

PERMISSIBILITY OF LIVE ANIMAL EXPERIMENTATION IN SECONDARY
SCHOOLS UNDER CRUELTY TO ANIMAL STATUTES

New Jersey S.P.C.A. v. Board of Educ., 91 N.J. Super. 81, 219 A.2d
200 (1966), *aff'd*, 49 N.J. 16, 227 A.2d 506 (1967)

A New Jersey high school student of exceptional ability performed under the careful supervision of his biology teacher cancer-inducing experiments upon live chickens. Two of them developed cancerous tumors and died. Slides of the cancerous matter were exhibited at the Newark Science Fair. The plaintiff, the New Jersey Society for the Prevention of Cruelty to Animals, brought suit based on the state cruelty-to-animals statute¹ against the defendant, East Orange Board of Education, for permitting the experiments to be conducted without authorization of the State Board of Health. The trial court found for the defendant. On appeal, this decision was affirmed.

The principal case raises two important issues. The first concerns a distinction—explicitly made in British law, but, if at all, only obliquely developed in American statutes—between live animal experimentation performed to increase scientific knowledge and that done to demonstrate to students former scientific discoveries. The second is the related question whether live animal testing should be permitted in high schools where it will almost inevitably be used solely for training and not necessarily even for those who will make use of that training. Achievements in education

1. N.J. STAT. ANN. § 4:22-17 (1959):

Cruelty in general; misdemeanor

A person who shall:

a. Overdrive, overload, drive when overloaded, overwork, torture, torment, deprive of necessary sustenance, unnecessarily or cruelly beat or otherwise abuse, or needlessly mutilate or kill, a living animal or creature; [or]

. . . .

c. Inflict unnecessary cruelty upon a living animal or creature of which he has charge either as owner or otherwise, or unnecessarily fail to provide it with proper food, drink, shelter, or protection from the weather—

Shall be guilty of a misdemeanor. . . .

N.J. STAT. ANN. § 4:22-16 (1959):

Construction of article

Nothing contained in this article shall be construed to prohibit or interfere with:

a. Properly conducted scientific experiments performed under the authority of the state department of health. That department may authorize the conduct of such experiments or investigations by agricultural stations and schools maintained by the state or federal government, or by medical societies, universities, colleges and philanthropic institutions incorporated or authorized to do business in this state and having among their corporate purposes investigation into the causes, nature, prevention and cure of diseases in men and animals. . . .

emphasized by Sputnik, and the need to educate an increasing number of scientists, make resolution of these issues important.²

The *Cruelty to Animals Act*³ of England permits live animal testing when performed by persons licensed by the Home Secretary. The *Act* allows experiments performed exclusively to train students if "absolutely necessary for the due instruction of persons to whom such lectures are given with a view to their acquiring physiological knowledge which will be useful to them for saving or prolonging life or alleviating suffering."⁴ The lifesaving requirement would obviate the possibility of most training experiments at the high school level. Any application for a license must be signed by the president of one or more specified learned societies and also by a professor of medical subjects in a university or college incorporated by charter in Great Britain.⁵ This licensing procedure as a practical matter precludes secondary students from performing live animal experiments.

In the majority of American jurisdictions anti-cruelty statutes include no exemptions even for properly conducted live animal experiments.⁶ When

2. Cruelty to animals, an offense unknown at common law, is entirely a creature of statute. Thus, to determine if the offense is committed it is necessary to ascertain if the animal is protected by the statute, and also if the alleged act was cruel. For a thorough discussion of the problem of cruelty to animals, see Annot., 82 A.L.R.2d 797 (1962).

3. 39 & 40 Vict., c. 77 (1876). This act represents the most comprehensive attempt to deal with the live animal experiment problem. The purpose for which the animal is used is not only carefully regulated, but the act also requires that the animal be anesthetised during the experiment, except on a showing that administering an anesthetic would frustrate the purpose of the experiment. Recent suggested legislation in Congress has attempted to incorporate the standards of The Cruelty to Animals Act; however, no comprehensive act has as yet been passed. See note 14 *infra*.

4. Cruelty to Animals Act of 1876, 39 & 40 Vict., c. 77, sched. 3.

5. Cruelty to Animals Act of 1876, 39 & 40 Vict., c. 77, sched. 5.

6. ALA. CODE tit. 3, § 11 (1958); ARIZ. REV. STAT. ANN. § 13-951 (1956); ARK. STAT. ANN. §§ 41-409, -424 (1947); COLO. REV. STAT. ANN. § 40-20-15 (1963); CONN. GEN. STAT. REV. § 53-247 (1958); DEL. CODE ANN. tit. 11, § 342 (1953); GA. CODE ANN. §§ 26-7902, -7904 (1953); HAWAII REV. LAWS §§ 262-1, -2 (1955); ILL. REV. STAT. ch. 8, § 221 (Smith-Hurd 1963); IND. ANN. STAT. § 10-205 (1956); IOWA CODE § 717.3 (1962); KAN. GEN. STAT. ANN. § 21-1202 (1964); KY. REV. STAT. ANN. § 436.180 (Supp. 1967); MD. ANN. CODE art 27, § 59 (1957); MINN. STAT. ANN. §§ 346.20, -.21 (1965); MISS. CODE ANN. § 2067 (1942); MONT. REV. CODES ANN. § 94-1201 (1967); N.H. REV. STAT. ANN § 575:1 (1955); N.M. STAT. ANN. § 40A-18-1 (1953); N.C. GEN. STAT. § 14-360 (1953); N.D. CENT. CODE § 36-21-02 (1960); OHIO REV. CODE ANN. § 1717.01 (Page 1964); OKLA. STAT. ANN. tit. 21, § 1685 (1961); ORE. REV. STAT. § 167.740 (1965); PA. STAT. ANN. tit. 18, § 4942 (Supp. 1965); R.I. GEN. LAWS ANN. § 4-1-2 (1956); TENN. CODE ANN. §§ 39-401, -404 (1955); TEX. PEN. CODE art. 1374 (1953); UTAH CODE ANN. § 76-5-1 (1953); VT. STAT. ANN. tit. 13, § 403 (1958); VA. CODE ANN. § 18.1-216 (1950); W. VA. CODE § 61-8-19 (1966); WYO. STAT. ANN. § 11-546 (Supp. 1965).

confronted with a problem, courts in these jurisdictions re-examine the statutory definitions of cruelty to decide whether the acts were cruel: they consider the experimenter's motive, the care given the animal, and the animal's condition after the testing.⁷

A minority of American jurisdictions have statutes that are much like those of the majority except that they exempt from the general cruelty provisions scientific experiments performed by certain categories of people.⁸ A few of these statutes require that the experiment be performed under the authority of the faculty of some regularly incorporated medical college or university of the state.⁹ The New Jersey statute under which the present action was brought expressly sanctions animal experimentation by authorities, enumerated in the statute, "having among their corporate purposes investigation into the causes, nature, prevention and cure of diseases in men and animals. . . ."¹⁰ California has a statute in some respects similar to New Jersey's. In a recent case, *Simpson v. City of Los Angeles*,¹¹ the

7. See *Commonwealth v. Anspach*, 124 Pa. Super. 100, 188 A. 98 (1936); *Commonwealth v. Barr*, 44 Pa. County Ct. 284, 25 Pa. Dist. 879 (Lancaster County 1916). Though in the *Anspach* case the "experiment" was performed in a non-institutional setting, the court's *ad hoc* approach to the problem of determining whether the defendant's acts were cruel is interesting. A store manager placed a two week old chicken in a five gallon glass bottle containing holes for ventilation and feeding, and a wire netting on which the chicken stood, for the purpose of advertising a special food, which was regularly given to the chicken. The chicken was removed when the Humane Society objected. Holding that such conduct was not cruel, the court took into consideration the care given the chicken, its healthy condition, its unusual growth, and the defendant's prompt removal of the chicken when the Humane Society objected. The court concluded that defendant's conduct was not cruel, reckless, or disregarding of the consequences.

8. ALASKA STAT. § 11.40.540 (1962); FLA. STAT. ANN. § 828.02 (1965); MO. REV. STAT. § 563.670 (1949); NEV. REV. STAT. § 574.200 (1965); WIS. STAT. ANN. § 947.10 (1958).

9. CAL. PEN. CODE § 599c (Deering 1960); D.C. CODE ANN. § 22-812 (1967) (or scientific society); IDAHO CODE ANN. § 18-2113 (1947); S.D. CODE § 40:2211 (1939); WASH. REV. CODE ANN. § 16.52.180 (1962).

10. N.J. STAT. ANN. § 4:22-16 (1959). For the text of this section, see note 1 *supra*. Maine prohibits the performance of any experiment upon a living animal, or the exhibition of any animal which has been experimented upon to any student. ME. REV. STAT. ANN. tit. 17, § 1055 (1964). Though this statute is presently in force in Maine, its vitality is doubtful since both hospitals and the University of Maine conduct experiments on animals. Since no case has arisen, the statute has not been construed. It seems doubtful that the courts would apply the statute literally, because such application would virtually end scientific research that uses animals in any way.

11. 40 Cal. 2d 271, 253 P.2d 464, *appeal dismissed*, 346 U.S. 802 (1953); see *Illinois Anti-Vivisection Soc'y v. City of Chicago*, 289 Ill. App. 391, 7 N.E.2d 379 (1937); *Massachusetts S.P.C.A. v. Commissioner of Pub. Health*, 339 Mass. 216, 158 N.E.2d 487 (1959); *New York State Voters League Against Vivisection, Inc. v. Hilleboe*, 202 Misc. 687, 114 N.Y.S.2d 805 (Sup. Ct. 1952); *Regents v. Dane County Humane Soc'y*, 260 Wis. 486, 51 N.W.2d 56 (1952).

statutory exemptions were widened. The court upheld a city ordinance that provided for surrender of unclaimed, impounded animals to institutions of learning, hospitals, or research institutions certified by the city health officer as organizations that will use animals humanely for the good of mankind in medical research. The ordinance did not conflict with the statute that exempts enumerated institutions from cruelty provisions even though institutions other than medical colleges may receive animals for experimentation under the ordinance. The purpose of the statute is to limit the effect of provisions prohibiting cruelty to animals and not to regulate the disposition of impounded animals.¹² Applying the *Simpson* reasoning, a high school student could arguably perform live animal experiments even though the state statute did not exempt high schools from cruelty provisions.

Federal law doesn't cover the problems of live animal experiments in secondary schools. In August of 1966, Congress, asserting a moral obligation to eliminate animal suffering without impeding legitimate research, enacted controls on the transportation and sale of animals for testing;¹³ but, since in passing the act Congress was relying on its power over interstate commerce, by the time the research starts the protection conferred by the act ends.¹⁴

A literal interpretation of the New Jersey statute would seem to prohibit the defendant's use of chickens in a cancer-inducing experiment. The defendant was not one of the authorities whose experimentation the statute sanctions,¹⁵ and the treatment of the chickens undoubtedly caused suffering and, arguably, fell within the statute's prohibition of abuse, needless killing or unnecessary cruelty.¹⁶ The court rejected plaintiff's argument that only those authorities enumerated in the statute could conduct experiments. It held that the purpose of enumerating certain authorities was to grant them an exemption from any inspection or prosecution by the S.P.C.A. and not to completely prevent groups other than those enum-

12. *Simpson v. City of Los Angeles*, 40 Cal. 2d 271, 278, 253 P.2d 464, 469, *appeal dismissed*, 346 U.S. 802 (1953).

13. *Research or Experimentation—Cats and Dogs*, 7 U.S.C.A. §§ 2131-54 (Supp. 1966).

14. *Id.* at § 2143. Two bills have been introduced to correct this defect. S. 3218, 89th Cong., 2d Sess. (1966) (died in committee); H.R. 4214, 90th Cong., 1st Sess. (1967). These bills would promote humane care of the animal while it is actually in the laboratory, by providing for measures such as proper use of anesthesia when possible and proper use of postoperative pain-relieving techniques.

15. N.J. STAT. ANN. § 4:22-16 (1959). For the text of this section, see note 1 *supra*.

16. N.J. STAT. ANN. § 4:22-17 (1959). For the text of this section, see note 1 *supra*.

erated from performing live animal experiments.¹⁷ Though high schools are not enumerated in the statute, the court held that the experiment was permissible so long as it did not fall within the provisions proscribing abuse, needless killing or unnecessary cruelty.¹⁸ On the latter issue, the court held that "if there is a truly useful motive, a real and valid purpose, there can, under the statute be acts done to animals which are ostensibly cruel or which ostensibly cause pain."¹⁹ The acts which the statute prohibits as cruel are those constituting "unjustifiable infliction of pain, with the act having some malevolent or mischievous motive. There must be something willful or wanton about it . . . and [it must] possess no redeeming quality."²⁰ Educational experiments with a legitimate purpose are not prohibited even though carried on by institutions other than those specifically exempted by the statute from the cruelty provisions and without any authorization from the State Board of Health.

According to the decision, a court should first determine if the experimenter is an institution that is expressly exempted from the cruelty provisions of the statute and has been duly licensed by the State Board of Health. If the experimenter meets these tests, it is free from prosecution. If the experimenter is not exempt, the court must interpret the words, "needless" and "unnecessary" to determine if the testing constituted cruelty; the experimenter is required to have a useful motive and valid purpose.²¹

The interpretation of the statute produces a curious result. Only scientific experiments by enumerated institutions are subject to control by the State Board of Health provided that the experiment does not fall within

17. *New Jersey S.P.C.A. v. Board of Educ.*, 91 N.J. Super. 81, 89, 219 A.2d 200, 205 (1966). The court also stated that those groups enumerated in the statute can inflict even unnecessary pain or even needlessly kill or mutilate a living animal in the course of their work without being liable to prosecution. Though there is little case law on this issue, other cases have held that authorities are liable to prosecution for cruelty to animals even though they are enumerated in such statutes. *Humane Soc'y of the United States, Cal. Branch v. Merrill*, 199 Cal. App. 2d 115, 18 Cal. Rptr. 701, (1962); *Massachusetts S.P.C.A. v. Commissioner of Pub. Health*, 339 Mass. 216, 158 N.E.2d 487 (1959); *Dee v. Yorke*, 30 T.L.R. 552 (K.B. 1914).

18. *New Jersey S.P.C.A. v. Board of Educ.*, 91 N.J. Super 81, 92, 219 A.2d 200, 205 (1966).

19. *Id.* at 92, 219 A.2d at 206.

20. *Id.* at 91, 219 A.2d at 206. The New Jersey Court invoked the well-established motive test, which has often been used by courts to determine whether certain acts were cruel. *See, e.g.*, *Yopp v. State*, 79 Ga. App. 584, 54 S.E.2d 505 (1949); *Maxwell v. State*, 50 Ga. App. 15, 176 S.E. 901 (1934); *Commonwealth v. Lufkin*, 89 Mass. 579 (1863); *State v. Prater*, 130 Mo. App. 348, 109 S.W. 1047 (1908); *State v. Isley*, 119 N.C. 862, 26 S.E. 35 (1896).

21. *New Jersey S.P.C.A. v. Board of Educ.*, 91 N.J. Super 81, 92, 219 A.2d 200, 206 (1966).

the cruelty provisions; non-exempt institutions can experiment without authorization. This result obviously indicates that the decision is not consistent with the intent of the draftsman of the statute for the statute provides no administrative procedure for protecting animals in those situations in which protection is perhaps most necessary, and justification for the experimentation weakest.

The plaintiff also argued that alternatives to experimentation were available in the form of slides and films, having equal educational and motivational value. In rejecting this argument the court relied on three factors; the valid purpose of the experiment as a teaching device, the fact that the experiment was carefully supervised, and the superior intellectual capacity and maturity of the student. The court did not decide whether all of these factors are necessary to a decision that the experiment is not cruel. It may, with some certainty, be predicted that courts will require a valid purpose and careful supervision, but a strong argument could be made in favor of permitting experimentation by serious students of only average ability if the experimentation is shown to make a meaningful contribution to their education.

The principal case represents an innovation in the law of live animal testing. Where the *Simpson* case allowed exceptions to cruelty statutes when supervised by a health officer,²² this case opens the door to experimentation to anyone willing to chance that his experiment will not be found needlessly and unnecessarily cruel. The principal case has meaning for the majority of states that do not expressly grant an exemption to scientific experiments, for it was really interpreting the cruelty provisions rather than the exemption clause. In doing so, it provides guidelines that might be followed in majority jurisdictions.

The case also illustrates the shortcomings of a statute that provides a limited exemption to scientific experiments. Non-exempt institutions can perform experiments without authorization of any kind while the exempt authorities are subject to control by the State Board of Health. This problem can now be remedied only by statutory amendment requiring that anyone desiring to experiment obtain authorization from the State Board of Health.

22. See text accompanying notes 11-12 *supra*.