cared for or owned is irrelevant. Severe abuse of any dog or cat can be prosecuted as a felony.

Less clear is precisely which other animals are companion animals under the section 350 definition. Under the statute, any domesticated animal that is normally maintained in or near the household of the owner or person who cares for such animal would be protected under the felony cruelty law. Note that the animal need not live inside the house to qualify as a companion animal. Today, a wide variety of animals are kept as family pets horses, pigs, goats, rabbits, and turtles, to name a few. Therefore, the determination of whether a particular animal is a companion animal should be made on a case-by-case basis, following examination of the surrounding circumstances. For example, a case has been successfully prosecuted under the felony cruelty law

for intentionally setting a pet hamster on fire.

While the amended definition of companion animal covers a broad range of animals, it specifically excludes farm animals, which are defined as:

....any ungulate, poultry, species of cattle, sheep, swine, goats, llamas, horses or fur-bearing animals, as defined in section 11-1907 of the environmental conservation law, which are raised for commercial or subsistence purposes. Fur-bearing animals shall not include dogs or cats.

Agriculture and Markets Law sec. 350 (4)

Section 11-1907 of the Environmental Conservation Law classifies fur-bearing animals as beaver, bobcat, coyote, raccoon, sable, marten, skunk, otter, fisher, nutria and muskrat.

Note that animals must be raised for commercial or subsistence purposes to be considered farm animals and thereby excluded from coverage under the felony cruelty law. This means that if the animals are not raised for profit or business purposes, or as food, they are not farm animals, and may qualify as companion animals.

No Justifiable Purpose

Section 353-a requires that behavior must have no justifiable purpose to constitute felony animal cruelty. The section provides no definition of this phrase, but as discussed in the misdemeanor cruelty section of this manual, the Penal Law concept of justification excuses behavior that would otherwise be criminal if it is authorized by a specific law or if the defendant reasonably believed the use of force was necessary to prevent the use of similar force against himself or another. Again, the reasonableness of this belief is an objective rather than subjective determination. That is, would a reasonable person in the defendant's position, under the same circumstances, believe as the defendant did?

Section 353-a (2) does specify various lawful activities that would not be considered felony cruelty, including lawful animal testing, hunting, trapping, fishing, and the dispatch of rabid or nuisance animals. Just as with the misdemeanor cruelty provision, other behavior involving injury to animals may not be cruelty if specifically authorized by law.

Intent

Section 353-a requires proof beyond a reasonable doubt, that the defendant **intentionally** killed or caused serious physical injury to a companion animal. The Penal Law provides that:

a person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.

Penal Law sec. 15.05 (1).

Intent is the highest level of mental culpability in the criminal law. Evidence of negligent or reckless behavior will not suffice. Proving intent may seem like a daunting task. However, the courts have recognized that it is virtually impossible to truly discern the workings of another's mind. Therefore, in most criminal prosecutions involving an intent crime, intent is established circumstantially. In intentional assault or homicide prosecutions the circumstantial evidence takes the form of proof as to the nature of the defendant's acts and the nature and severity of the injuries he inflicted. In this manner, intent is often inferred from all relevant circumstances surrounding the infliction of harm. **People v. Horton, 18 N.Y.2d 355, 359 (1966)** (intent to kill inferred from totality of circumstances). **See People v. Jackson, 18 N.Y.2d 516 (1966)** (intent to kill may be inferred from defendant's conduct in inflicting fatal injury).

For example, the defendant's intent to cause serious physical injury in an assault second prosecution was established by evidence that he punched the victim, causing him to lose consciousness and fall to the ground, that he continued to punch the victim as he lay on the ground, and that the victim suffered the loss of two teeth and a fractured jaw requiring two surgeries. **People v. Martinez, 224 A.D.2d 254 (1st Dept. 1996)**. Similarly, intent to cause serious physical injury was established through testimony that the accused kicked the victim over a period of several hours, burned her on the ankle, bit her and repeatedly punched her in the face causing such severe disfigurement that she was unrecognizable. **People v. Knapp, 213 A.D.2d 740 (3rd Dept. 1995)**.

Evidence of the way in which the defendant swung a cue stick, which he used to strike the victim in the head, was deemed sufficient to allow the jury to infer that he intended to cause physical injury to the victim. **People v. Knox, 134 A.D.2d 704, 706 (3rd Dept. 1987)**. See also, **People v. Davis, 191 A.D.2d 705 (2d Dept. 1993)** (use of bottle to hit victim in jaw coupled with resulting fracture, loss of teeth and chipping of remaining tooth sufficient to establish intent to cause serious physical injury); **People v. Piscitelli, 156 A.D.2d 596 (2d Dept. 1989)** (evidence that defendant knocked victim down flight of stairs and repeatedly punched him in the nose sufficient to prove intent to cause serious physical injury).

In prosecutions under the felony animal cruelty law, sufficient proof of intent to kill or cause serious physical injury will depend on thorough and detailed development of the defendant's behavior and the seriousness of the animal's injuries. This will be difficult to accomplish unless the investigation includes clear, high-quality photographs of the animal at the time it was first observed or at the very latest, immediately following seizure by law enforcement. Photographs depicting grievous injuries are admissible at trial to establish intent, the existence of serious physical injury and also to show that the offense was committed with aggravated cruelty (discussed herein). See **People v. Duprey, 192 A.D.2d 716 (2d Dept. 1993)** (photos of victim's head injury admissible to prove intent to cause physical injury an essential element of assault in the second degree). See also **People v. Cruz, 672 N.Y.S.2d 26 (1st Dept. 1998)**. The ability to place pictures depicting severe or even gruesome animal cruelty before a jury is of obvious value to the prosecution of any cruelty case.

Establishing the nature and severity of the animal's injuries will be critical to prove not only intent, but also other elements of the felony cruelty charge, such as serious physical injury and the additional aggravated cruelty requirement. To successfully meet this burden, the prosecution should be armed with written documentation from treating veterinarians (one of whom should have examined the animal immediately following its seizure) concerning its condition at the time of the seizure as well as all necessary treatment administered. The veterinarians' records should include all observations, either by the vet or her staff, documenting the animal's response

to its injuries things like lack of mobility, limping, crying, cringing, loss of appetite, inability to sleep, etc.

Also, keep in mind the importance of using a veterinarian to assist in the cruelty case who has expertise in the examination and treatment of the particular species of animal that is the subject of the complaint. (You need a large animal vet to examine and treat a horse and to testify at hearings and trial concerning her findings).

The prosecution should have in its arsenal sworn statements by every witness law enforcement or lay person who observed the condition of the animal or the premises from which it was seized prior to, at the time of, or immediately following its seizure or the defendant's arrest (if the animal was not seized).

The existence of this type of evidence depends, of course, on a careful and comprehensive investigation by SPCA peace officers, police, or both. Understanding the proof requirements of the cruelty law should help law enforcement better appreciate and determine the evidence that must be gathered in each cruelty case.

Serious Physical Injury

Section 353-a requires proof beyond a reasonable doubt that the defendant intended to kill or cause serious physical injury to the companion animal. Although not defined in the Agriculture and Markets Law, serious physical injury is defined in the Penal Law, which describes it as physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ. **Penal Law sec. 10.00 (10).**

To meet the serious physical injury threshold, the prosecution must therefore first establish that the defendant caused physical injury defined in the Penal Law as impairment of physical condition or substantial pain. **Penal Law sec. 10.00 (9).** At minimum, this requires something beyond petty slap, shoves, kicks and the like. **Penal Law sec. 10.00 (McKinney's volume 39, commentary at p. 20-21).** And while the courts do not always require proof of medical

treatment to establish physical injury (**People v. Jackson**, 232 A.D.2d 193, 194 (1st Dept. 1996); **People v. Guidice**, 83 N.Y.2d 630, 636 (1994), they do generally require evidence of the appearance and severity of the injury, as well as proof that the injury caused some aftereffects, even if only for a few hours after it was inflicted. See **People v. McDowell**, 28 N.Y.2d 373, 375 (1971) (evidence of black eye without further development of its appearance, severity, swelling, or pain insufficient to establish physical injury); **People v. Jimenez**, 55 N.Y.2d 895, 896 (1982) (one centimeter cut above lip without more insufficient to prove physical injury); **People v. Oquendo**, 134 A.D.2d 203 (1st Dept. 1987) (injury consisting entirely of pain at time of commission of offense and some bruising, without evidence of any aftereffects insufficient to establish substantial pain); **People v. Chandler**, 120 A.D.2d 542 (2d Dept. 1986) (blow to head which did not cause victim to fall down, seek medical attention or suffer aftereffects did not constitute substantial pain).

Substantial pain has been established with evidence that a three-year-old assault victim was beaten with a belt for thirty minutes, causing swelling, soreness and bruises and necessitating a four-day hospital stay. **People v. Fields**, 134 A.D.2d 365 (2d Dept. 1987). Substantial pain has also been established where the victim testified that the defendant hit her in the face and that her face was killing her and that the pain continued for approximately one week. **People v. Nix**, 156 A.D.2d 722 (2d Dept. 1989). See **People v. Fallen**, 194 A.D.2d 928 (3rd Dept. 1993) (evidence sufficient despite absence of victim's testimony regarding actual pain experienced where proof that victim suffered three-centimeter laceration on her palm, which bled profusely, required stitches, resulted in scar and caused her to miss two weeks of work); **People v. Rojas**, 61 N.Y.2d 726, 727-28 (1984) (substantial pain established even where the victim did not testify regarding the degree of pain experienced where evidence showed bullet caused laceration in victim's back the result of which was still visible at trial, that victim returned to hospital after treatment because wound was oozing, and doctor testified that injury could have caused pain); **People v. Evans**, 672 N.Y.S 2d 862 (1st Dept. 1998) (substantial pain established, without testimony of victim, where evidence showed defendant beat victim in head and face causing multi-

ple bruises, bleeding and swelling, requiring application of ice packs).

Impairment of physical condition has been established where the victim was hit in the head with the barrel of a gun, causing a wound that left a half-inch scar over his eye. **People v. Tejada, 78 N.Y.2d 936 (1991)**. Proof that a police officer was bitten on both hands and that he suffered back strain during a struggle with the defendant, requiring bed rest for one week, was also held to constitute impairment of physical condition. **People v. Maturevitz, 149 A.D.2d 908 (4th Dept. 1989)**. Substantial swelling and bruising of the victim's eye (in part established with photos taken at the hospital shortly after the attack) as a result of the defendant's blow was also deemed enough to establish impairment of physical condition. **People v. Harper, 145 A.D.2d 933 (4th Dept. 1988)**. See **People v. Almonte, 102 Misc.2d 950, 953 (Sup Ct. New York Co.1980)** (cut upper lip which bled, caused by punch in the mouth, was impairment of physical condition)

As with other elements of the animal cruelty law, physical injury may be inferred from the surrounding circumstances. **People v. Wilkins, 657 N.Y.S.2d 599 (1st Dept. 1997)** (substantial pain and thus physical injury inferred from all circumstances, including age of child assault victim and force of blows administered by defendant). This is of obvious importance in animal cruelty prosecutions, which, like child abuse cases, involve victims who cannot verbally communicate the degree, severity or duration of their pain. However, nothing is a substitute for concrete evidence of injury and pain.

That is why, in a prosecution for animal cruelty, photographs and medical evidence depicting the severity of the injuries, any aftereffects and all treatments that were required are absolutely critical. The victim will never be able to say whether he suffered pain or describe the lasting effects of his injuries. This essential evidence must therefore be gleaned from other sources. Without it, the cruelty case is in serious jeopardy.

Beyond Physical Injury

To establish the level of injury necessary for a felony animal cruelty conviction, the pros-

ecution must establish not only that the defendant caused physical injury, but also that the injury was serious. Serious physical injury is physical injury that creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ. While this definition appears to provide prosecutors with several alternative grounds on which to proceed, similar evidence is generally relied on to establish all but the causes death component of the definition.

Evidence sufficient to establish serious physical injury is generally premised on proof that the injury was severe, that it necessitated medical treatment and that it caused substantial even if temporary aftereffects. For example, serious physical injury was established where the victim suffered a fractured skull, a laceration requiring eight stitches, a permanent scar, and where resulting swelling and headaches continued at the time of trial. **People v. Romer, 163 A.D.2d 880 (4th Dept. 1990).**

The evidence was likewise sufficient where an injury to the victim's thumb required medical treatment including immobilization, which caused temporary loss of use, and where the victim experienced throbbing pain for several days and tenderness for several weeks. **People v. Fortuna, 188 A.D.2d 683, 684 (3rd Dept. 1992).** See **People v. Crawford, 200 A.D.2d 683, 684 (2d Dept. 1994)** (serious physical injury established by evidence that defendant punched and kicked victim after he fell to floor, and that victim was bruised, suffered two chipped teeth and missed two weeks of work); **People v. Kern, 75 N.Y.2d 638, 658 (1990)** (severe injuries to back and eye which effected victim for almost one year deemed sufficient to establish serious physical injury); **People v. Moreno, 233 A.D.2d 531 (2d Dept. 1996)** (gunshot wound to shoulder which caused nerve damage and loss of sensation in hand was serious physical injury); **People v. Hope, 128 A.D.2d 638, 639 (2d Dept. 1987)** (substantial pain and thus serious physical injury was established where, although victim did not quantify degree of pain, there was evidence that he was punched and dragged down a flight of subway stairs, causing pain that lasted two to three weeks); **People v. Gibson, 140 A.D.2d 453, 454 (2d Dept. 1988)** (knife wound to victim's arm necessitating five days in hospital, 30 days of missed work and several months of physical ther-

apy constituted serious physical injury).

Again, keep in mind that the heightened level of injury and aftereffects required to establish serious physical injury cannot rely on testimony of the victim. Competent medical evidence, eyewitness observations, and photographs of the animal s injuries are necessary to satisfy this element of the felony cruelty provision. Also, evidence that the animal s injuries required prolonged or substantial recovery time will help establish that the harm inflicted indeed constituted serious physical injury.

In addition, behavioral symptoms of abuse cowering when approached or when a hand is raised near the animal, for example should be documented and used as part of the prosecution s case.

Aggravated Cruelty

Section 353-a has a double intent requirement. The prosecution must prove not only that the defendant intended to kill or cause serious physical injury. It must also establish beyond a reasonable doubt that the defendant acted with aggravated cruelty, defined as conduct which:

- (i) is intended to cause extreme physical pain; or
- (ii) is done or carried out in an especially depraved or sadistic manner.⁷

Agriculture and Markets Law sec. 353-a (1) (i), (ii).

Much like intent to kill or cause serious physical injury, proof of intent to cause extreme physical pain is likely to be inferred from the circumstances surrounding the commission of the offense, including the nature of the defendant s conduct and the severity of the animal s injuries. In many cases, the same veterinary, photographic and documentary evidence that will prove serious physical injury should also suffice to establish that the defendant intended to cause the animal victim extreme physical pain.

Conduct that is done or carried out in an especially depraved or sadistic manner is not

⁷ The aggravated cruelty law has been held constitutional even though it does not define the terms extreme physical pain and especially depraved or sadistic . **See People v. Knowles, 184 Misc.2d 474 (County Ct., Rensselaer County 2000)**

defined in the Agriculture and Markets law. However, the concept of depravity is one found in the Penal Law, as an element of certain homicide and assault offenses. **See Penal Law secs. 120.10(3), 125.25(2).** Depraved indifference to human life, the phrase contained in the Penal Law offenses, has been interpreted to mean unmitigated wickedness, extreme inhumanity, or actions exhibiting a high degree of wantonness. **People v. Kibbe, 35 N.Y.2d 407 (1974); People v. Northrup, 83 A.D.2d 737 (3rd Dept. 1981).** See **People v. Register, 60 N.Y.2d 270, 274 (1983); People v. Gomez, 65 N.Y.2d 9, 11 (1985).** *Black's Law Dictionary* defines depraved mind as an inherent deficiency in moral sense and rectitude . a corrupt or perverted mind... ill will, hatred, spite or evil intent (*Black's Law Dictionary, 5th Edition pp. 396, 97*).

In murder cases, depraved indifference is established through circumstantial evidence showing that the defendant's actions were committed with an extreme disregard for the life of another, typically with proof of the extreme callousness of the defendant's behavior and the severity of the injuries suffered by his victim. **See Penal Law sec. 125.25 (2); People v. Stewart, 659 N.Y.S.2d 337, 338 (3rd Dept. 1997)** (depraved indifference murder established where defendant admitted repeatedly striking victim on the back of the head with a poker); **People v. Abney, 173 A.D.2d 545 (2d Dept. 1991)** (defendant who went into a rage, repeatedly hit uncle in face and head with axe and stomped and kicked victim while he lay on ground, was guilty of depraved indifference murder); **People v. Rios, 230 A.D.2d 87 (1st Dept. 1997)** (single blow to head with baseball bat sufficient to sustain depraved indifference murder conviction); **People v. Ventiquattro, 138 A.D.2d 925, 926-27 (4th Dept. 1988)** (15-year-old defendant who handled loaded shotgun in bedroom, pointed gun at companion and pulled trigger evinced a wanton indifference to human life); **People v. Register, 90 A.D.2d 972 (4th Dept. 1982), aff d, 60 N.Y.2d 270 (1983)** (firing gun three times in crowded barroom was depraved indifference to human life).

In felony animal cruelty prosecutions, the depravity requirement will likely be satisfied with similar proof of the defendant's specific actions or failure to act, all surrounding circumstances and the nature and severity of the injuries inflicted.

Keep in mind that any circumstances that show the defendant's lack of regard for the life or well being of the animal victim are particularly relevant. For example, did the defendant make statements or act in a way that showed he did not care about the animal, or even that he derived satisfaction from harming or killing it?

Photographs of the crime scene, depicting filth, lack of food, water or shelter and any other hazards, as well as pictures of the animal's injuries, will also help establish that the defendant's conduct was depraved. Photographs of the victim, including autopsy pictures, are admissible to establish depraved indifference to human life in murder cases. They should be used this same way in felony animal cruelty prosecutions. Good photos will obviously go a long way in persuading a jury that the defendant acted with aggravated cruelty.

Conduct carried out in an especially sadistic manner is also not defined in the Agriculture and Markets law. Sadism is commonly defined as a form of satisfaction derived from inflicting harm on another. *Black's Law Dictionary (5th Edition, p.1198)*. Therefore, it seems likely that much of the same type of evidence that would satisfy the especially depraved element would also satisfy the sadistic formulation. However, this element of proof does seem to require evidence that the defendant either enjoyed or was somehow satisfied by harming the animal. Again, statements made by the defendant to witnesses, the condition of the crime scene, the extreme nature of the defendant's acts and the severity of the injuries will be critical here.

Sentencing Under the Felony Cruelty Law

Violation of section 353-a is a felony punishable pursuant to section 55.10 of the Penal Law (with one important exception). Penal law sec.55.10 (1)(b) provides that:

any offense defined outside this chapter which is declared by law to be a felony without specification of the classification thereof, or for which a law outside this chapter provides a sentence to a term of imprisonment in excess of one year, shall be deemed a class E felony.

As a class E felony, an aggravated cruelty conviction carries the following sentencing options.

The court can sentence the defendant to probation, which must be for a period of five years. **Penal law sec. 65.00**. As with a misdemeanor cruelty conviction, (**See Pages 22-23 herein**) the court has broad discretion to order conditions of probation it deems necessary, including an order that the defendant avoid injurious or vicious habits, that he receive medical or psychological treatment, and/or that he participate in an alcohol or substance abuse program. In addition, the court has the power to impose any other condition that it deems necessary to ensure that the defendant will lead a law-abiding life and not become a repeat offender. **Penal Law sec. 65.10 (2) (a) (d) (e), (5)**.

Perhaps the most important condition the court can impose on a defendant convicted of felony animal cruelty is one that prohibits him from owning, living with or having contact with companion animals during his five-year probationary period. Agriculture and Markets Law sec. 374 (5)(c).

Following a conviction of felony cruelty the court is also authorized to order that the defendant forfeit ownership of any animals that are the subject of the conviction. Agriculture and Markets Law sec. 374 (5) (a).

If the court decides to impose a period of incarceration, the felony cruelty law dictates the length of that sentence. While a class E felony normally carries a permissible sentence of up to 1 and 1/3 to four years in prison, (**Penal Law sec. 70.00 (2)(c) (3)(b)**), section 353-a provides that if a sentence of imprisonment is imposed, it must be a definite sentence and it cannot exceed two years.

The court can choose to impose a five-year period of probation, with appropriate conditions such as a prohibition on owning or having contact with animals, psychiatric treatment, and a six-month period of incarceration. (**Penal Law sec. 60.01 (2) (d)**).

A defendant convicted under section 353-a may also be ordered to pay a fine of up to \$5,000 (**Penal Law sec. 80.00 (1)**)

Note that the penalties for violation of section 353-a are not mutually exclusive. Therefore, the court can sentence the defendant to jail or probation (or both) and also order that he pay a fine.

VII. Appropriate Shelter for Dogs Left Outdoors (section 353-b)

Legislation passed in June 2003 in New York (but not yet signed by the Governor at the time that this manual went to print) will create a new section of law (section 353-b of the agriculture and markets law) making it a violation to deprive a dog left outdoors of appropriate shelter in inclement weather. The law, which will take effect sixty days after it becomes law, defines inclement weather as weather conditions that are likely to adversely affect the health or safety of the dog, including but not limited to rain, sleet, ice, snow, wind or extreme heat or cold.

Dogs that are left outdoors are defined as dogs that are outdoors in inclement weather without ready access to, or the ability to enter, a house, apartment building, office building, or other structure that complies with the standards enumerated in the law.

The appropriate shelter required by the statute includes: shelter appropriate to the dog's breed, physical condition and the climate, and must at minimum include: for all dogs restrained outdoors, adequate shade from direct sunlight when exposure to sunlight is likely to threaten the health of the dog; for all dogs left outdoors in inclement weather: a housing facility which must 1) have a waterproof roof, 2) be structurally sound with insulation appropriate to the local climate and sufficient to protect the dog from inclement weather, 3) be constructed to allow the dog adequate freedom of movement to make normal postural adjustments, including the ability to stand up, turn and around and lie down with its limbs outstretched, and 4) allow for effective removal of excretions, dirt and trash. The housing structure and the immediate area surrounding it must also be kept clean and sanitary to minimize health hazards.

Violation of the law is a violation, punishable by a fine of \$50-\$100 for a first offense and \$100-\$250 for second and subsequent offenses. Beginning seventy-two hours after a charge of violation this section, (when the dog is still outdoors in the owner or custodian's custody) each day that the owner or custodian fails to bring the shelter into compliance with the law is a separate offense.

The court is authorized to reduce the fine imposed by an amount that the defendant proves

he spent to bring the dog shelter into compliance with the law. Any dog seized for violation of this provision cannot be returned unless there is proof that appropriate shelter is being provided.

VIII. Security Posting and Forfeiture in Animal Cruelty Cases

Security Posting Agriculture and Markets Law section 373

When a person is charged with animal cruelty or animal fighting in New York, the animals in his care are often seized and placed in the custody of a humane society or SPCA until the case is resolved a process that can take many months. During this time, the animals need proper food, medical care and shelter, necessities typically provided at considerable expense by the SPCA or other impounding organization.

To reduce the burden on these organizations, New York passed a law in 1997 that authorizes the court to order a person from whom the animal is seized or the owner of the animal (if these are different people) to post security to cover the reasonable expenses of caring for the animal during the pendency of the charges. **Agriculture and Markets Law sec. 373 (6) (7).**⁸

Reasonable expenses include, but are not limited to, estimated medical care and boarding for at least 30 days. The court determines the amount of the security by considering all circumstances, including the recommendation of the impounding organization. If security is posted, the SPCA can make withdrawals from it to pay the actual costs of caring for the seized animal.

The impounding organization must follow specific procedures to get a security posting order from the court. First, it must file a petition with the court when the accused person first appears to answer the charges, or at any time thereafter during the course of the proceedings.⁹

⁸ The question often arises as to whether a proceeding seeking security posting is part of the criminal case or a separate civil proceeding. At least one court has held that the security posting proceeding is part of the underlying criminal case (**People v. Provencher**, County Court, Schenectady Co. Judge Hoye, July 10, 2002, p.8.) See Appendix A.

The court must then hold a hearing within 10 business days of the filing of the petition. The impounding organization or petitioner ¹⁰must serve a copy on the defendant, the district attorney and any interested person. An interested person means an individual, partnership, firm, joint stock company, corporation, association, trust, estate or other legal entity that the court decides may have a monetary interest in the seized animals.

At the hearing, the petitioner has the burden of proving by a preponderance of the evidence that the accused committed the acts charged in the abuse case. But even if the petitioner meets this burden, the court, has discretion, if good cause is shown, to waive the posting of security.

When the court does order that security be posted, it must be posted with the clerk of the court within five business days of the hearing. If the person ordered to post security fails to do so, the court can order immediate forfeiture of the seized animal to the impounding organization. This means that the owner or custodian loses all legal right to the animal (except for proceeds from the sale of farm animals described herein).

If the forfeited animal is a companion animal or pet any dog or cat and any other domesticated animal normally maintained in or near the household of its owner or custodian (**Agriculture and Markets Law sec. 350**) the impounding organization may either make the animal available for adoption or humanely euthanize it according to the rules set out in sections

⁹ The statute says the petition should be brought upon arraignment. This language has been the cause of some confusion. The legislative intent underlying this provision supports the interpretation that the petition may be brought either at arraignment or within a reasonable time thereafter while the case is pending. To interpret it otherwise would thwart the purpose of the law, which is to lessen the financial burden on the impounding organization, which is charged with care of the seized animals while the case is resolved.

¹⁰ While the statute speaks of the impounding organization as the entity that files the petition, the assistant district attorney handling the cruelty or animal fighting charges may also do so. The authority of the prosecutor to bring the petition is supported by the court's decision in **People v. Provencher**, County Court, Schenectady County, Judge Hoye, July 10, 2002, p.8 (See Appendix A) that the security posting proceedings is part of the underlying criminal case. Having an attorney familiar with criminal law and procedure litigate the security posting issue is obviously preferable to having an impounding organization do so (particularly where, as is often the case, the impounding organization is forced to handle the matter without benefit of counsel).

118 and 374.

If the forfeited animal is a farm animal animals like chicken and cattle that are raised for commercial or subsistence purposes the court can order that it be sold. But first, all interested persons must be given the opportunity to redeem their interest in the animal and to buy the interest of the person ordered to post the security. The court can impose conditions on this right of redemption that it considers necessary to assure the proper care of the forfeited animal.

The court is not permitted to order the sale of farm animals that are so diseased, maimed or disabled as to be unfit for sale or for any useful purpose, or that have contagious or infectious diseases dangerous to people or other animals. These animals must be made available for adoption or humanely euthanized. The court also cannot order the sale of baby rabbits (those less than two months old), baby chicks, ducklings or other fowl unless they are sold in a group of at least six and unless proper brooding facilities are provided.

Proceeds from the sale of forfeited farm animals go toward reimbursing the person who posted security and any interested persons, less any costs incurred by the impounding organization in caring for the seized animals.

If the person accused of cruelty or an animal fighting offense is found guilty of the charges before the 30 days covered by the security has elapsed, the court can still order forfeiture of the animals. In fact, section 374 specifically gives the court power to order forfeiture of abused animals when the owner or custodian has been convicted of abuse or neglect. The court has this authority even though no security was posted and even if the animal remained in the custody of the accused while his case was being decided.

When the accused is convicted before the 30 days covered by the security has elapsed, the person who posted the security is reimbursed for that portion not already spent on the care of the seized animals.

If the accused person is found innocent of the charges or if the charges are dismissed, the person who posted the security is entitled to a full refund as well as return of the animal within a reasonable time of the court's decision. A case that is adjourned in contemplation of dismissal

under section 215.30 of the Criminal Procedure Law is not considered a dismissal or acquittal under this law and therefore does not entitle the person who posted security to either reimbursement or return of the seized animal.

The law also provides an important protection for animals that remain in the defendant's custody while his case is pending. The court can order the defendant to provide necessary food, water, shelter and care for the animals. The court can also order any law enforcement officer, officer of a society for the prevention of cruelty to animals, or any agent of these organizations, to make regular visits to insure that the animals are being properly cared for until the determination of the charges. The law also permits law enforcement or an SPCA to apply for a warrant to seize the animals if they are not receiving appropriate care.

Forfeiture Following Conviction Agriculture and Markets Law sec. 374

Once the defendant is convicted of cruelty or animal fighting, the court can order that he forfeit the abused animal to an incorporated humane society, SPCA or an agent of one of these organizations.

Once the court has ordered forfeiture, the humane society or SPCA may find new homes for the animals or humanely euthanize them without legal liability to the former owner or custodian. To make sure the animals are not returned to the abusive situation from which they were rescued, the law prevents the former owner, or anyone in his household who participated in the offense or knew or should have known about it, from adopting the animal.

The law also makes it illegal for a humane society or SPCA, pound or shelter to use any cat or dog for research, experimentation or testing, or to sell, transfer or in any other way make a dog or cat available to someone else for the purpose of research, experimentation or testing.

The court even has authority to limit the convicted person's opportunity to harm other animals in the future by prohibiting him and anyone living in the same household who participated in the offense or who knew or should have known about the illegal behavior from owning, harboring, or having custody or control of any animal, except a farm animal, for a period of time the

court determines to be reasonable.

Special rules apply when someone is convicted of harming a farm animal. While the court cannot order the sale of companion animals, it can order that forfeited farm animals be sold. The court may not, however, order the sale of any animal that has a contagious or infectious disease.

Because more than one person often owns farm animals, the court cannot order forfeiture based on a conviction without first holding a hearing within 30 days of the conviction. This must be done to determine if anyone other than the convicted person has a monetary interest in the animal, and if so, the amount of that interest. Interested persons must receive five days written notice of the hearing. And notice of the hearing must be published in a local newspaper at least seven days before the hearing is held.

At the hearing, the interested persons must be given the opportunity to redeem their interest in the farm animals and also to buy the interest of the convicted person. The convicted person is reimbursed for his interest in the animals, less the cost of any fines imposed as part of his sentence and less the cost of veterinary, boarding or any other costs associated with caring for the animals during the pendency of the case.

Just as they cannot adopt a forfeited animal, under no circumstances can the convicted person, anyone living in the same household or any interested person who participated in the offense or who knew or should have known of the illegal behavior, redeem a farm animal at a court-ordered sale.

The question often arises as to whether the impounding organization can retain custody of animals that were seized but that are not the subject of the charges for which the defendant is ultimately convicted. This situation frequently occurs where large numbers of animals are seized from a single residence or facility and, after veterinary examination, charges are only deemed appropriate with respect to some, but not all of them, or where there are numerous charges brought but only some are part of the conviction. Section 374 (5) says that the court can order forfeiture of animals that are the basis of the conviction. However, there is case law relying on other provisions of law that comes to a contrary conclusion, at least under certain circumstances.

Section 373 (2) authorizes seizure of any animal which for more than twelve successive hours has been confined or kept in a crowded or unhealthy condition or in unhealthful or unsanitary surroundings or not properly cared for or without necessary sustenance, food or drink.

The Appellate Division, Third Department has held that this provision contemplates a permanent rather than a temporary remedy, since to conclude otherwise would severely limit [the] stated objective of attempting to prevent cruelty to animals. **Montgomery County Society for the Prevention of Cruelty to Animals vs. Bennett-Blue**, 255 A.D.2d 705 (3rd Dept. 1998). In accordance with this position, the court in Bennet-Blue held that the impounding organization had authority to seek permanent custody of more than 100 animals seized from the defendant regardless of the outcome of the criminal case or the terms of the plea-bargain agreement (which provided that some of the animals were to be returned to defendant). Note that the court's rationale was at least in part premised on the fact that the impounding organization was not bound by the outcome of the criminal case since it was not a party to that proceeding. **See also, Humane Society of Rochester and Monroe County v. Passmore**, 2001 NY Slip Op 40137U; 2001 N.Y. Misc. Lexis 361(Supreme Co. Monroe Co.)(Appendix B). This same reasoning that would authorize seeking permanent custody of seized animals that are not the basis of the conviction would also appear to authorize seeking security posting for the care of animals seized from unsanitary conditions but not the subject of the charges.

IX. New York State Animal Welfare Laws

Familiarity with all sections of New York law pertaining to harming or killing animals is of obvious value in the investigative, charging and prosecution phases of a cruelty case. The following list and brief summary is provided for your convenience and easy reference.

Agriculture and Markets Law

Article 26

Animal Fighting (section 351)

Prohibits training or using animals in fighting contests for amusement or gain, permitting use of one's premises for that purpose, owning, possessing or keeping an animal trained for fighting on premises where fighting occurs (felony up to 4 years imprisonment and/or fine up to \$25,000).

Prohibits owning, possessing or keeping any animal under circumstances evincing an intent that the animal engage in fighting (misdemeanor up to 1 year in jail and/or fine up to \$15,000).

Prohibits a knowing presence as a spectator having paid an admission fee or placed a wager at an animal fight (misdemeanor up to one year in jail and/or fine up to \$1,000).

Note: Circumstantial Evidence is Essential to Animal Fighting Cases. It is not necessary to observe animals engaged in fighting to charge a felony under New York law. Training animals to fight is also a felony offense. But to establish that the defendants have committed this crime (or that they have committed the misdemeanor offense involving keeping animals with the intent that they engage in animal fighting) will generally require gathering of circumstantial evidence that will help prove precisely what the defendants are unlikely to admit: that their purpose is to train dogs to fight and to fight them. Dogs (and birds) seized in suspected animal fighting cases of course provide critical evidence in the form of injuries, scars and animal-aggressive behavior. Veterinarian and behaviorist assistance is critical to assist the prosecution in analyzing and interpreting this evidence.

Other circumstantial evidence to look for: equipment and materials used to strengthen and condition dogs and to exercise and restrain dogs (treadmills, cat mills, hanging devices); wooden sticks or other instruments used to pry open dog jaws; magazines, photographs, films, videotapes or books that depict or promote animal fighting; still or video cameras used to record animal fighting activity; antibiotics, vitamins or drugs used to treat fighting animals or to enhance their performance; needles and syringes used for administration of such drugs; suture kits and other veterinary supplies; computers and computer diskettes or other media containing information related to animal fighting; registration papers or other written materials showing ownership of fighting dogs (typically pit bulls), including bills of sale, pedigrees, breeding records, veterinary records, dog fighting records, including names and phone numbers of persons suspected of being dog fighters, awards, trophies, plaques or ribbons promoting or relating to animal fighting; constructed enclosures (pits) or arenas used for dog fighting or training dogs to fight; weight scales, wash tubs, buckets, pails and sponges used to wash dogs; rules, contracts, or other written agreements concerning dog fighting.

Overdriving, Torturing and Injuring Animals; Failure to Provide Proper Sustenance (section 353)

Prohibits overdriving, overloading, torturing, cruelly beating, unjustifiably injuring, maiming or mutilating any animal, as well as depriving any animal of necessary food, drink or sustenance and any acts that cause, permit or further any of these acts of cruelty (misdemeanor up to one year in jail and/or a fine up to \$1,000).

Aggravated Cruelty to Animals (section 353-a)

Prohibits intentional, unjustified killing or causing serious physical injury to a companion animal with aggravated cruelty. Aggravated cruelty means conduct that 1) is intended to cause extreme physical pain, or 2) is done or carried out in an especially depraved or sadistic manner (felony up to two years in jail/and or fines up to \$ 5,000;or five years probation, or six months in jail and

five years probation).

Appropriate Shelter for Dogs left Outdoors (section 353-b)(passed June 2003, not signed into law at press time; effective sixty days after signature)

Requires that dogs left outdoors in inclement weather be provided with appropriate shelter which must include: protection from direct sunlight for dogs that are restrained; a waterproof roof, sufficient insulation and space to make normal postural movements, ability to effectively remove excrement, dirt and trash, a clean and sanitary structure and surrounding area (violation, \$50-\$100 fine for first offense; \$100-\$250 for second and subsequent offenses; fines may be reduced by amount proven spent on providing adequate shelter; dogs seized for violations cannot be returned without proof that adequate shelter is being provided; each day after first seventy-two hours is separate offense for each dog still outdoors and in owner or custodian s custody)

Sale of Baby Chicks and Rabbits (section 354)

Provides restrictions on the sale, barter and giving away of baby chicks, duckling and rabbits (misdemeanor up to one year in jail and/or fine up to \$500).

Abandonment of Animals (section 355)

Prohibits abandonment of any animal by its owner or possessor (misdemeanor up to one year in jail and/or fine up to \$1,000).

Failure to Provide Proper Food and Drink to Impounded Animal (section 356)

Punishes failure to provide impounded animal with good and wholesome air, food, water and shelter as a misdemeanor. If impounded animal is deprived of any of the foregoing for more than twelve successive hours, any person may lawfully enter the premises and provide the animal with these necessities; exempts such person from liability for such entry; costs of food, water, etc. chargeable to owner. (up to one year in jail and/or a fine up to \$1,000).

Selling or Offering to Sell or Exposing Diseased Animal (section 357)

Prohibits willful sale, offer of sale, use, or permitting the sale of any animal with a contagious disease dangerous to human or animal life (misdemeanor up to one year in jail and/or fine up to \$1,000).

Selling Disabled Horses (section 358)

Prohibits auctioneers from selling at public auction horses that are so ill or injured that they cannot be worked in New York without violating the cruelty laws (violation six months in jail and/or a fine between \$5 and \$100).

Live Animals as Prizes Prohibited (section 358-a)

Prohibits giving away, offering to give away, exchanging or offering to exchange for nominal consideration, animals other than purebred livestock or fish, as prizes; exempts cooperative extensions (civil penalty of up to \$250 or violation fine up to \$250).

Carrying Animal in a Cruel Manner (section 359)

Prohibits carrying an animal on any vessel in a cruel or inhumane manner; imposes time restric-

tions on confinement of certain animals during transport by railroad (misdemeanor up to one year in jail and/or a fine of up to \$1,000).

Transportation of Horses (section 359-a)

Regulates transport of horses; prohibits use of two-tier vehicles for transporting more than six horses on a highway; contains specific requirements such as adequate ventilation, smooth, non-skid surfaces and sufficient insulation to maintain appropriate temperature, sufficient space and clearance for safe ingress and egress, ramps for loading and unloading (violation fine up to \$250, subsequent violations are misdemeanors up to one year in jail and/or a fine up to \$1,000).

Poisoning or Attempting to Poison Animals (section 360)

Prohibits unjustified administration of any noxious or poisonous substance to any horse, mule, domestic cattle (felony); other animals (misdemeanor up to one year in jail and/or fine up to \$1,000)

Interference with or Injury to Certain Domestic Animals (section 361)

Prohibits interference with, injury, destruction or tampering with any horse, dog or other domestic animal used for racing, breeding or exhibition (felony).

Throwing Substance Injurious to Animals in Public Place (section 362)

Prohibits throwing, dropping or placing on a road, highway, street or public place, glass, nails, pieces of metal, or any other substance which might wound, disable or injure an animal (misdemeanor up to one year in jail and/or fine up to \$1,000).

Running Horses on Highway (section 364)

Prohibits running horses drawing any vehicle (misdemeanor up to one year in jail and/or fine up to \$500).

Clipping or Cutting the Ears of Dogs (section 365)

Prohibits cutting or clipping of dogs ears without anesthetic; requires surgery to be performed by licensed veterinarian (misdemeanor up to one year in jail and/or fine up to \$1,000).

Dog Stealing (section 366)

Prohibits removal of identification tags, enticing, seizing or molesting a dog while it is being held by a person or while it is properly muzzled or wearing identification tags, and transporting dog not lawfully possessed for purpose of selling or killing it (misdemeanor six months in jail and/or a fine up to \$200).

Removing, Seizing or Transporting Dogs for Research Purposes (section 366-a)

Prohibits seizing a dog belonging to or licensed to another for the purpose of sale, barter or giving away the dog to a laboratory or other organization engaged in research without the express consent of the owner or licensee (misdemeanor up to six months in jail and/or a fine up to \$500).

Operating upon tails of Horses (section 368)

Prohibits operating or assisting in operation on tail of horses to dock, set or otherwise alter the natural carriage of the tail; prohibits exhibition of horses with surgically altered tails (misdemeanor up to one year in jail and/or fine up to \$500).

Leaving State to Avoid Provisions of Article 26 (section 367)

Punishable under the provision violated.

Interference with Officers (section 369)

Prohibits interference with police or agent of society for the prevention of cruelty to animals in discharging their duties to enforce laws relating to animals (misdemeanor up to one year in jail and/or fine up to \$1,000).

Spay/Neuter Law (sec. 377-a)

Requires shelters, humane societies, societies for the prevention of cruelty to animals, pounds and dog and cat protective associations to do one of the following: 1) spay or neuter dogs and cats before adoption; or 2) take a minimum deposit of \$35 from adopters refundable upon proof that they have spayed or neutered their pet; or 3) charge an adoption fee that includes the cost of the spay/neuter procedure and then pay for the procedure when it is performed. Deposits that are not refunded under option 2) go into the Animal Population Control Program, which means they come back to the jurisdiction where they were collected in the form of low-cost spay/neuter vouchers for other adopters of unaltered animals.

Article 5-A

Cat/Dog Meat/Fur Ban (Agriculture and Markets Law sections 96a-96-c, 96-h, General Business Law Section 399-aa) Bans killing domesticated dogs and cats for food, as well as manufacturing, selling, importing or otherwise marketing the flesh, skin, hair or fur of these animals or products made from these body parts. Violations of the law entails substantial fines payable into New York State s Animal Population Control Fund, which provides low-cost spay/neuter services to state residents who adopt pets from shelters and humane societies (civil penalties).

Article 26-A

The Pet Dealer Consumer Protection and Animal Care Standards Act (Agriculture and Markets Law Article 26-A, General Business Law section 755)

Pet stores and breeders in New York State that sell dogs and cats to the public for profit must be licensed and inspected. The law, which is civil rather than criminal in nature, requires pet dealers to comply with comprehensive standards of animal care, record-keeping and consumer disclosure provisions. Pet dealers who violate these provisions are subject to fines, as well as suspension or revocation of the license that is required for them to do business.

A pet dealer for purposes of this law is a person, firm, corporation or other association that sells to the public nine or more dogs or cats per year. It includes pet stores and breeders, with one exception. Breeders who sell less than 25 dogs or cats per year to the public that are born and raised on the breeders residential premises are not pet dealers with respect to the sale of those animals. Note, however, that if any of these three criteria are not met (born and raised in the breeder s home) the breeder will be considered a pet dealer as long as he sells the requisite more than nine dogs or cats per year to the public for profit.

So, for example, the breeder who sells puppies he obtained from someone else (such as an out-of-state puppy mill) and the breeder who raises or keeps dogs in a kennel setting on his property, will both be considered pet dealers as long as they sell more than nine per year to the public for profit.

Duly incorporated humane societies that place animals for adoption, whether or not they charge an adoption fee, are not considered pet dealers.

The law specifically requires:

- ¥ state licensing of pet dealers
- ¥ licensing fee of \$100 for dealers who sell 25 or more dogs or cats per year or \$25 per year for those that sell fewer (between 9 and 25)
- ¥ yearly inspections of dealers that sell more than 25 dogs or cats per year
- ¥ inspection of smaller dealers when a complaint is lodged
- ¥ continued licensure dependent upon passing inspection
- ¥ licensing and inspection done by State Department of Agriculture and Markets unless written agreement is entered with county or city where pet dealer is located for that local government to conduct licensing and inspection
- ¥ compliance with humane standards of animal care, including housing, feeding and veterinary care
- ¥ record keeping and disclosure to consumers information concerning health, origin and medical history of pets
- ¥ fines and/or suspension or revocation of license for violations

This law is civil, not criminal in nature. It does not affect the authority of humane societies, police and district attorneys to investigate and prosecute animal cruelty under the criminal law. A civil violation and a criminal proceeding can be pursued simultaneously when circumstances warrant. This will typically occur where a pet dealer has violated the law with respect to care of the animals.

Article 7

Dog Licensing (sections 109, 110)

Requires that dogs be licensed at four months of age; makes proof of rabies inoculation a prerequisite to licensing; sets license fees and fee differential for unaltered and altered dogs; provides for discount purebred licenses and exemptions from licensing fees for guide, service, police, hearing and war dogs (violations punishable either under penal law or as civil offense; applicable fines listed in section 119).

Dog Identification (sec. 112)

Requires dogs wear tags bearing permanent official identification number (violations punishable either under penal law or as civil offenses; applicable fines listed in section 119).

Dangerous Dogs (sections 108 (24), 121)

Defines dangerous dog as a dog that (1) without justification attacks a person and causes physical injury or death, or (2) poses a serious and unjustified imminent threat of harm to one or more

persons, or (3) without justification attacks a service dog, guide dog or hearing dog and causes physical injury or death.

Provisions for bringing a dangerous dog petition, holding a hearing and dispositions/civil consequences of a dangerous dog finding (euthanasia or permanent confinement (section 121 (4)).

Animal Population Control Program (sec. 117-a)

Provides low-cost spay/neuter vouchers to New York State residents who adopt their pets from pounds, shelters, duly incorporated societies for the prevention of cruelty to animals, humane societies and dog and cat protective associations. Adopters pay \$30 to participating veterinarians for the sterilization procedure. The program is funded by the \$3 surcharge on unaltered dog licenses, with proceeds from the New York State spay/neuter license plate and with unclaimed deposits collected pursuant to the spay/neuter law.

Public Health Law

Rabies Inoculation (Public Health Law Article 21, sections 2140-2146, Agriculture and Markets Law sections 105-d, 109, 110, 114; General Business Law, section 753)

Dogs, cats (except ferals) and domesticated ferrets must be rabies-vaccinated by four months of age. Dogs must be licensed by four months of age. Every county where rabies is present is required to hold at least three rabies inoculation clinics each year free of charge to county residents.

Environmental Conservation Law

Licensure of Nuisance Wildlife Control Operators (section 11-0524)

Requires licensing of nuisance wildlife control operators who charge a fee to remove, possess, transport or release nuisance wildlife. Prerequisites to licensing include training in site evaluation, methods of resolving common nuisance wildlife problems (including nonlethal methods), exclusion methods, habitat modification and capture and handling of wildlife.

Nuisance wildlife operators are also required to file annual reports with the Department of Environmental Conservation specifying each client's name and address, the date of the work performed, the species of animal controlled, the abatement method used, the disposition of the animal and any other information required by the department. The department is required to annually update and make available a list of licensed nuisance wildlife control operators.

Canned Shoots (sec. 11-1904)

Prohibits any person who owns, operates or manages a facility that harbors nonnative big game mammals from knowingly permitting taking of such animals by any person who pays a fee to do by any of the following means: shooting or spearing of a nonnative big game mammal that is tied, hobbled or staked or attached to any object; shooting or spearing of a nonnative big game mammal that is confined in a box, cage, pen, similar container or fenced or other area of ten or less contiguous acres from which there is no means of escape; or the deliberate release of a nonnative big game mammal that is confined in a cage, box, pen or similar enclosure of ten or less

contiguous acres in the presence of a person who is, or will be, shooting or spearing such animal.

General Municipal Law

Reporting Possession of Wild Animals (section 209-cc)

Requires that people who possess certain wild animals, including primates, big cats, wolves and venomous snakes, report the presence of these animals on their premises to the town, city or village clerk, who in turn is required to report to the state, county and municipal police. A copy of the report must be forwarded to the fire department, ambulance or emergency medical service company covering the jurisdiction. Failure to report is a civil offense, subject to escalating fines. The law does not cover pet dealers or zoos (civil penalties).

Penal Law

Petit Larceny (sec.155.25)

Prohibits stealing property belonging to another (includes animals that are legally considered property) (class A misdemeanor up to one year in jail and/or three years probation and/or fines up to \$1,000).

Criminal Mischief (sections 145.00, 145.05, 145.10)

Fourth degree - 145.00 prohibits intentionally damaging property of another (regardless of value) or recklessly damaging property in an amount exceeding \$250 (class A misdemeanor up to one year in jail and/or three years probation and/or fines up to \$1,000).

Third Degree - 145.05 prohibits intentionally damaging property of another in amount exceeding \$250 (class E felony up to 1 and 1/3 to 4 years in prison and/or 5 years probation and/or fines up to \$5,000).

Second Degree - 145.10 prohibits intentionally damaging property of another in amount exceeding \$1500 (class D felony).

Killing or Injuring a Police Animal (section 195.06)

Prohibits injuring or killing police animals while performing its duties under supervision of police or peace officer (class A misdemeanor).

Harming an Animal Trained to Aid a Person with a Disability (sections 195.11, 195.12)

Second degree (section 195.11)

Prohibits intentionally harming an animal trained to aid the disabled while animal is aiding such person where injury renders animal incapable of performing duties for which it was trained (class B misdemeanor).

First degree (section 195.12)

Prohibits intentionally harming an animal trained to aid the disabled while in performance of its duties, such that the animal is rendered permanently incapable of performing functions for which it was trained; prohibits intentionally killing such animal while in the performance of its duties (class A misdemeanor).

Obstructing Governmental Administration in the Second Degree (section 195.05)

Prohibits intentional obstruction, preventing or attempting to prevent the administration of law or the performance of an official function by means of physical force, interference or by means of any independently unlawful act (class A misdemeanor).

Refusing to Aid a Peace or Police Officer (section 195.10)

Prohibits unreasonable failure or refusal to aid a peace or police officer in effecting an arrest or in preventing another person from committing an offense (class B misdemeanor).

Resisting Arrest (section 205.30)

Prohibits intentionally preventing or attempting to prevent a police or peace officer from affecting an authorized arrest of oneself or another (class A misdemeanor).

Sexual Misconduct (section 130.20)

Prohibits sexual conduct with an animal (class A misdemeanor).

Burglary Third Degree (section 140.20)

Prohibits knowingly entering or remaining unlawfully in a building with intent to commit a crime therein (class D felony).

Education Law

Practicing Veterinary Medicine without a License (section 6512)

Prohibits practice, offering to practice, or holding oneself out as being able to practice veterinary medicine without a license or when a license to practice has been suspended, revoked or annulled; aiding and abetting another in unauthorized practice; fraudulent sale, filing, furnishing, obtaining or attempting to fraudulently sell, file, furnish or obtain a diploma, license, record or permit purporting to authorize the practice of veterinary medicine (class E felony).

Treatment Records of Animals (section 6714)

Grants immunity from liability to veterinarians who in good faith report suspected cruelty to companion animals that they discover while treating their patients.

Vehicle and Traffic Law

Leaving Scene of Injuries to Certain Animals without Reporting (section 601)

Requires operator of motor vehicle that hits and injures a horse, dog, cat or cattle to stop and try to locate the owner or the police, peace or judicial officer for the area, to take any other reasonable steps necessary to ensure the animal receives medical attention, and to promptly report such incident to the owner, custodian or officer (violation).

Local Laws and Ordinances

Local governments in New York State have enacted provisions in their jurisdictions governing a variety of animal issues, including leash laws, ordinances regulating cats at large, limiting the number of pets per household and dangerous dogs. Note that these provisions are authorized as

long as they do not conflict with existing state, federal, or constitutional law [e.g. localities may enact their own dangerous dog laws as long as they are not breed-specific. Agriculture and Markets Law sec. 107 (5)].

X. Conclusion

With the passage of a felony animal cruelty law in 1999, the New York State legislature has recognized that intentional, severe animal cruelty is a serious crime. Creation of new laws that more appropriately classify offenses against animals is an important but preliminary step toward the protection of animals in our communities. Prompt and effective enforcement of the law is equally important. That is why all of you who devote yourselves to the investigation and prosecution of these crimes play such a vital role in the effort to stem the tide of violence against defenseless animals. Your work is difficult and, at times, even dangerous. We applaud you for doing it despite these difficulties and hope that this manual will assist in your efforts.

Appendix A

People v. Provencher, (County Court, Schenectady County July 10, 2002)

INDICTMENT #202-27

STATE OF NEW YORK
COUNTY COURT
COUNTY OF SCHENECTADY

THE PEOPLE OF THE STATE OF
NEW YORK

DECISION
AND
ORDER

-against-

THOMAS PROVENCHER and
CHRISTINE PROVENCHER,

Defendant.

APPEARANCES:

For the People:

Hon. Robert M. Carney, District Attorney
by: Matthew Schwartz, Esq., Assistant
District Attorney

For Thomas Provencher

Frank M. Putorti, Jr., Esq.

For Christine Provencher

Paul M. Callahan, Esq.

HOYE, J.

This matters comes before me following a hearing held on May 30, 2002 and thereafter continued on May 31, June 24 and June 28, 2002 to determine whether or not the Animal Protective Foundation of Schenectady is entitled to a posted security from the defendants. This matter was brought on by the filing of a petition under Agriculture and Markets law /373(6) on May 14, 2002. The defendant Thomas Provencher responded with a Notice of Cross Petitions and Affirmation dated May 28, 2002. The defendant Christine Provencher responded with an

Answer dated May 30, 2002. The People's witnesses testified at all four of the hearing dates shown above and once the People rested on June 28, 2002, the defendants moved to dismiss the petition. The court reversed decision on the motion and the defendants did not call any witnesses. Now, upon the evidence adduced at the hearing and upon all the papers previously filed herein, and due deliberation having been had thereon, I now make this decision and order, separately stating my findings of fact and conclusions of law.

FINDINGS OF FACT

History of the case

On Jan 29, 2002, the New York State Police, assisted by the Animal Protective Foundation of Schenectady, executed a search warrant signed on the same date by Town of Princetown Justice, Michelle Van Woeart. The subject of the search was the Town of Princetown property of the defendants, Thomas and Christine Provencher. In addition to other property, a total of thirteen American pit bull terrier dogs were seized. Since that date, the thirteen dogs have been held at two different shelters, The Animal Protective Foundation of Schenectady and the Mohawk & Hudson River Humane Society.

Subsequently, on May 1, 2002, a twenty-nine count indictment was handed up against both defendants. The indictment contains numerous felony and misdemeanor charges related to Animal Fighting under the Agriculture and Markets Law.

Thereafter, on May 14, 2002, a petition was filed in this court by Gordon G. Willard, Executive Director of the Animal Protective Foundation, seeking a court order directing the defendants to post a security for the reasonable expenses related to the impoundment and care of the seized dogs.

The Hearing

The petitioner's case was presented by Assistant District Attorney, Matthew Schwartz, who called two witnesses. The petitioner's first witness was New York State Police Investigator Susan McDonough. She had been the applicant for the search warrant and participated in the execution of the warrant. She has investigated and worked on numerous other cases of alleged animal abuse, including direct involvement as an investigator in three other dog fighting cases. She has acquired knowledge over the years, through training, case work and obvious personal interest, about the activity of dog fighting and the type of training required to develop dogs into fighting dogs.

McDonough testified that all but two of the thirteen dogs seized were found outside the Provencher residence, either in individual kennels or chained in the yard. The other two dogs were inside the residence. She testified as to items found and seized on the property, which, in

her opinions, constituted evidence that the dogs were being used for or trained for fighting. Among these items were a spring pole, treadmills, a concrete block, weight scales, a breaking stick, heavy chains, a carpet with apparent blood stains, injectable anabolic steroids, lactated ringers, hypodermic needles, dog fighting magazines and videos.

Both of the prosecution witnesses testified with regard to the identification of these implements with dog fighting. The first three items are used to strengthen the neck and jaw muscles of the dog, making it a more effective fighter. The breaking stick is a long piece of wood that can be inserted in a dog's mouth, between its jaws, and used to pry the jaws apart. The heavy chains are also used to strengthen a dog's neck muscles. The witnesses suggested that the carpet might have been used as a fighting ground for the dogs. The other items are described in detail below.

She also testified about visiting the Provenchers web site, which contained references to performance bred dogs, which she said refers to either dog fighting, pig hunting or weight pulling. She had extensive knowledge of terms used in the dog fighting industry. In her opinion, there was no evidence to suggest that the Provenchers dogs were involved in either of the legal pursuits of pig hunting or weight pulling, and she believed that the dogs were being trained to fight. She admitted, on cross-examination, however, that the Provenchers web site did have references to pulling contests.

All the dogs seized were photographed and assigned a number from 1 to 13. The second witness was Dr. Beverly Blinn-Knapp, a licensed veterinarian. She has been a practicing veterinarian for approximately twelve years, and is now professionally associated with the Animal Protective Foundation of Schenectady, having been in private practice in the past. She had been trained and obtained practical experience with various aspects of cruelty to animals, including dog fighting.

Dr. Blinn-Knapp was present when the search warrant was executed on January 29, 2002. Her duties at that time were to identify and assess the condition of the dogs. She observed the exterior parts of the defendants property but did not go into the house, except to briefly step into the porch area.

She prepared the People's exhibit #51, a bill for services for the thirteen dogs. This exhibit contains standard fees for boarding thirteen dogs for 180 days of \$23,400. It also contains \$1,473 in enumerated veterinary services and makes a total of \$24,873. I find these fees to be reasonable and to have been established by a preponderance of the evidence.

Dr. Blinn-Knapp testified that out of the thirteen dogs seized, six were puppies which were healthy and showed no signs of injury or involvement in fighting. The remaining seven dogs all had extensive scarring in the areas of the face and limbs, although all the scarring was well healed, with the exception of one dog (Dog #4), whose scarring was more recent. She tes-

tified that healed injuries she observed to the various dogs were consistent with dog fighting. She stated that it was significant that many of the scars were in close proximity to each other. This establishes, in her opinion, that the injuries were sustained at different times; otherwise, the blood flow in the injured area would have been restricted to the limb below the injury, to the extent that the use of the limb would have been restricted or lost.

All of the adult dogs that she observed were covered with scars and she gave an opinion that the scars were consistent with animal fighting. No other witness testified with regard to any explanation or the multiple scars other than animal fighting. In addition, Dog #3, an older female, had a traumatic injury to the bridge of her nose that had caused severe crushing to bones and tissue. The witness testified that this injury was consistent with a hard, prolonged dog bite of the kind delivered in animal fighting. No other witness testified with any explanation of this injury. Dog #12 was missing an ear flap. The witness testified that the flap had been removed by a tearing motion as could be seen by the irregular margin. She testified that this was consistent with the ear flap being bitten off in a dog fight. No other testimony was given to explain this injury.

Also of note was the fact that one of the dogs (Dog #13) had a severe skin infection in advanced stages. Dr. Blinn-Knapp testified that this dog received four weeks of medical treatment for this condition before it resolved. She also stated that she believed that the dog's owners may have declined to seek veterinary care for the animal, due to questions that the dog's scarring would raise about fighting.

Dr. Blinn-Knapp testified that the heavy chains were the only item found on the premises that posed an immediate danger to the health of the dogs, as they made it much easier for an unattended dog to suffocate if the chain was caught on an obstacle. She also testified that a breaking stick was an item not commonly found among dog owners, not even owners of multiple pit bulls.

Both Investigator McDonough and Dr. Blinn-Knapp testified as to injectable anabolic steroids found on the property. Inv. McDonough testified that steroids are used in the dog fighting industry to make dogs more aggressive. According to Dr. Blinn-Knapp, steroids have no use for the breeding of animals, as they decrease fertility. She said that steroids are used to develop muscle and cause increased aggression, as a side effect. No testing was done on the dogs for the presence of steroids. Of particular interest was the observation of Dr. Blinn-Knapp that the steroid packaging had writing in Spanish and diagrams of animals. This strongly indicates that the chemicals were intended for animal use in training dogs for dog fighting. No other explanation was offered by any witness.

Both witnesses also testified about finding lactated ringers, a fluid used to combat dehydration or to counteract shock from loss of blood or fluids after trauma. Inv. McDonough

stated that lactated ringers are used by people who fight dogs to revive them after a fight. Dr. Blinn-Knapp stated that she has never prescribed lactated ringers for dogs, and has only used them in cases of renal failure in cats. They are not generally prescribed because they have to be administered intravenously, which requires medical training.

I find Investigator McDonough to be very knowledgeable about the activity of dog fighting, and give full credence to that portion of her testimony that relates generally to the training of dogs for fighting, the specialized terminology of the trade and the training tools used in the trade. With respect to the other witness, Dr. Blinn-Knapp, I give full credence to her testimony, based upon her demonstrated knowledge of veterinary medicine, the thoroughness of her observations and her objective and straight-forward answers to questions.

CONCLUSIONS OF LAW

The initial question before me concerns the nature of the within proceeding. Is this matter under Agriculture and Markets Law /373(6) in the nature of a motion in a criminal case or a special proceeding under CPLR Article 4? Unfortunately there is no direct guidance to be found in either case law or statute. This court was able to find only two cases interpreting Agriculture and Markets Law /373 and both involved Article 4 proceedings. Montgomery County SPCA v. Bennett-Blue, 255 AD2d 705 (3rd Dept, 1998) addresses permanent removal of animals under /373(1). County of Albany v. American SPCA, 112 Misc2d 829 (Supreme Court, Albany County, 1982) addresses a seizure of animals under /373(4) or /373(2), and involved an Article 4 proceeding for a declaratory judgment. Thus neither case addresses the status of a proceeding under Agriculture and Markets Law /373(6).

There are, however, a number of provisions found within /373(6) that lead to the conclusion that this is not an Article 4 proceeding. Initially, the petitioner must show that a crime has been committed, even though the standard of proof is by a preponderance of the evidence rather than beyond a reasonable doubt. Further, /373(6)(b)(1) provides that the petition shall be filed with the court and that the court shall set a hearing date. Thereafter the petitioner shall serve a true copy of the petition upon the defendant and the district attorney. [emphasis supplied] This is contrary to the procedure of CPLR Article 4 in that there is no provision for a notice of petition (CPLR/403). Neither is there any other provision for obtaining jurisdiction over the defendant, presumably because jurisdiction has already been obtained in the underlying criminal action. Finally, the responding party is referred to as the defendant rather than the respondent as required in CPLR/401. Based upon these elements of Agriculture and Markets Law /373(6) this court concludes that the within proceeding is in the nature of a motion in the underlying criminal matter rather than a summary proceeding under CPLR Article

4.

The next issue before me concerns the status of the notice of cross-petition filed by defendant Thomas Provencher. This was not accompanied by an actual cross-petition; instead it was annexed to an attorney's affirmation. While containing five points, the affirmation makes four basic assertions: (1) the petition lacks merit and should be denied, (2) some of the dogs are not identified or misidentified and should be returned, (3) the search warrant was improper, and because of the above, (4) the dogs should be returned. The first point could have been contained in an Answer, and is addressed in the conclusions regarding the merits set forth below. The second point does not appear to be addressed to any requirement of Agriculture and Markets Law §373 with regard to non-farm animals. The petition simply refers to 13 dogs seized from the defendants. These dogs were arbitrarily numbered by the prosecution witnesses and referred to consistently during their testimony. There was no evidence submitted to indicate that the animals had other identifying numbers, like A.K.C. numbers. The defendants did not testify, but their attorneys sometimes referred to the dogs by given names, which was not a better way of identifying the dogs, as two of the dogs had the same name. Neither, of course, could the People be expected to know or identify the dogs by name. Finally, the court notes that the method of identification utilized by the People in this proceeding did not appear to produce any confusion and was sufficient to allow the defendants' attorneys to cross-examine the prosecution's witnesses extensively with regard to each of the dogs seized. Accordingly, I conclude that the identification procedures used by the People were sufficient for the purposes of the within proceeding.

The third point is, essentially, a request for a Mapp hearing and has been included in an omnibus motion addressed to another judge. Accordingly, I decline to rule with regard to this issue.

The next issue concerns the applicability of Agriculture and Markets Law §118, which requires notices upon the seizure of dogs. The wording of this section appears to limit its applicability to seizures under Article 7 of the Agriculture and Markets law. Accordingly, I conclude that it is not applicable to this matter.

Similarly the procedure outlined in Agriculture and Markets law §373(7) is not available to the defendants herein because it only applies in cases where the dogs have not already been seized.

The other procedural issue before me concerns discovery. There is no provision for discovery under Ag & Markets Law §373(6) and very little provision for discovery under CPLR Article 4. The legislature perceived discovery as a time consuming process and envisioned Article 4 proceedings as being swiftly resolved. The same would undoubtedly be true of §373(6) proceedings if the issue had been considered. The People have provided the defen-

dants with those items that are appropriate Rosario and Brady material for a pretrial hearing in a criminal case. I have already ruled orally that this is an adequate level of discovery. I repeat that determination here, noting that this sort of proceeding was clearly intended to be as swiftly resolved as possible.

The last issue is not in the nature of a defense but is a prayer for relief that would be the subject of a cross-petition. There is no provision under Agriculture and Markets Law §373(6) for a cross-petition unless and until the underlying criminal action is resolved in favor of the defendant. CPLR Article 4 is not as clear, but as least one court has held that a cross-claim is not permitted in a summary proceeding without leave of the court. O Connor v. D Apice, 156 AD2d 610(2nd Dept., 1989). Finally, County of Albany v. American SPCA, 112 Misc2d 829(Supreme Court, Albany County, 1982), is good authority for the proposition that a dog owner seeking return of animals should bring an Article 78 proceeding. 112 Misc2d at 831. Accordingly, I find that the cross-petition should be dismissed, except for those portions that may be treated as an answer.

With regard to the merits of the within proceeding, I find that the People have shown by a preponderance of the evidence that the defendants, acting in concert, violated a provision of the Agriculture and Markets Law. Specifically, the People have shown that the defendants violated Agriculture and Markets Law §351(3)(b), owning dogs under circumstances evincing an intent to engage in animal fighting. Accordingly the defendants motion to dismiss the petition is denied.

I further conclude that the People have shown by a preponderance of the evidence that the reasonable expenses that have been or are expected to be incurred by the impounding organization for a period of six months from the time the animals were seized are \$24,873.00. The defendants have raised an objection to the daily maintenance fee of \$10.00 per day for each of three animals which are not being housed but petitioning organization by have been placed with another animal protective organization presumably because of lack of space. Defendants do not question that the animals were seized by the petitioner, which is all that is required for Agriculture and Markets Law §373(6). Neither do I find the charges of \$10.00 per day per animals to be unreasonable.

I also conclude that the security requirement should not be waived in this case. The defendants allegation that several of the dogs were house pets was not supported by any direct evidence, as it certainly could have been. A waiver of security in a case under Agriculture and Markets Law §373(6) where the prosecution has met its burden of proof and the defendants have not offered any evidence at all is not appropriate. Further, defendants various motions for return of the animals are denied for the reasons stated above. Defendant Christine Provencher s motion to dismiss the within prosecution on the basis of New York Constitution, Article 1,

Section 12 is also denied with regard to this proceeding and without prejudice to further proceeding in this case.

Finally, there is the issue of the nature of the deposit. While the section does not specify, it does make provision for the petition to deduct its incurred expenses from the security as deposited. Therefore, it does not appear that Agriculture and Markets Law 373(6) contemplates any kind of security other than a deposit of money.

Therefore, the relief sought in the position is granted and the defendants are ordered to post security with the petitioner by depositing with them the sum of \$24,873.00 in cash within five business days from the receipt of this decision and order.

The foregoing constitutes the decision and order of the court.

ENTER
DATED

-

POLLY A. HOYLE
ACTING SCHENECTADY COUNTY COURT JUDGE

Appendix B

Humane Society of Rochester and Monroe County v. Passmore, 2001 NY Slip Op 40137U (Supreme Court, Monroe Co. 2001)

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[*1] Humane Society of Rochester and Monroe County, Inc.,
Plaintiff, v. Harold E. Passmore, Defendant.

Index No. 2001/3258

SUPREME COURT OF NEW YORK, MONROE COUNTY

2001 NY Slip Op 40137U; 2001 N.Y. Misc. LEXIS 361

April 24, 2001, Decided

NOTICE:

[**1] THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE OFFICIAL REPORTS.

DISPOSITION:

Plaintiff allowed to retain possession of the animals. No costs or expenses charged by either party against each other.

COUNSEL:

Harris, Chesworth & O'Brien (Michael P. Leone and Salvatore Cipolla, of counsel), attorneys for plaintiff, Rochester, New York.

Ziff, Wiermiller, Hayden & Mustico, LLP (Carl T. Hayden, of counsel), attorneys for defendant, Elmira, New York.

JUDGES:

Andrew V. Siracuse, J.S.C.

OPINION BY:

Andrew V. Siracuse

OPINION:

MEMORANDUM DECISION

ANDREW V. SIRACUSE, J.

Last October, in an undertaking that attracted the attention of television, [*2] newspapers, and advocates for animals throughout western New York, some 235 animals were taken from the farm of Harold Passmore, a retiree who lives on the border with Pennsylvania at the end of a dirt road in Caton, New York. Because no local facilities could house such a large number of animals or provide the care they needed, the animals were taken to Lollypop Farm, the plaintiff's facility in Egypt, New York. Mr. Passmore was charged with violations [**2] of Agriculture and Markets Law /353.

Pursuant to a plea bargain in Caton Town Court that was much criticized in the Rochester media, Mr. Passmore entered an Alford plea to a single count of neglect, a plea which does not concede liability. Town Justice Matusick issued a complex probation order, permitting the return of approximately half of the animals at Lollypop Farm and directing that Mr. Passmore's farm be visited periodically by veterinarians to ensure that he was treating his animals properly.

Before Mr. Passmore could travel to Rochester to bring his animals back the Humane Society commenced this action, seeking to retain all of the animals under authority of sections 373 and 374 of the Agriculture and Markets Law. By Order to Show Cause, to be served by March 23, 2001, and returnable on April 20, 2001, Mr. Passmore was ordered to show why the animals should not be kept by the plaintiff.

The effect of such an order, of course, is to bring the matter before the court; the burden remains on the plaintiff. Mr. Passmore's counsel accepted service of the Order to Show Cause, was in touch with the court when it [*3] rescheduled what all parties referred to [**3] as the hearing date, but did not serve answering papers until a few days before the hearing. In those papers he raised objections to the procedure and to the jurisdiction of the court, contending that an identical proceeding had been brought by the plaintiff in Steuben County and then withdrawn with prejudice. This was denied by the plaintiff in a reply affidavit.

A hearing was held, as scheduled, on April 20, 2001. Counsel for the plaintiff presented four witnesses and the defense called three, including Mr. Passmore himself. Before testimony was taken, however, defense counsel moved for dismissal. The court reserved on this motion and took testimony. As a preliminary matter, therefore, it is necessary to address the defendant's motion.

This motion, as elaborated in oral argument, raised three issues: first, an alleged failure of procedural due process in the short time allowed before the hearing, without time to answer or for discovery; second, the alleged failure to give notice that the April 20 proceeding would be a full-blown hearing rather than a motion argument; and, finally, the previously-mentioned contention that the plaintiffs counsel had consented to the plea bargain, [**4] had withdrawn the Steuben County action and explicitly waived any right to bring this present action. Counsel maintained that the speed with which this matter was handled gave him no time to bring proof on this last point. He requested either dismissal or an adjournment.

The first two of these points may be dealt with together. The defendant had almost a month in which to respond and during which he could have asked for discovery; in that period he could easily have contacted the court had his [*4] preparation been hindered in any way. He did not do so. Defense counsel repeatedly argued that he had received an amended complaint less than 20 days before the return date, giving him no time to respond; but he had ample time to respond to the original complaint, which raises the same issues, and also did not do so. In extenuation he argues that he was taken by surprise only a few days before the hearing to discover that evidence would be presented there.

Yet there were no preliminary legal issues raised by the plaintiff s papers; they raise only the factual question of whether the animals taken to Lollypop Farm had been neglected. Such legal questions as now have to be resolved were raised [**5] by defense counsel. There would have been no point to having an appearance on the return date of the Order to Show Cause if fact questions were excluded. The court could have done nothing more than set a date for a hearing.

It was the clear expectation of both the plaintiff and the court that witnesses would be called on the return date, and the court has in its possession a letter from defense counsel s firm confirming the date for the Order to Show Cause Hearing. While any misapprehension on the defendant s part is unfortunate, the court cannot see that defense counsel was led astray by anything other than his own assumptions. The claim that the defendant has not had time to prepare a response is unfounded.

The defendant also failed to establish that this action is barred by the existence of a prior action in Steuben County. Once again, counsel claimed that the unexpected nature of the hearing put him at a disadvantage, in that he could [*5] produce no documentation of the events he claimed happened. Yet if the April 20 proceeding had not been a hearing but a motion argument, as counsel claims he believed, he would have been expected to bring support for his con-

tentions in his [**6] motion papers or a supplement of some sort, as he was in effect moving to dismiss. Since counsel was in control of the time and manner in which this specific issue was raised, he cannot complain that he has not been given time to establish it.

The defendant's motion is therefore denied in its entirety. This remains, however, an unusual proceeding, and one without explicit support in statute. The court, instead, has followed a decision from the Third Department, *Montgomery County Society for the Prevention of Cruelty to Animals v Juliana Bennett-blue* (255 A.D.2d 705), which is extraordinarily close to the present one in its fact pattern and which, as the sole Appellate Division authority on this point, binds trial courts in all Departments.

In that case

Plaintiff and the Sheriff's Department raided defendant's farm, located in the Town of Perth, Fulton County, and found 148 live animals and numerous decomposing animal bodies; many of the animals found alive were severely malnourished and approximately 34 animals had to be immediately destroyed. The Sheriff's Department seized the remaining animals and placed them in plaintiff's custody and defendant was charged, [**7] in violation of Agriculture and Markets Law § 353 and 356, with several misdemeanor counts of cruelty to animals.

Thereafter, in accordance with a plea agreement, defendant entered an Alford plea to a violation of Agriculture and Markets Law § 369, interference with officers, and was sentenced to a period of probation. The terms of probation included, inter alia, monthly monitoring of defendant by licensed veterinarians for one year and, further, that the animals seized, except those adopted out to other families, would be returned to her. The plea and sentence agreement was reduced to writing and executed by defendant, her attorney, an Assistant District Attorney and the Town Justice; significantly, a representative of plaintiff's organization did not sign the agreement. Subsequently, plaintiff commenced this action pursuant to Agriculture and Markets Law § 373 seeking, inter alia, permanent custody of the seized animals (id., at 705-706).

In construing sections 373 and 374 of the Agriculture and Markets Law together, the Appellate Division held that the Society had standing to [**8] commence this type of action as well as the authority to seek permanent custody of the animals it seized from defendant, regardless of the criminal proceedings or the plea bargain (loc. cit.). The defendant's arguments based on res judicata and double jeopardy [*7] grounds were rejected, and the trial court's verdict was affirmed.

There is only one distinction that the court can see between that case and the present one, and that is the party named as plaintiff. In the cited case the plaintiff, though located in a different county, was apparently the society chartered to look after animal welfare in the county where the animals were found. Here, on the other hand, the animals were in a different county, and the Monroe County society took possession at the request of the local organization because that group's facilities were inadequate to house so many animals.

In his closing argument defense counsel laid stress on this fact, arguing that Steuben County had not authorized the present plaintiff to pursue a remedy which belonged only to the home county of the animals. But this is a distinction without a difference. Both relevant sections of the Agriculture and Markets Law speak of [**9] the American Society for the Prevention of Cruelty to Animals, or any society duly incorporated for that purpose (374[1]; the wording in 373[1] is similar but not identical). No system of county-by-county jurisdiction is intended, and therefore the Monroe County Society may maintain this action.

The court is thus free to address the merits of the case. This proves to be the least difficult aspect of the case, because the defendant did not directly confront the testimony of plaintiff's witnesses. These testified that thick layers of manure covered the bottom of most cages, requiring animals to stand and sleep in filth; dead animals were found in cages and pens with live ones; horses' hooves were unkept, some growing out to resemble a Turkish slipper and others severely [*8] deteriorated due to the lack of a farrier's care; cages with open bottoms were stacked so droppings fell from one animal onto another. Many of the animals seized were found to be severely malnourished, and veterinarians determined that a quarter of them should be euthanized. The record contains other, similarly distressing accounts.

In response to this Mr. Passmore attempted to show, both by direct evidence [**10] and in the thrust of his counsel's cross-examinations, that he was now able to look after the returned animals properly. He had photographs of new and sanitary cages, and by testimony of other poultry fanciers established that he had an excellent local reputation for the quality and health of the rare birds he liked to show at county fairs.

In addition, defense counsel suggested that the plaintiff was attempting to hold Mr. Passmore to a gold standard of animal care, one practiced by similar societies but unattainable in the hardscrabble world of the working farmer.

The court does not agree with this last point, in particular. The condition of these animals went far beyond a degree of unkemptness or dirt. One does not need a degree in agricultural science to know that animals cages need to be cleaned regularly. Most significantly, Mr. Passmore s own testimony contradicted his lawyer s arguments, because it was clear that the appalling conditions discovered last fall were not necessarily representative of his farm.

Mr. Passmore is clearly a man who values his independence, and he was ill at ease when called upon to defend his conduct. Just as clearly, he struck the court [*9] as [**11] someone who genuinely wanted to do best by his animals, though lacking the sentimental regard for them that urbanites often confuse with care. The court rejects any insinuation that he acted with conscious or intentional cruelty.

At the same time, however, the standard for cruelty and animal neglect is, like negligence, an objective one, and Mr. Passmore fell short of the minimum required by law. The plaintiffs testimony amply brought home the results of what appears to have been inattention; and Mr. Passmore s own testimony furnished an explanation for it. He had experienced a number of time-consuming problems, including the loss of a barn roof and an inoperable manure spreader, and these difficulties led his attention away from the animals.

This may be a reasonable explanation, but it is not an excuse. With any animal comes a degree of responsibility, and a farm with more than 300 animals, some of them rare, demands a great deal of attention. The court concludes that adequate care of the vast number of animals in his menagerie proved to be beyond Mr. Passmore s powers, especially with the additional problems he faced last year.

This might not have led to the disastrous conditions [**12] found by the plaintiff, but Mr. Passmore was both unwilling to seek help and apparently unaware of the consequences of his inaction. He showed a strong prejudice against veterinarians, asserting that he had lost more animals to vets than to his own care. Far worse, however, was his explanation for the condition of the cages: he told the court that his manure spreader was broken for three to four months.

It argues strongly against the defendant s concern for the animals that he [*10] seems to have left their cages uncleaned for the sole reason that he had no way to distribute their wastes over his fields. So, too, does his almost casual assurance that his animals were all well fed, when he admitted to the court that lighting conditions in the bam were so poor that he could not see if some of them were getting food or not. This may in part explain the number of dead animals

found rotting in cages and pens with live ones.

The court finds, then, that the animals were indeed neglected, though it does not exclude the possibility that Mr. Passmore might in other circumstances be able to keep them in reasonable health. The question for the court is whether, in light of this neglect, Mr. Passmore [**13] ought to have the animals returned to him.

It seems most likely that Justice Matusick of Caton Town Court had similar concerns, because his probation order would have the effect of reducing the size of Mr. Passmore's collection and monitoring his care. While the court does not agree with this result, it gives Justice Matusick full credit for a scrupulous approach to a difficult question. The highly-charged language with which the plaintiff's papers characterized Justice Matusick's deliberations is entirely uncalled for.

Indeed, this court gave serious consideration to a similar result. In the end, however, such a plan is quite possibly beyond this court's powers and the court believes that it has little hope of success.

The legal issue has not been addressed by any court. Justice Matusick was acting in the context of a criminal proceeding, with considerable flexibility in the [*11] crafting of an appropriate order of probation. This proceeding, however, would seem to be limited by the terms of Sections 373 and 374 of the Agriculture and Markets Law, and these speak of the neglecting party's forfeiture of the right to keep the animals (∕ 374[5][a]). No intermediate remedies are specified, [**14] and the statute very clearly bars sale or return of the animals even to those living in the same household as the original owner (∕ 374[5][d]).

Even were the court not limited to a single remedy, it is not apparent that a period of probation, supervision or training would change the way Mr. Passmore acts or prevent a recurrence of the neglect the next time his attention is distracted by the inevitable crises of rural life. His counsel protested that he was being made to suffer for a refusal to express remorse. This is simply not true; but it does point to a genuinely significant question, which is Mr. Passmore's refusal to admit that problems existed on his farm. Similarly, this refusal undercuts his claims that he had no opportunity to remedy the conditions before his animals were taken from him. The statute does not require that he be given a warning, though the local animal control officer testified that he left his card and then a notice on Mr. Passmore's door before he visited in late September and decided, without telling Mr. Passmore, that he would ask that the animals be

confiscated. In light of Mr. Passmore's consistent denials, in court and out, that the animals were [**15] in any way neglected, the court cannot withhold the plaintiff's requested remedy because he was not given time to improve conditions he maintains were satisfactory.

The plaintiff, then, is to be allowed to retain possession of the animals [*12] under authority of the Agriculture and Markets Law, to sell or put up for adoption as it sees fit. There remains the issue of money. Mr. Passmore estimated that the animals seized were worth from twenty to twenty-five thousand dollars. This figure likely assumes that the animals were in good health, an assumption that is clearly incorrect. Under the statutory scheme, however, he is entitled to any monies brought in by the sale of the animals, less any costs, including, but not limited to, veterinary and custodial care, and any fines and penalties imposed by the court (✓374[5][d]). It is highly unlikely that the remaining value of these animals could exceed the costs of keeping and healing them. The court therefore orders that no costs or expenses are to be charged by either party against the other.

This constitutes the decision of the court, and counsel for the plaintiff may prepare an order, with no costs or disbursements; but the court [**16] also wishes to add that the vilification of Mr. Passmore and, to a lesser extent, Justice Matusick have gone well beyond the needs of advocacy. It is the court's hope that Mr. Passmore may in the future limit his collection to a size that he may easily care for given the constraints of time, age, and funds, and that such animals as he does keep will provide him, his visitors, and fairgoers with pleasure for many years.

DATED: Rochester, New York

April 24, 2001

Andrew V. Siracuse, J.S.C.