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June 13, 1990

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ATTORNEY GENERAL OPINION NO. 90- 72

The Honorable Sheila Hochhauser
State Representative, 58th District
1636 Leavenworth
Manhattan, Kansas 66502

Re: Livestock and Domestic Animals -- Farm Animal and
Research Facilities Protection Act -- 1990 Senate
Bill No. 776

Synopsis: The proscribed criminal conduct defined by 1990
Senate Bill No. 776 applies only to animals used in
food, fur or fiber production, agriculture, testing
or education at an animal facility. Animals used
in any other manner remain subject to protective
actions by humane societies pursuant to the cruelty
to animals statute which provides limited lawful
authority to take and care for an abused animal.
Under Senate Bill No. 776, a question of fact may
arise relating to the specific intent with which an
animal was taken from an animal facility. The
specific intent to damage the enterprise conducted
at an animal facility is a required element of the
crimes defined by the bill. Upon conviction
restitution may be ordered in an amount sufficient
to compensate the victim for the loss suffered. In
a civil action compensatory damages may include
out-of-pocket loss as well as consequential
damages. Liability is limited to the extent to
which the perpetrators acts caused the damage.
Cited herein: K.S.A. 21-3701; 21-4310; 21-4311;
21-4501; 21-4603; 21-4610; 47-1701; 47-1827.

* * *

Dear Representative Hochhauser:

As representative for the sixty-seventh district, you ask our opinion on several issues relating to the farm animal and research facilities protection act.

Specifically, you ask initially whether 1990 Senate Bill No. 776 conflicts with the provision of K.S.A. 21-4311(1) which authorizes an officer or agent of any incorporated humane society, animal shelter or other appropriate facility to take into custody an animal which clearly shows evidence of cruelty. Based on the rationale set forth herein, we find there is no conflict.

In comparatively recent years, statutes have been enacted in most jurisdictions which have for their common object the protection of animals from the ill-treatment or cruelty of man, by making subject to prosecution and conviction one who willfully or wantonly abuses, neglects or cruelly mistreats them. Such legislation is a valid exercise of the police power of the state. 4 Am.Jur.2d Animals § 27 (1988).

The legislatures in seven states have provided societies for the prevention of cruelty to animals and humane societies with power to prosecute violations of the anti-cruelty statutes. The majority of states, however, do not vest prosecutorial authority in the humane societies, but rather limit their authority to the power to arrest or aid in prosecution. Comment, Creating a Private Cause of Action Against Abusive Animal Research, 134 U. Pa. L.R. 399 (1986). In Kansas the authority of humane societies is limited to removing an animal from an abusive environment when evidence of cruelty is clearly manifested. K.S.A. 21-4311. A Kansas humane society may not, however, retain custody of the animal where the owner is not prosecuted or convicted of cruelty to animals. Attorney General Opinion No. 86-34. [The animal dealers act, K.S.A. 47-1701 et seq. also provides protection to dogs and cats which are sold, offered or maintained for sale by requiring appropriate watering, sanitizing and housing conditions.]

K.S.A. 21-4310(1) defines cruelty to animals as:

"(a) Intentionally killing, injuring, maiming, torturing or mutilating any animal;

"(b) Abandoning or leaving any animal in any place without making provisions for its proper care; or

"(c) Having physical custody of any animal and failing to provide such food, potable water, protection from the elements, opportunity for exercise and other care as is needed for the health or well-being of such kind of animal."

Section (2) of K.S.A. 21-4310 provides exclusions for which the crime of cruelty to animals is not applicable: accepted veterinary practices; bona fide experiments carried on by commonly recognized research facilities; killing, attempting to kill, trapping, catching or taking an animal in accordance with the provisions of chapter 32 or chapter 47 of Kansas Statutes Annotated; accepted rodeo practices; humane killing as provided by law; accepted animal husbandry practices; the killing of a threatening animal; use of a tranquilizing gun by an animal control officer.

K.S.A. 21-4311 provides that:

"(1) Any public health officer, law enforcement officer, licensed veterinarian or officer or agent of any incorporated humane society, animal shelter or other appropriate facility may take into custody any animal, upon either private or public property, which clearly shows evidence of cruelty to animals, as defined in K.S.A. 21-4310 and amendments thereto. Such officers, agent or veterinarian may inspect, care for or treat such animal or place such animal in the care of a duly incorporated humane society or licensed veterinarian for treatment, boarding or other care or, if an officer of such humane society or such veterinarian determines that the animal appears to be diseased or disabled beyond recovery for any useful purpose, for humane killing."

The authority of the persons and organizations specified in K.S.A. 21-4311 to take an abused or neglected animal into custody for care and treatment is limited by the exclusions set forth in K.S.A. 21-4310. In other words, pursuant to the

cruelty to animals statute, a humane society officer or agent may not take an animal from specified places, including a research facility, even if that animal clearly shows evidence of cruelty.

As cruelty statutes are not intended to interfere unreasonably with man's possession, use, enjoyment or government of animals, not every act which causes pain and suffering is prohibited. Generally, it may be said that an act is considered justifiable or necessary where its purpose or object is reasonable and adequate, and the pain and suffering caused is not disproportionate to the end sought to be attained. 4 Am.Jur.2d Animals § 27 (1988). The tension between animal rights activists who seek to protect animals and medical researchers who seek understanding and treatment for human afflictions has created a need for legislatures to balance often conflicting interests. Suffer the Little Animals, 15 Student Lawyer 12 (1986).

1990 Senate Bill No. 776 enacted the farm animal and research facilities protection act, prohibiting certain acts with regard to animal facilities. Section 3(b) of that act provides:

"No person shall, without the effective consent of the owner, acquire or otherwise exercise control over an animal facility, an animal from an animal facility or other property from an animal facility, with the intent to deprive the owner of such facility, animal or property, and to damage the enterprise conducted at the animal facility."

We assume it is section 3(b) which prompted your inquiry of a possible conflict with K.S.A. 21-4311. We find no conflict primarily because of the way "animal" is defined in the farm animal and research facilities protection act, to wit:

"'Animal' means any warm blooded or cold blooded animal used in food, fur, or fiber production, agriculture, research, testing or education and includes dogs, cats, poultry, fish and invertebrates."
(Emphasis added).

Initially we observe that the phrase "and includes dogs, cats, poultry, fish and invertebrates" is redundant as each of

those specified animals is either a warm or cold blooded animal. Secondly, the prohibition set forth in section 3(a) of Senate Bill 776 applies only to animals used in the manners specified at an animal facility. Animals used in any other manner, for instance sold in pet shops or raised in "puppy mills," are still subject to protective actions against cruelty taken by humane societies or animal shelters pursuant to K.S.A. 21-4311.

Further, section 3(a) requires as an element of the defined crime "intent to damage the enterprise conducted at the animal facility." Presumably, the intent with which a humane society acquires or otherwise exercises control over an animal is the intent to protect an animal. While there is no conflict of law between section 3(b) of Senate Bill 776 and K.S.A. 21-4311, in some circumstances a potential question of fact to be resolved by a judge or jury may arise, i.e., with what intent was an animal taken. For instance, presume a rabbit is the subject of a benign grade school experiment (i.e. education), but the rabbit is not being provided with adequate food, water, or sanitation. Further, the rabbit is mercilessly teased and tormented by the children. A humane society takes the rabbit believing there is sufficient evidence of cruelty. The prosecutor declines to prosecute for cruelty to animals and instead files a charge against the humane shelter pursuant to Sec. 3(b) of Senate Bill 776. The judge or jury will determine the specific intent with which the taking of the animal was done. Such a determination is based on the totality of the surrounding facts and circumstances. See State v. Harper, 235 Kan. 825 (1984). Since humane society and animal shelter officers and agents are not authorized to take an animal from a research facility in the first place, this factual determination should not arise in that context.

Closely related is the issue of "unauthorized control" over property. Section 3(b) of Senate Bill 776 prohibits acquiring or exerting control over property without the effective consent of the owner. This language is comparable to the prohibition found in the theft statute, K.S.A. 21-3701, against "exerting unauthorized control" over property which means "without lawful authority." State v. Greene, 5 Kan.App.2d 698 (1981). Usually lawful authority derives from consent of the owner. However, K.S.A. 21-4311 provides lawful authority for a humane shelter to take an animal belonging to another without consent in the limited circumstances discussed above.

In summary, 1990 Senate Bill No. 776 proscribes the taking of any animal used in food, fur or fiber production, agriculture, testing or education from an animals facility. It does not preclude humane society and animal shelter officers and agents from taking into custody for care and treatment any other animal which shows evidence of cruelty, within the limitations specified in K.S.A. 21-4310(2). Thus, in our opinion, Senate Bill 776 and K.S.A. 21-4311 are not in conflict.

You also request our opinion regarding the construction of section 3(c)(4) of Senate Bill 776 and the likelihood of prosecution of humane societies under that section. Section 3(c)(4) provides:

"No person shall, without the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility, enter an animal facility to take pictures by photograph, video camera or by other means."

Violation of that section is a class E felony, the sentence for which shall be an indeterminate term of imprisonment, the minimum of which shall be one year and the maximum of which shall be fixed by the court at not less than two years nor more than five years. K.S.A. 21-4501(e). Upon conviction, the court is also authorized to release the defendant on probation subject to such conditions as the court may deem appropriate, including orders requiring full or partial restitution. K.S.A. 21-4603(2)(c).

Upon a prosecution initiated for violation of section 3(c)(4) of Senate Bill 776, the state would be required to prove the following elements to the satisfaction of a judge or jury beyond a reasonable doubt:

"(1) That the defendant entered an animal facility;

"(2) that the defendant did so to take pictures by photograph, video camera or by other means;

"(3) that the defendant did so with the intent to damage the enterprise conducted at the animal facility;

"(4) that the defendant did so without the effective consent of the owner."

If each of the above listed elements of the crime are proved beyond a reasonable doubt to the satisfaction of the trier of fact, a verdict of guilty would be required. The second element of proof requires evidence that the defendant entered an animal facility to take pictures; it does not require proof that pictures were actually taken. The third element requires proof that such an entry was made with the intent to damage the enterprise conducted at the animal facility.

The defined criminal conduct is somewhat comparable to the crime of burglary in which following entry into a structure, for which the specific element of "intent to commit a felony or theft therein" is required. Regarding proof of this specific intent, State v. Harper, 235 Kan. 825 (1984), holds:

"In a prosecution for burglary, the manner of the entry, the time of day, the character and contents of the building, the person's actions after entry, the totality of the surrounding circumstances, and the intruder's explanation, if he or she decides to give one, are all important in determining whether inference arises that the intruder intended to commit a theft. The intent with which an entry is made is rarely susceptible of direct proof; it is usually inferred from the surrounding facts and circumstances."

Likewise, upon a charge of violation of section 3(c)(4) of Senate Bill 776, the intent with which the entry was made would rarely be susceptible of direct proof and would usually be inferred from the surrounding facts and circumstances.

Regarding the likelihood of prosecution, this determination is made on a case-by-case basis based upon the district or county attorney's evaluation of evidence gathered by law enforcement authorities. The prosecutor has prosecutorial discretion whether or not to file a case against an individual for violation of a crime. Each such determination is totally within the discretion of the prosecutor and therefore we are unable to give an opinion regarding the likelihood of prosecution in general.

As mentioned, unlike many other states, Kansas humane shelters have limited authority under K.S.A. 21-4311 and may only take animals showing evidence of cruelty for inspection, care and treatment within the limitations discussed above. There is no direct statutory authority to aid in prosecution of cruelty to animals by any other means, for instance by gathering evidence. On the other hand, there is no prohibition against aiding in prosecution, other than the provisions of section 3(c)(4) of Senate Bill 776. While the definition of "animal facility" (any vehicle, building, structure, research facility, or premises where an animal is kept, handled, housed, exhibited, bred, or offered for sale) is extremely broad, the definition of "animal" is narrow, resulting in making only animals used in specified ways the subjects of prohibited conduct.

Whether a prosecution is commenced is a decision within the prosecutorial discretion of an individual county or district attorney. If a prosecution is commenced, it is the province of the trier of fact to determine whether all of the elements of the crime charged have been proved beyond a reasonable doubt. Those elements include proof of the specific intent of the defendant based on the totality of the circumstances.

You also ask in relation to section (3)(c)(4) of Senate Bill 776 whether the phrase "intent to damage the enterprise conducted at the animal facility" is limited to physical damage or whether it also includes damages resulting from the later publication of a photograph taken at the facility.

Again, we first note that this conduct is proscribed only at animal facilities in which animals are used in the ways specified in the bill's definition of animals, and does not include kennels, "puppy mills," or pet shops.

Upon a conviction for the crime defined in section (3)(c)(4), the sentencing court has authority to order restitution. K.S.A. 21-4603(2)(c), K.S.A. 21-4610(4)(a). In a criminal case the measure of damage is that loss suffered by the victim of the crime; restitution should make the victim whole. Actual loss suffered is therefore the measure of restitution to be ordered. State v. Hinckley, 13 Kan.App.2d 417 (1989). The actual amount of restitution is a question of fact for the trial court's determination based on evidence presented of loss incurred in connection with the crime.

Section 4(a) of Senate Bill 776 provides authority for a civil cause of action thus:

"Any person who has been damaged by reason of a violation of section (3) may bring an action in the district court against the person causing the damage to recover:

"(1) an amount equal to three times all actual and consequential damages; and

"(2) court costs and reasonable attorney fees."

In such a civil action actual damages, sometimes referred to as compensatory damages, is also compensation for the actual loss for injuries sustained by reason of the actor's wrong doing. The term contemplates out-of-pocket losses and may also include damages for impairment of reputation, personal humiliation, and loss of profit, both present and future. Compensatory damages generally must have a money value, and be capable of estimation with a pecuniary standard. 22 Am.Jur.2d Damages, §§ 24 and 28 (1988).

If someone other than the photographer publishes a damaging photograph taken at an animal facility, the issue becomes the limitation of liability to the photographer.

"Generally speaking, and apart from the situation where defendant is held responsible on the doctrine of respondeat superior or the like, a defendant is liable only to the extent to which his own acts have caused the injury. It follows the separate wrongs done by independent agents cannot be joined together to increase the responsibility of one of the wrong doers, notwithstanding any difficulty there may be in determining what part of the injury or loss was the result of the acts or omissions of the defendant, and what part was the result of other causes. Thus, as a general rule, when there is a logical basis to allocate damages between two or more incidents and among various parties, an attempt should be made to do so. It is also the duty of the triers of fact to determine what damage was caused by each party's act or negligence, even if the acts were concurrent, but the jury can only do the

best job of separating the damages that the evidence allows; the difficulty of separating the damage caused by one party from the damage caused by the act of some other party cannot defeat a recovery. If it is impossible, in the nature of the case, to distinguish between the damage arising from the actionable injury and damage which has another origin, the jurors should make the best estimate in their power as reasonable persons, based on the evidence presented, and award to the plaintiff compensatory damages for the actionable injury. But if a plaintiff fails to prove there is any cause or link between its losses and the conduct of any one of multiple defendants, no recovery should be allowed." 22 Am.Jur.2d Damages, § 29.

The intent to damage the enterprise conducted at the animal facility is a necessary element of a criminal prosecution or a civil action for damages. Upon conviction of the crime defined in a criminal case, or upon a finding of liability in a civil case, actual damages, which include consequential damages, may be assessed. The dollar amount of such order of restitution or assessment of civil damages will depend upon evidence of the amount required to make the injured party whole for losses actually suffered.

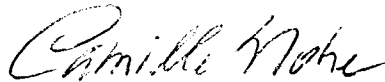
In conclusion, the proscribed criminal conduct defined by 1990 Senate Bill No. 776 applies only to animals used in food, fur or fiber production, agriculture, testing or education at an animal facility. Animals used in any other manner remain subject to protective actions by humane societies pursuant to the cruelty to animals statute which provides limited lawful authority to take and care for an abused animal. Under Senate Bill No. 776, a question of fact may arise relating to the specific intent with which an animal was taken from an animal facility. The specific intent to damage the enterprise conducted at an animal facility is a required element of the crimes defined by the bill. Upon conviction restitution may be ordered in an amount sufficient to compensate the victim for the loss suffered. In a civil action compensatory damages

may include out-of-pocket loss as well as consequential damages. Liability is limited to the extent to which the perpetrators acts caused the damage.

Very truly yours,



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