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LCA 1684/96

Let the Animals Live

v.

Hamat Gader Recreation Enterprises

Rony Loten

Kibbutz Afik

Kibbutz Meitar

Kibbutz Mavo Hama

Kibbutz Kfar Haruv

The Supreme Court sitting as the Court of Civil Appeal

[22.6.1997]

Before Justices T. Or, M. Cheshin, Y. Turkel

Application for leave to appeal from the decision of the Tel--Aviv-Jaffa District
Court (Judge V. Alshich), which was handed down on 20.2.1996 in CA 983/95,

which reversed the decision of the Tel-Aviv-Jaffa Magistrate Court (Judge H. Gerstal), which was handed down on 1.5.1995, in ROM 175418/95. The application for leave was argued as an appeal. The appeal was accepted.

Facts: The petitioner, an organization for the protection of animal rights, petitioned the magistrate court to issue an injunction against the respondents, which would prohibit the show they presented, which included a battle between a man and an alligator. The magistrate court, holding that the battle in question constituted cruelty to animals, which was prohibited under section 2 of the Cruelty to Animals Law (Protection of Animals)-1994. The respondents appealed this order to the district court, which cancelled the injunction. The petitioners requested leave to appeal this decision to this Court.

Held: The Court held that the show in question constituted cruelty against animals, as prohibited under section 2 of the Cruelty to Animals Law (Protection of Animals)-1994.

Petition denied.

Legislation Cited:

Cruelty to Animals Law (Protection of Animals)-1994
Penal Law Ordinance-1936
Law to Amend the Penal Law Ordinance (no 28)-1966
Penal Law-1977
Cruelty to Animals Law (Experimentation on Animals)-1994
Penal Law (Amendment no 26)-1989
Basic Law: Human Dignity and Liberty
Basic Law: Freedom of Occupation
Wild Animals Protection Law-1955

Israeli Supreme Court Judgments Cited:

- [1] HCJ 5016/96 *Horev v. The Transportation Minister*, IsrSC 51(4) 1
- [2] HCJ 281/78 *The Society for the Prevention of Cruelty to Animals in Israel v. The City of Tel-Aviv-Jaffa*, IsrSC 32(2) 404
- [3] Crim. App. 495/69 *Omar v. The State of Israel*, IsrSC 24(1) 408
- [4] HCJ 4804/94 *Station Films Company Ltd. v. The Film and Play Review Board*, IsrSC 50(5) 661

[5]

English Cases Cited:

- [6] *Ford v. Wiley* [1889] 23 Q.B. 203.

- [7] *Barnard v. Evans* [1925] 2 K.B. 794.
[8] *C.E. Americae Inc. v. Antinori*, 201 So.2d 443 (1968).
[9] *Waters v. People*, 46 P. 112 (1896).
[10] *Pennsylvania Society for P.C.A. v. Bravo Enterprises*, 237 A.2d 342 (1968)

[11]

Israeli Articles Cited:

- [12] I. Zamir, *Israel's Administrative Law as Compared to Germany's*, 2 *Mishpat U'Mimshal* 109 (1995).

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Foreign Books Cited:

- [14] J.M. Masson & S. McCarthy, *When Elephants Weep: Animals' Emotional Life* (J. Peleg trans. 1997)
[15] *Political Theory and Animal Rights* (P.A.B. Clarke & A. Linzey eds., 1990)
[16] *In Defense of Animals* (P. Singer ed., 1986).
[17] S.A. Soehnel, *What Constitutes the Offence of Cruelty to Animals – Modern Cases*, 6 A.L.R. 5th (1992) 733.
[18] S. Dorner, *What is a Right*, 30 *The Journal of Value Inquiry* 427 (1996).
[19] 14 *Am. Jur.* 2d (1995).
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Jewish law Sources Cited:

- [21] Exodus, A :11,13– 14 ; 22 :21– 22 ; 23 :5, 19.
[22] Deuteronomy 22 :4,6,10 ; 26 :6.
[23] Samuel II 13 :14.
[24] Genesis 16 :6.
[25] Jeremiah 6 :23 ; 38 :19.
[26] Isaiah 13 :9.
[27] Samuel I 31 :4.
[28] Judges 19 :25.
[29] Sabbath 31a ; 128b.
[30] Maimonides, *The laws Regarding Murder and the Preservation of Life*, 13:13.
[31] Leviticus 22 :28.
[32] Maimonides, *Guide of the Perplexed* (Rabbi Kapach edition, 1977) Part III, Chapters 17 : 48.
[33] *Baba Metzia* 32b ; 85a.
[34] *Shmot Raba*, Portion 2, Point 2.
[35] A. Steinberg *Medical– Halachic Encyclopedia* (Volume V, 1996).
[36] *Sefer Ha'Hinuch* (Rabbi Shawal's edition, 1994).

- [37] Kings II, 25:7.
[38] Nahmanides, Deutronomy, 22 :6.
[39] N. Leibowitz *New Issues in the Book of Leviticus* (1986).
[40] Numbers 22 :32.
[41] *Midrash Ha'Gadol*, Numbers (S. Fish editions, Jerusalem, 1963).
[42] *Midrash Lekach Tov*, Numbers (Jerusalem ??).
[43] Rav Kook *Afikim BaNegev, The Vision of Vegetation and Peace* (Rabbi D. Cohen ed. 1983) Chapter 6 p. 7).
[44] *Avoda Zara* 18b.
[45] Rashi, *Avoda Zara*, 18b.
[46] *Kitzur Shulhan Aroh* 126 :4.
[47] *Tosefta* (Zukermendel edition) *Avoda Zara* 2 :6 p. 462.
[48] S. Lieberman *Researching the Land of Israel's Torah* (1991).
[49]

For the petitioner – Yoram Halevy

For the respondent – Dalia Philosof

JUDGMENT

Justice M. Cheshin

1. One who harms his fellow man is brought to justice. But those who are not men but have nonetheless been harmed by man – who will do justice for them? Concerning such matters, the legislature saw fit to provide the following:

No one shall torture an animal, treat it cruelly, or abuse it in any way.

This is the obligation of each citizen under section 2(a) of the Cruelty to Animals Law (Protection of Animals)-1994 [hereinafter the law]. The law, vague in the ordinary manner of ordinary language, further instructs that anyone violating these provisions is liable for 3 years imprisonment. See § 17(a). In addition, a court order may be issued against such an individual, to restrain him from persisting in this prohibited behavior. § 17A.

The concerns of man are this Court's daily toil. In this case, we continue to deal with man – though our central concern is with animals, not humans. We shall deal with the pain and suffering that man inflicts upon animals.

The Central Facts of the Case

2. The petitioner is an organization named "Let the Animals Live." One of its goals, among others, is the worthy objective of preventing abuse and cruelty to animals. The first respondent is the managing company of the "Hamat Gader" tourist and vacation resort, which includes an alligator farm. respondent no. 2 is the company's director and respondents nos. 3-6 are the owners of company. Among its other activities, the respondent presents an alligator exhibit for its visitors, which portrays the alligator's habits, characteristics and nutritional needs. The show lasts approximately thirty minutes and concludes with a battle between man and alligator. This struggle lasts for about forty-seven seconds and, needless to say, at the end, man emerges victorious. While the magistrate and district court judgments speak of a struggle lasting only ten seconds, I can say with certainty, after having viewed the presented videotape, that the struggle lasts forty-seven seconds.

3. This performance – known as "Alligators' Battle Against Man" – enraged the petitioner who, taking advantage of the right of standing granted to him under section 17(a)(9) of the law, approached the magistrate court with a petition to prohibit the respondents from continuing with this spectacle. The magistrate court, per Judge H. Gerstel, granted the request and issued an injunction. The respondent appealed to the district court, which reversed the original decision. The court, per Judge V. Alshich, decided to grant the appeal and to revoke the injunction. The petitioner requests leave to appeal this latter judgment. We decided to hear this petition as though leave had been granted and an appeal filed in accordance therewith.

4. The petitioner's argument was, and remains, that during the struggle with the alligator, the fighter performs acts which are prohibited by section 2(a) of the law. Specifically, the fighter afflicts the alligator,

treats it cruelly and abuses it. The petition requests that the respondent be ordered to stop these illegal acts. The respondent answer was, and remains, that its actions do not violate the law, and that the man fighting the alligator does not torture it, treat it cruelly or abuse it in any way. We emphasize that we are only discussing the part of the show in which the man battles against the alligator. The petitioner does not contest the other elements of the performance, during which the respondent introduces the visitors to the alligator, and these parts of the performance shall not be addressed.

5. What does this fighter do to the alligator, and of what do the petitioners complain? Here are his actions, as described in the magistrate court's ruling:

1. Grabbing the alligator by its tail;
2. Grabbing the alligator by its jaws;
3. Riding the alligator; grabbing the alligator by its head and pulling it backwards;
4. Pulling the alligator's back legs;
5. Turning the alligator over on its back;
6. Pressing against the lower part of the alligator's head
- 7.

Do these actions cross the line set out in section 2(a) of the law, or do they not actually cross the boundaries of that prohibition? Each of the parties introduced their own expert evidence in order to shed light on this matter. Professor Heinrich Mendelson, Professor of Zoology at Tel-Aviv University, and an expert on alligators, testified on the petitioner's behalf, as did Dr. Doron Neri, an expert veterinarian, specializing in animal behavior and anatomy. The opinions of the experts are unequivocal. Plainly put, the acts performed on the alligator constitute abuse. As Professor Mendelson stated in his affidavit:

Watching the combat very much disgusted me. The man who appears to be fighting the alligator is in fact simply abusing and torturing it by dragging it on the ground, riding it, pulling its head back, shaking it and turning it on its back. As though this weren't enough, the fighter pressed the

alligator forcefully on its backside and the soft side of its head while it was on its back.

With this behavior ... the man in question is abusing the alligator, treating it cruelly and causing it great suffering, particularly when bending the alligator's head back, because the alligator is not a flexible being. As such, bending any of its body parts causes it suffering.

In concluding his opinion, Professor Mendelson stated:

I have no doubt that this sort of behavior ... causes the alligator to not only feel physical pain and suffering but also experience depression.

Dr. Doron Neri further strengthened Professor Mendelson's opinion:

Like many other vertebrae animals, alligators are subject to the following phenomenon: when they are in very stressful situations, their immune system, as a result of the feelings of danger, is affected and its ability to function effectively decreases significantly, thus increasing its susceptibility to disease.

When a person pulls an alligator by its tail, or by any other body part, drags it on the ground, shakes it, turns it over on its back or side, rides it, bends its head backwards or applies pressure to its body parts, the alligator is thrust into a very stressful situation because it does not understand that these actions are for amusement and are not life-threatening.

As such, the alligator's immune system is affected and it is exposed to a greater danger of contracting diseases, not to mention that this high tension and fear that it is made to feel causes it suffering.

In addition, it should be emphasized that, this described situation, there is a high probability of harm to the alligator's outer and/or inner limbs such as its eyes, teeth, digestive system, tongue, and skin.

During their oral testimony, the experts added several other points. Suffice it to recall Professor Mendelson's statements noting that the alligator's head naturally moves from right to left – not up and down. It therefore follows that pulling its head upwards is not natural to the alligator and causes it to suffer.

6. The respondent presented his own expert, Dr. Doron Tiomkin, a leading expert in examining cattle that will be used for consumption, an expert in animal gynecology and the attending doctor at the resort. It also called Mr. Paul Rappaport – the resort's professional director, who is professionally trained in caring for alligators. Both these men vociferously disputed the petitioner's experts' statements. For instance, in his opinion, Dr. Tiomkin states that while the effectiveness of the alligator's immune system may decrease following the struggle:

The exhibit does not involve any real harm, for after the stressful period associated with the event passes, the alligator returns to its standard routine and its immune system is restored to its normal state. The stress spoken of is merely a passing phase, which in no way justifies completely refraining from allowing animals, including alligators, to participate in such events.

Experience teaches that the alligators' health, nutritional, and physical state returns to normal immediately after the stressful situation ends.

And in conclusion, he stated:

The alligators are neither scratched nor harmed during the performance.

In his oral testimony, this expert proceeded to add that an examination of the alligators following the struggle showed that they had not suffered any physical injury whatsoever. Regarding the allegation that turning the alligator on its back makes it depressed, he responded:

I do not speak in terms of depression. That is a psychological term. I speak in terms of stress. Turning an alligator on its back does involve a certain degree of stress.

Relating to the impact of the stress on the alligator, this witness observed that "the alligators eat less the day of the performance." This having been said, he added that they "subsequently return to their normal condition." Addressing the fact that the alligator's head is being pulled upwards, the witness noted that "an alligator cannot naturally bend its head back 90 degrees, as it is not flexible being."

In his affidavit, the respondent's other expert witness, Mr. Rappaport, informs us that performances involving alligator fights such as this take place around the world and that these shows are conducted under expert supervision, and with expert approval. As for pulling the alligator's head back, the witness declared:

The alligator is as flexible as any other vertebrae creature, and pulling its head up to the trainer's head does not pose any danger to its health.

And in conclusion:

To the best of my knowledge, the performance does not harm the alligators and certainly does not constitute cruel treatment.

In his testimony before the Court, this witness agreed that the man in question applied pressure to the alligator's body. However, he did add that "he does not apply more pressure than the alligator can tolerate."

7. In addition to this testimony, the magistrate court also heard from Mr. Loten, the resort's director, and Mr. Multon, the man who battles the alligator. Both these men testified that the alligator is unharmed by the struggle. In contrast, Ms. Altman, the petitioner's spokesperson, testified that the combat is simply a form of abuse. The court was presented with a videotape recording of the performance. In fact, the court was even privy to a live performance of the battle.

8. The magistrate court analyzed the evidence before it and determined that "it is absolutely clear that that the performance causes the alligator physical suffering, since it involves the use of much force, pressure, pulling, dragging, and shaking. Furthermore, "throughout the show, the alligator is forced into unnatural, violent, and frightening movements, which may even be harmful." The court concluded that, "the performance causes physical suffering and stress," and that "it seems clear that the show causes the alligator grave physical suffering." As such, the court granted the petition.

Having decided as such, the court examined whether the "physical suffering" in question falls within the prohibition set out in section 2(a) of the law. In the absence of Israeli case law on the issue, the Court was forced to turn to English and American jurisprudence interpreting similar legislation. The court decided – unequivocally and without any doubt or hesitation – that:

According to the standards set out in England, the performance in question can be deemed cruel. Indeed, as held, it involves causing the alligators unjustified physical suffering. The only objective that the respondents could set forth to justify the show was financial gain, the product of entertaining the public.

Financial gain simply does not justify cruelty.

9. As noted, the district court, for its part, reached a different conclusion. First and foremost, the Court ruled that "there is no objective evidence that pain or suffering is inflicted upon the alligators during the show.

From a technical perspective, suffering is almost impossible to measure." Nevertheless, the Court agreed that during the struggle "the alligator is forced to perform unnatural movements." However, it added that no connection was shown between whether a particular movement is natural and whether that movement inflicts pain upon the alligator. Thus, while a particular movement may not be natural, it is not necessarily painful. "Does the fact that a particular movement is not natural necessarily indicate that it causes the alligator pain and suffering? I would be surprised. In my humble opinion, whether a movement is natural or not is not at all relevant to the issue of whether it is painful for the alligator." And it therefore follows that "[t]he magistrate court's conclusion that the alligator experiences 'serious physical suffering' borders on the unreasonable." As for the fact that the alligator is made to turn on its back, the district court went on to rule that the petitioner failed to prove "that the alligator suffers or is hurt as a result of this trick. At the very most, it experiences some stress." Regarding the pressure that the man in question applies to the alligator's lower jaw, the court held that:

We must not forget that we are dealing with a large and clumsy predator. As such, the petitioner failed to show that this trick causes the alligator actual pain, save some discomfort. I would think that no one disputes that "stress" and "suffering" are not one and the same.

At a different juncture, the court noted that it was not proven that the alligator experienced "severe physical suffering" but rather, at most, that it was made to feel "some discomfort." According to the Court, the legislature's objective was to prohibit "behavior that causes animals severe suffering" and, as such, "discomfort" alone does not trigger the provisions of the law. From this proceeds the district court's conclusion – handed down with some hesitation – that the injunction should be revoked and the show allowed to continue. In summary:

I have decided to overturn the lower court's decision and rule that the petitioner failed to satisfy the burden of proof necessary to show that the performance constitutes "torture" "abuse" or "cruelty" as prohibited by law.

The Relevant Legal Provisions and Their History

10. In the beginning, there was section 386 of the Penal Law Ordinance-1936, which dealt with cruelty to animals. This provision was created in the image of its English sister-statute, the Protection of Animals Act-1911. The chapter containing this offence was found under the headline of "minor offences" and the maximum punishment for those found guilty of cruelty to animals was a week's imprisonment, for a first offence, and a month's imprisonment for recurring offences. In 1976, the punishment was raised to one month's imprisonment for first offences as well. *See* The Law to Amend the Penal Law Ordinance (no 28)-1966. In the Penal Law-1977, what was previously section 386 became section 495, the content having been left unchanged, and the heading remaining "minor offences."

11. The change to the legislation came in the form of the Prevention of Cruelty to Animals Law-1922. During the legislation process, the bill was split into two separate statutes: Cruelty to Animals Law (Protection of Animals) – the law we are concerned with – and its counterpart, the Cruelty to Animals Law (Experimentation on Animals)-1994 [hereinafter the Experiments on Animals Law]. The chief amendments brought to the law we are concerned with are the following: first of all, the punishments were made more severe. The one-month prison sentence previously set out for first offences was raised to a maximum of three years for some of the offences and one year for others. *See* § 17 of the law. The bill's initiator, Member of Knesset Poraz, had the following to say regarding the changes

We are raising the punishment set out for abusing animals from a maximum of one year imprisonment [he was perhaps referring to one month – Cheshin, J.] to three years. This, to my mind, is a reasonable punishment. Today, the legislature deems even trivial, minor matters to be serious offences. I think that meting out a punishment of one year's imprisonment [once again the MK probably meant to say one month – Cheshin, J.] for whoever intentionally and knowingly abuses animals is unreasonable.

See Minutes of the Knesset 134 (1994) 3426. The second change, formulated in section 17(a) of the law, involved allowing for injunctions to be issued against those who violated the law's provisions. The law also provided a mechanism, in sections 15-17 of the law, for granting judicial standing to "organizations for the protection of animals," both for the purpose of pressing criminal charges and for the purpose of petitioning the courts for injunctions. The petitioner before this Court – the "Let the Animals Live" Organization – was recognized as an organization having judicial standing by law.

12. We are concerned with the provisions of section 2(a), which state the following:

Prohibition Against Abuse

2(a) No one shall torture an animal, treat it cruelly, or abuse it in any way.

It seems to me that these statutory provisions should properly be read in conjunction with other statutory provisions, which, read together, form a humane whole. As such, we cite the provisions of sections 2(b) and (2c), as well as sections 3 and 4 and some of section 17:

2. Prohibition Against Abuse

- (b) No one shall set one animal upon another.
- (c) No one shall organize a fighting competition between
- (d)

3. Prohibition Against Overworking Animals

- (a) No one shall put an animal to work when its physical condition does not allow it to work.
- (b) No one shall force an animal to work until its strength is exhausted.

(c)

4. Prohibition Against Putting Down Animals Using Poison

No one shall put to death animal using strychnine or any other poison specified by the Director in an official notice, unless the Director's permission to this end is obtained.

17. Punishment and Fines

- (a) Persons infringing on the provisions of section 2 are liable for three years' imprisonment.
- (b) Persons infringing on the provisions of sections 3 or 4 are liable for one year's imprisonment.
- (c) The commission of an offence under section 3 also gives rise to charges being brought against the animals' owners or keepers, unless it is proven that the offence was committed without their knowledge and that they took all reasonable means to prevent its commission.

(d)

As noted, for our purposes, we are concerned with section 2(a) of the law. We shall therefore proceed to outline the proper interpretation of this statutory provision.

The Law's Interpretation: "Torture," "Cruelty," and "Abuse"

13. The legislature prohibited three types of behavior: the torture of animals, cruelty against animals, and the abuse of animals. These three words: torture, cruelty, and abuse, are not primarily legal terms. Instead, these concepts describe a certain social phenomenon. For example, the provisions of section 3689(c) of the Penal law – a provision added to the Penal Law-1989 (in Penal Law (Amendment no 26)-1989) – deals with the physical, emotional, or sexual abuse of minors or helpless persons:

368. Abuse of minors or helpless persons

- (d) Anyone who physically, emotionally or sexually abuses a minor or helpless person is liable for seven years imprisonment; where the perpetrator is the minor or helpless individual's guardian, he is liable for nine years imprisonment.

(e)

A helpless person is defined by section 368(a) of the Penal Law:

Whoever by reason of his/her age, illness, or physical or emotional limitations, mental incapacity or for whatever other reason, cannot care for his/her basic needs (sustenance), health, or welfare.

14. These concepts – torture, cruelty, and abuse – are familiar to us all. While borderline behavior, as in all other fields, is likely to elicit debate regarding the interpretation of each of these terms, the marking stones of these fields are more or less known to us. Nevertheless, these matters are worthy of closer examination.

To "torture" (*inui*) is to cause suffering, pain and torment: "Therefore they did set over them taskmasters to afflict them (*anoto*) with their burden." Exodus 1:11. The verse continues to describe the affliction:

And the Egyptians made the children of Israel to serve with rigor: And they made their lives bitter with hard bondage, in mortar, and in brick, and in all manner of service in the field: all their service, wherein they made them serve, was with rigor.

Id. at 13-14. "And the Egyptians evil entreated us, and afflicted us (*va'y'anunu*), and laid upon us hard bondage." Deuteronomy 26:6. And the biblical commandment: "Ye shall not afflict (*tanun*) any widow, or fatherless child. If thou afflict them (*ane ta'ane*) in any wise, and they cry at all unto me, I will surely hear their cry." Exodus 22:21-23. Similarly, regarding Amnon's deed against Tamar: "Howbeit he would not hearken unto her voice: but, being stronger than she, forced her, and afflicted her (*v'y'aneha*)." II Samuel II, 13:14. And Sarah's actions

against Hagar: "But Abram said unto Sarai, Behold, thy maid is in thine hand; do to her as it pleaseth thee. And when Sarai dealt hardly with her (*va't'aneha*), she fled from her face." Genesis, 16:6

To "treat cruelly" (*l'hitahzar*) means to treat humans or animals harshly, to be merciless, to act heartlessly: "... they are cruel (*ahzari*), and have no mercy..." Jeremiah 6: 23. "Behold, the day of the Lord cometh, cruel (*ahzari*) both with wrath and fierce anger..." Isaiah 13: 9.

"Abuse" (*hitolelut*) refers to harsh and cruel treatment against another, humiliating another, or degrading another: "Then said Saul unto his armor bearer, Draw thy sword, and thrust me through therewith; lest these uncircumcised come and thrust me through, and abuse me (*v'hitalelu-bi*)." I Samuel 31:4. Like the Tribe of Benjamin's deeds against the Levite's mistress in Givah: "and [they] abused her (*va'yitalelu-ba*) all the night until the morning" Judges 19:25. "And Zedekiah the king said unto Jeremiah, I am afraid of the Jews that are fallen to the Chaldeans, lest they deliver me into their hand, and they abuse me (*v'hitalelu-bi*)." Jeremiah, 38: 19

Each of these three prohibited deeds – torture, cruelty and abuse – has its own sphere. These are not identical to one another, though they overlap. At times it is difficult to distinguish an evil of one sort from an evil of another. A man who strikes a donkey repeatedly – as the donkey writhes in pain – commits all three evils: he tortures the donkey, treats it cruelly and abuses the animal.

15. A few traits are common to all three of the prohibited acts that the law proscribes. These characteristics hold the key to understanding the prohibition against cruelty to animals. First of all, we opine that the three prohibitions we are discussing differ from other legal prohibitions, in that they are general in nature, and they set up a framework rather than setting down specifics. They are unique in this sense. For instance, section 2(b) of the law prohibits setting animals against one another; section 2(c), for its part, prohibits organizing fighting competitions between animals; these are specific prohibitions. Likewise, the prohibitions under sections 3(a) and 3(b) of the law are specific

prohibitions – their area of application is relatively narrow in scope. That is not the case with regards to the prohibitions forming the subject of this petition. Here, the legislature did not specify what types of behavior are prohibited in advance. Instead, these provisions' chief occupation is with the moral imperative enshrined therein, the prohibition against cruelty to animals. A similar framework is found in Hillel's saying: "Do not do unto your neighbor that which is hateful to you. That is the entire Torah. The rest is merely commentary – now go and learn." Sabbath, 31a. Thus, while the "that which is hateful to you" commandment creates a "framework-prohibition" its "interpretation" creates practical prohibitions.

As such, the prohibition that concerns us does not set out precise boundaries of conduct. Nor does it list the prohibited deeds. Instead, it plants the tree that bears the fruit.

What then are the foundations upon which the prohibition against cruelty to animals is premised?

The Foundations of the Prohibitions

16. A central factor that unifies the three prohibitions lies in the mental element associated with the crimes of torture, cruelty and abuse. Thus, it is not necessary that the person torturing the animal, treating it cruelly or abusing it willfully intends to treat the animal so. Rather, for the purpose of punishment, as per section 20(a) of the Penal Law, it suffices that one have "awareness of the nature of the deed, of the circumstances and the possibility of the ensuing consequences." As for obtaining the civil remedy of an injunction, it is sufficient that the actions can objectively be deemed to constitute torture, cruelty or abuse. The law's purpose is to protect animals from harm. What recourse has an animal thrown at the mercy of a sadist who hurts it, deriving pleasure from the suffering of another living being, or an unfeeling person lacking empathy for another's pain? What recourse has an animal from a man who does feel his fellow man's pain but is unmoved by that of an animal, which he feels it is proper to hurt until it bows to his will? Behold an overburdened carriage beginning to lag at the foot of a hill, and the

carriage-master begins whipping the horse mercilessly so that it continues on its journey. Should we attempt to unearth whether the carriage-master's intention was to torture the horse, to treat it cruelly, or to abuse it? It is clear that the decision of whether to issue an injunction against one who tortures an animal, treated it cruelly or abused it, is subject to an objective standard: what a passer-by would have concluded upon observing the behavior. In other words, should the individual's deeds – as such, and under the circumstances – be deemed torture, cruelty, or abuse?

17. A second basis common to all three deeds prohibited by section 2(a) of the law – torture, cruelty and abuse – is the suffering that they cause the animal and the pain that it feels as a result. This raises the following question: what amount of suffering and pain must the animal experience for us to conclude that the pain and suffering falls under the definition of torture, cruelty and abuse? What amount of suffering or pain corresponds to the law's definition? What is the "scale" of pain and suffering? The district court said the following with regard to this matter:

Reading the section together with the legislative history reveals its underlying objective: to prohibit the cruel suffering of animals, that is to say to prohibit harm causing significant pain and suffering. The words employed by the legislature – torture, cruelty, abuse – all prohibit behavior causing severe suffering. A broader interpretation than that would border on the absurd.

The district court's interpretation is narrow in scope. Under that interpretation, only severe incidents fall under the law's prohibition. The law only prohibits harming animals in a "cruel" manner; it prescribes that we refrain from "causing significant pain and suffering"; a sanction is only activated by behavior causing "severe" suffering.

I, for my part, find it difficult to understand where the court found this interpretation of the law. The law instructs that it is forbidden to abuse animals "in any way." How that can be taken to mean "severe suffering" is beyond me. "Abuse" is "abuse" – even if it does not cause "significant

suffering." Take, for instance, a man who abuses a street dog, tormenting it, but not necessarily causing it "severe suffering." Why and on what basis should we interpret the law in a manner that would place that individual beyond its grasp? Why and on what basis would we interpret the law in a manner that precludes preventing this man from continuing to abuse this dog? I find this approach difficult to understand and will not agree to such a narrow interpretation of the law. At a later juncture, I will attempt to explain why it would not be appropriate to interpret the law narrowly. Even if we did not address these points, however, it is our opinion that there is no justification for interpreting the law as the district court did. We will not set out a measure for suffering, nor will we determine the threshold of this "suffering-meter," which magically indicates whether an individual has tortured an animal, treated it cruelly or abused it.

18. Pain or suffering – though not severe – is sufficient to satisfy the second element establishing torture, cruelty, or abuse. A hint – or perhaps even more than a hint – to this effect can be found in section 8(d) of the Experiments on Animals Law: "experimenting on animals shall be conducted as specified in the annex." Section 1 to the Annex teaches that "experiments that cause pain or suffering shall not be conducted without general or local anesthesia or analgesia." Thus, the annex speaks of using "means to attenuate the pain and suffering." Adjacent to its discussion of "pain and suffering," the annex proceeds to specifically state that "animals who can only expect prolonged suffering and acute pain after the experiment shall be put to sleep even if the experiment's objectives were not yet met" *See* Annex to the Experiments on Animals Law, § 3. From this we learn the distinction between "pain" and "acute pain"; there is "suffering" and "prolonged suffering." I could therefore not understand why we should restrict the definition of torture, abuse and cruelty to "significant" pain and "severe" suffering.

19. The district court distinguishes between torture, cruelty and abuse – which are prohibited – and the causing of "discomfort" – which it deems to be permitted. Regarding discomfort, the magistrate court stated:

Any broader interpretation would border on the absurd. Any person walking his dog on a leash and fitting it with a muzzle could potentially be found guilty of causing the animal discomfort, thus constituting an offence under section 2(a) of the law.

For purposes of the term "discomfort," I can do no more than to repeat and restate that which I said regarding the measure of suffering. The purpose of the concept of "discomfort" is to describe certain deeds committed against animals, which, although unworthy, do not fall under the definition of torture, cruelty or abuse. If that is in fact the case, we have said nothing, for the word "discomfort" contributes nothing. While we agree that "discomfort" is not tantamount to "suffering," the question of whether an animal in a specific instance merely feels "discomfort" or suffering and torment must be answered on a case by case basis. As for the leash and muzzle example – it too may one day find its way to bar, and if it does we shall address it then. I, for my part, believe that the leash and muzzle issue's resolution most likely lies in the third element of the law, which shall be discussed below.

As we have discussed this hierarchy of suffering, let us recall that at the bottom of this hierarchy lie the most negligible of matters, namely, feelings that may be deemed "very slight discomfort."

20. A final word: abuse of animals can take the form of physical abuse – the usual form encountered – or it can be emotional abuse. I think we all agree that abuse, torture and cruelty do not necessarily have to involve any physical contact. Indeed, emotional abuse may, at times, be far worse than its physical counterpart. This is true in human victims – as section 368(c) of the Penal law teaches – and I see no reason not to apply this rule to animals as well. The issue is one of proof, and, needless to say, emotional abuse in animals is quite difficult to prove. *See* J. M. Masson and S. McCarthy, *When Elephants Weep: Animals' Emotional Life* [11]; *see also* *C.E. Ameriea Inc. v. Antinori* (1968) [7]. The abstract of the decision, which discusses provoking a bull for the purposes of a bull fight, may be found in 6 A.L.R. 5th 868-69 (1992).

21. We have now reached the third element forming the offence of abuse, cruelty and torture – it being the most difficult of all. The first two elements discussed are, essentially, factual elements. Truth be told, both these elements also raise questions of law – at times complex – but are, nevertheless, to my mind, chiefly preoccupied with questions of fact that may be answered with the help of experts and on the basis of factual presumptions. Substantively different, the third element is a juridical–normative one. At this point, we do presume that a person caused an animal suffering, and for purposes of this hearing, we will also assume that the suffering is significant. In other words, take an example where all agree that the second element – the presence of torture, suffering and abuse – is present. However, causing significant suffering to an animal – and doing so intentionally – does not yet constitute "abuse," "torture" or "cruelty." Take, for instance, a veterinarian operating on a dog who was hit by a car, which, save the sedation administered, suffers terrible pain and torment. No one would dare accuse the veterinarian of abusing the dog, torturing it or treating it cruelly. Quite the opposite: the doctor is attempting to help the dog, to heal it. From this we learn that causing animals suffering does not, *per se*, satisfy one of the three elements of the offence. Rather, an additional element must be met. Once that additional element is established – and only then – does one violate this three-fold prohibition. This element, almost self-evident, is that the suffering and torment caused to an animal has no justification. Only causing unjustified and unnecessary suffering serves to establish the elements of the offence. And if the behavior in question can be justified, it shall not be deemed to constitute an offence or a wrong.

22. And herein lies the difficulty: when will an act causing suffering to animals be deemed justified and when will it not? To say that every matter shall be judged according to the circumstances surrounding it is insufficient, seeing as how the issue of justification is, essentially, a value–laden question, which must be examined in accordance to values – not only in light of the circumstances.

Below are the words of the wise judge Lord Coleridge, in *Ford v. Wiley*, 209 (1889):

Now it is important to settle in one's mind, so far as it can be settled, clearly what is cruelty, and what is cruelly to abuse or torture an animal within the meaning of the statute. The mere infliction of pain, even if extreme pain, is manifestly not by itself sufficient. Men constantly inflict great pain on one another and upon the brute creation, either for reasons of beneficence, as in surgery and medicine, or under sanctions that warrant its infliction, as in war or in punishment. It is further lawful to inflict it if it is reasonably necessary; a phrase vague, no doubt, but with which in many branches of the law every lawyer is familiar. This involves the consideration of what "necessary," and "necessity" mean in this regard. It is difficult to define these words from the positive side, but we may perhaps approach a definition from the negative.

Later on, Lord Coleridge cites an earlier judgment according to which "the cruelty intended by the statute is the unnecessary abuse of the animal." *Id.* at 210. And here are Justice Hawkins' words in that earlier case:

To support a conviction then, two things must be proved – first, that pain or suffering has been inflicted in fact. Secondly, that it was inflicted cruelly, that is, without necessity, or, in other words, without good reason.

Id. at 218. And further:

What amounts to a necessity or good reason for inflicting suffering upon animals protected by the statute is hardly capable of satisfactory definition – each case in which the question arises must depend upon a variety of circumstances; the amount of pain caused, the intensity and duration of the suffering, and the object sought to be attained, must, however, always be essential elements for consideration. To attain one object the infliction of more pain may be justified than would be ever tolerated to secure another.

Similarly, our English statute of 1911, *see supra*. para. 10, speaks of those causing animals "any unnecessary suffering." *See also Barnard v. Evans* (1925) [6], where Justice Avory noted that "I think the expression 'cruelly ill-treat' applies to a case where a person willfully causes pain to an animal without justification for so doing."

The concept of justification for the causing of suffering to animals is – as the judges' statements teach – quite complex. It is contingent upon various factors such as the extent of suffering, its duration, and its objective. Great suffering may be justifiably caused for one purpose, and another purpose may not even justify the slightest pain. In Justice Coleridge's words in *Ford* [5]:

Necessity to form an excuse under the statute does not mean, as I have explained, simply that the effect of an operation cannot be otherwise secured. There must be proportion between the object and the means.

Id. at 215. In the same vein are Justice Hawkins comments:

[I]t would not be contended by the strongest advocates of the cause of humanity that pain to some extent may not be reasonably inflicted with a view to save an animal's life, to cure it from sickness or injury, or to fit it to fulfill the part for which by common consent it is designed. In each case, however, the beneficial or useful end sought to be attained must be reasonably proportionate to the extent of the suffering caused, and in no case can substantial suffering be inflicted, unless necessity for its infliction can reasonably be said to exist. To save the life of an animal, to restore it to health when suffering from painful disorder, violent measures, causing much misery to it, may often – times be a matter of necessity; a wounded or diseased limb, or an injured eye, may require surgical treatment inseparable from pain; these are illustrations of cases in which the pain caused is for the direct benefit of the animal itself ... the good to be

attained must be reasonably proportionate to the suffering caused.

Id. at 219. And further on:

I have said enough to indicate my views, namely, that the legality of a painful operation must be governed by the necessity for it, and even where a desirable and legitimate object is sought to be attained, the magnitude of the operation and the pain caused thereby must not so far outbalance the importance of the end as to make it clear to any reasonable person that it is preferable the object should be abandoned rather than that disproportionate suffering should be inflicted.

Id. at 220.

The significance of these comments, therefore, is that after finding that an individual caused an animal suffering and torment, likely to constitute torture, cruelty or abuse, it is incumbent upon us to clarify and unearth the purpose for which the act was committed, and whether that purpose reflects a worthy social value. In the event that the purpose in question is found to be worthy, we proceed to examine whether the means used by the individual were appropriate. And finally we ask: is the torment and suffering experienced by the animal proportional to the purpose and means for which and via which they are inflicted.

As such, these are the factors that we shall address: does the suffering experienced by the animals in question fall under the definition of torture, cruelty or abuse? For what purpose was the suffering inflicted? Are the means employed proper means? Is the amount suffering proportional to the purpose and means for which it was inflicted?

23. American case law and legislation are in the same spirit as their English counterparts. *See, e.g.,* S.A. Soehnel, *What constitutes the*

Offense of Cruelty to Animals – Modern Cases, 6 A.L.R. 5th, at 733-52 (1992) [14]. To show this correspondence, it will suffice to cite two paragraphs from 4 Am. Jur. 2d § 29, at 370 [16]:

As cruelty statutes are not intended to interfere unreasonably with one'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.

And further:

The question as to what specific acts come within the scope of the law depends very often on the wording of the particular statute of ordinance involved. The word 'cruelty', as used act, omission' or neglect whereby unjustifiable pain or suffering, and under some statutes, death, is caused or permitted; and the words 'torture' and torment' as employed in cruelty to animals statutes have on occasion' been similarly defined as including an act, omission, or neglect whereby 'unnecessary' or 'unjustifiable' pain or suffering is caused or permitted.

Id. § 31, at 372.

As for the relationship between the suffering endured and the purpose for which it is inflicted, it is proper that we cite the court in *Waters v. People* (1896) [8]. The case involved the freeing of caged pigeons, which, at the moment of taking flight, were shot at. There, Justice Campbell wrote:

Every act that causes pain and suffering to animals is not prohibited. Where the end or object in view is reasonable and adequate, the act resulting in pain is, in the sense of the statute, necessary or justifiable, as where a surgical operation is performed to save a life, or where the act is done to protect

life or property, or to minister to some of the necessities of man. But the killing of captive doves as they are released from a trap, merely to improve one's skill of marksmanship, or for sport and amusement, though there is no specific intention to inflict pain or torture, is, within the meaning of this act, unnecessary and unjustifiable.

Id. at 115. And later on:

Where, as here, the acts charged are admittedly done, not to furnish food, but merely for the sport and amusement of the defendant and his associates, the facts clearly bring the case within the ban of the statute. In contemplation of this law, the pain and suffering caused by such acts are disproportionate to the end sought to be attained, and furnish no adequate or reasonable excuse for the acts which, to be necessary or justifiable, must be prompted by a worthy motive and a reasonable object.

24. Similar statements were made by Members of the Knesset during the law's legislative stages. For example, MK Poraz stated:

Someone [in the Knesset] asked what sort of society we would be if we kill them [animals] and finally eat them, but raise issues of abuse? I would like to say that while animals do not have the right to life, they do have the right not to be abused, tortured or unnecessarily harmed. This bill seeks to fulfill this objective.

Minutes of the Knesset, 134 *supra.* at p. 3425, on 11.1. 1994. I note, in passing, that the Member of Knesset's statement that animals do not enjoy the right to life is not unproblematic, but this issue exceeds the boundaries of this discussion.

25. Having made the above statements we cannot help but revisit the provisions set out in the new Basic laws, including the Basic Law:

Human Dignity and Liberty and the Basic Law: Freedom of Occupation.
As per section 8 of the Basic law: Human Dignity and Liberty:

8. Violation of rights

There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.

See also the similar provisions in Basic Law: Freedom of Occupation, § 4. This provision covers both purpose and proportionality. *See* HCJ 5016/96 *Horev v. The Transportation Minister* [1], paras. 64-65 (Barak, P.); Professor I. Zamir, *Israel's Administrative Law as Compared to Germany's*, [10], 130-33.

26. It is incumbent upon us to strike a balance between the three following matters: the degree of pain and suffering endured, the purpose for which it is inflicted, and the means by which it is inflicted. Occasionally, it is up to the legislature to strike this balance, as it has done in the Experiments on Animals Law. That statute does not prohibit testing on animals but rather sets out the specific guidelines and mechanisms. It establishes thresholds, both for purposes of inflicting the pain and the means that are employed. Matters for which the Legislature did not provide specific arrangements – of which there are many – are left to the courts, which must strike the proper balance between conflicting interests. The issues are not easily decided, as it is the values deep in our hearts that guide us on this journey. We need not go farther than the stark differences of opinion between the magistrate and district court judges in order to grasp the complexity of the matter awaiting this Court's decision.

27. Who would debate the worthiness of efforts to save an animal's life or to heal it, irrespective of whether the treatment causes the creature some pain and torment? This assumes, of course, that the means used to this end are both reasonable and appropriate. In other words, when faced with the matter of an animal's welfare, all agree that the animal should

be helped, even if extending this assistance involves causing pain and suffering – provided that they are "proportional." Having said this, what is the rule when pain is caused for the sole purpose of benefiting man? Some believe that animals have legal rights. Indeed, this school of thought's more extreme proponents argue that all animals are entitled not to be made to feel any pain or suffering for any reason whatsoever. To them, animals are equal to humans, or almost equal. Thus, every animal has the natural right not to endure pain and suffering – a right that nature endowed it with – a right that is independent of man's needs. *See, e.g., Political Theory and Animal Rights : In Defense of Animals* [13]. Thus, for example, this view opposes any human use of animals, even in name of science, agriculture or consumption. For a similar approach, which does not invoke "rights" see S. Dorner, *What is a Right* [15]:

I think that we ought to behave toward other animals, in principle, like toward human beings, not by reason of the rights they have ..., but because it is *right* (morally, ethically) to treat them equally, where the relevant circumstances are equal. So I don't need a sophisticated rights – theory here, like that of Tom Regan in *The Case for Animals Rights*, to convince me that it is very bad to treat animals badly, seeing them as inanimate chattels (as humanity usually treats them, perhaps mostly unknowingly). For me it is not less self-obvious that to hit a dog (to deal with a most banal example) is bad – than that to hit a human being is bad, except perhaps that hitting a dog, in normal everyday circumstances, is more inhuman. If the rights-theory is any good here, it is mainly to show that, on principle, the same reasons which compel us to deduce that there are moral considerations for treating human beings, in given circumstances, in a certain way, also compel us to deduce that there are moral consideration to treat other creatures, in the same circumstances, in analogous ways.

We shall examine these issues further below.

While the school of thought that recognizes animal "rights" does not find support, either in legislation or in case law, it does teach us that although man rules the earth and its creatures, he must nonetheless respect his environment and take into account the interests of animals.

The Law's Rationale: Why is Cruelty to Animals Prohibited?

28. Why do courts and legislatures see fit to set out rules for the protection of animals? It is essential that we discuss the rationale underlying such rules, if only because it is in light of their rationale that the boundaries of statutes and case law rules may be discerned. It turns out that the law and related case law are founded on a number of premises, which we intend to examine one by one.

29. The first and chief basis for these prohibitions is founded on our innermost feelings that abusing animals, treating them cruelly or torturing them is immoral and unfair. The empathy that we feel for abused animals derives from a place deep in our hearts, from our sense of morality, feelings imprinted in our hearts, elicited by the sight of the weak and helpless being harmed. From birth, we are taught to protect the weak – and animals are weak. Compared to humans, animals are like children, scared and helpless. The abuse of children disgusts us and so does the abuse of animals. Animals, like children, are innocent. They do not know the meaning of evil, or how to deal with it. Animals find it difficult to protect themselves from humans and the battle between man and beast is not one between peers. Man is therefore commanded to protect animals, as part of the moral imperative to protect the weak. The rule prohibiting cruelty to animals apparently comes to protect animals as creatures to which God gave a soul. All those who have God in their hearts do their best to prevent man from torturing animals, from treating them cruelly or abusing them. It therefore follows that the laws for the protection of animals derive from man's own heart.

30. Our [Jewish] sources of old say the following respecting cruelty to animals:

If thou see the ass of him that hateth thee lying under his burden, and wouldest forbear to help him, thou shalt surely help with him.

Exodus: 23: 5. Similarly,

Thou shalt not see thy brother's ass or his ox fall down by the way, and hide thyself from them: thou shalt surely help him to lift them up again.

Deuteronomy 22:4 [J]. A question: when faced with both commandments simultaneously – freeing a beast of its burden or returning the burden to the beast's back – which comes first? Our Rabbi, Maimonides instructs:

He who encounters both a man attempting to unburden his animal and one placing his merchandise on his beast is commanded to assist the former and only then the latter, in order to spare the animal waiting to be unburdened further suffering.

Maimonides, Laws Regarding Murder and the Preservation of Life, 13: 13 [J]. Once more, we are commanded not to cause animals pain for they are living beings.

31. So instructs the Torah:

And whether it be cow, or ewe, ye shall not kill it and her young both in one day.

Leviticus 22: 28 [K]. Slaughtering a cow or sheep is both possible and permissible and yet is forbidden to slaughter such a beast and its offspring on the same day. The Torah further instructs:

If a bird's nest chance to be before thee in the way in any tree, or on the ground, whether they be young ones or eggs, and the dam sitting upon the young, or upon the eggs, thou shalt not take the dam with the young.

Deuteronomy 22:6 [C]. What is the rationale underlying these commandments? In Guide of the Perplexed, Part II, Chapter 48 [L] Maimonides teaches:

"The commandment concerning the slaughtering of animals is necessary. For the food of man consists only of the plants deriving from the seeds growing in the earth and of the flesh of animals, the most excellent kinds of meat are those permitted to us...

Now since the necessity to have good food requires that animals be killed, the aim was to kill them in the easiest manner, and it was forbidden to torment them through killing them in a reprehensible manner by piercing the lower part of their throat or by cutting off one of their members, just as we have explained.

It is likewise forbidden to slaughter it and its young on the same day, this being a precautionary measure in order to avoid the slaughtering of the young in front of its mother. For in these cases animals feel very great pain, there being no difference regarding this pain between man and the other animals. For the love and the tenderness of a mother for her child is not consequent upon reason, but upon the activity of the imaginative faculty, which is found in most animals just as it is found in man...

This is also the reason for the commandment to send the mother's bird from the nest. For in general the eggs over which the bird has sat and the young that need their mother are not fit to be eaten. If then the mother is let go and escapes by her own accord, she will not be pained by seeing that the young are taken away...

So goes the wonderful legend of Rabbi Yehudah the Prince – in the Talmud, simply known as the Rabbi – and the calf, meant for slaughter, who asked to be saved. For failing to spare the calf from slaughter, the

Rabbi endured enormous suffering. This suffering only ended in the merit of the pity the Rabbi took on other animals:

[T]he Rabbi's torments were brought on by his own deeds, and ceased by virtue of another deed. What deeds brought on the torments? A calf on its way to slaughter approached the Rabbi, its head bowed, weeping. Said the Rabbi to the calf: 'go to slaughter— it [slaughter] is the purpose for which you were created'.

Said the Heavens: 'let him [the Rabbi] suffer for he does not have mercy on animals...'

The torments ceased by virtue of a different deed. So goes the story: one day, the Rabbi's servant was sweeping the house and came across baby rats, which she began to sweep away. Said the Rabbi "take pity on them, for it is written 'and He took pity on all His creations' (Psalms 145:9).

Said the Heavens: "Since he has mercy— We shall show him mercy. And his torments ceased."

Baba Metzia, 85a [M]. And in this manner The Holy One, Blessed be He, chose Moses to lead His people:

"Now Moses kept the flock." Exodus 3: 1. The Holy One, Blessed be He evaluated Moses from the way he kept the sheep.

Our rabbis said: When Moses was Jethro's shepherd in the desert, a young goat ran away from the flock, and Moses chased after it, until it reached shelter. In this shelter, the young goat chanced upon a pool of water, and began to drink. When Moses arrived, he said "I did not realize you ran because of thirst. And now, you must be tired." Moses

placed the young goat on his shoulders and walked back to the camp.

Said the Holy One, Blessed be He: Moses, you shepherd the flock of men with mercy; so shall you shepherd Israel, My own flock.

Shmot Rabba 2b [N]. Similar is the commandment:

Thou shall not plow with an ox and a donkey together.

Deuteronomy 22: 10 [B]. *See also* 5 Professor A. Steinberg, Medical-Halachic Encyclopedia 431, 445 *et seq.* [O], on the value of "preventing cruelty to animals." *See also* Sefer Ha'Hinuch, Commandment 570 [P].

The injunction not to cause animals pain is also a Biblical commandment, and, as such, supercedes the teachings of the Rabbis:

Preventing cruelty to animals is a commandment originating in the Torah and such a commandment supercedes a commandment of our sages.

Sabbath, 128b [I].

Up to this point, we are of one heart – we must not be cruel to animals for they are living beings. Such is the standard of our hearts, prohibiting us from harming those weaker than us. We recall the deeds of the Babylonians deeds against King Zedekiah:

And they slew the sons of Zedekiah before his eyes, and put out the eyes of Zedekiah, and bound him with fetters of brass, and carried him to Babylon.

Kings II 25:7 []. This is indeed the form of torture that Zedekiah feared and discussed with Jeremiah. *See* Jeremiah 38: 19 [E]. *See supra* para. 14.

32. A second perspective teaches that the both the commandment to send the mother bird from her nest, as well as the prohibition against slaughtering an animal and its young in the same day, aim to prevent man from becoming cruel, and to protect his soul from being corrupted by cruel deeds. This is the view of Nahmanides, regarding the mother bird:

"When you shall chance upon a bird's nest." Deuteronomy 22: 6. This too is a commandment inspired by the same rationale as "she and her young shall not be slaughtered on the same day" for the rationale underlying both is to prevent our hearts from becoming cruel and unmerciful. ... In the "Guide to the Perplexed," Maimonides wrote that the reason for both these commandments is to ensure that animals are not caused anguish – neither by taking the bird from before its mother, nor by slaughtering the mother's young in front of her – for there is no difference between the pain that a human or animal mother would feel in such an instance, for the mother's love and tenderness for its offspring is not rational but a fruit of the imagination found in both man and animal. Therefore, says Maimonides, the central prohibition concerns slaughtering the young goat before its mother. The opposite aspect of the prohibition – slaughtering the mother before its young – is merely a precautionary measure. *More importantly, the purpose of these commandments is to prevent us from becoming cruel....These prohibitions teach us mercy, compassion and prevent us from acting cruelly. For cruelty enters, infects, and spreads through the soul...the commandments' purpose is to teach us the value of compassion.*

Commentary of Nahmanides, Deuteronomy 22: 6 [] (emphasis added). Thus, Nahmanides disagrees with Maimonides as to the rationale underlying these commandments. To his mind, these commandments are meant to educate man, so that he does not become cruel, so that hardness of heart and cruelty are not etched onto his soul. **In her interpretation of the Scriptures (New Issues in the Book of Leviticus [S]), Dr. Nechama**

Leibowitz raises this debate, and adds the Rashbam's view to that of Nahmanides' interpretation of the commandment

"Thou shalt not see the kid in his mother's milk" (Exodus 23: 19 [A]). The Rashbam goes the way of Nahmanides. In his view, this commandment, like the other two, comes "to teach us the civilized way commanded by Scripture.

Thus, Dr. Leibowitz notes that the Rashbam's interpretation to the commandment to send the mother bird from the nest, "which is similar to the cruelty and gluttony associated with taking, slaughtering, cooking and eating a mother together with its young." Later on in her treatise, Dr. Leibowitz raises yet a third interpretation for these commandments – to teach us humility. *Id.* at 317– 319.

33. I for my part, see no contradiction between the various interpretations offered. Indeed, the three interpretations complement and clarify one another. Although I will not deny that, in my view, these commandments derive from man's inner intuition, as Maimonides teaches. Nevertheless, it is also appropriate that we learn kindness and mercy. Hence, when an audience sits down to watch a bull-fight, screaming and cheering "Ole!" with blushing faces, gawking at the sight of a bull with knives stuck in its back, its blood gushing in spurts, we can very well expect that, upon exiting the stadium, the members of this audience will be rude to their fellow man, in the spirit of the performance that they just witness. One whose heart is dull and unfeeling towards an animal may be equally insensitive towards his fellow man. To abuse an animal is to abuse those who are helpless. The entire deed is drenched in a type of unfeeling, which slowly seeps into, to be absorbed, by man's soul

34. Today too, various explanations for the prohibitions against abuse, cruelty and torture of animals are offered. At times, we hear of mercy, other times of education, or the unfairness that characterizes the abuse of a helpless and defenseless animal. Thus, for instance, Justice Campbell wrote the following regarding the statutes seeking to protect animals:

Their aim is not only to protect these animals, but to conserve public morals, both of which are undoubtedly proper subjects of legislation. With these general objects all right-minded people sympathize

Waters [8] at 113. And so it appears that, with these words, Justice Campbell sides with the explanations offered by both Maimonides and Nahmanides.

In *Ford* [5], Justice Hawkins further states that allowing the abuse of animals would harden the hearts of men:

Constant familiarity with unnecessary torture to and abuse of dumb animals cannot fail by degrees to brutalize and harden all who are concerned in or witness the miseries of the sufferers, a consequence to be scrupulously avoided in the best interests of civilized society.

In *Pennsylvania Society For P.C.A. v. Bravo Enterprises* (1968) [9] Justice Musmanno makes a few comments worthy of mention in his minority opinion

If there is one commodity of which there is no need for a further supply, it is violence. If there is one school that the world can afford to miss, it is one for the tutoring of methods of violence, brutality and cruelty. Thus, In Pennsylvania, we can well do without a bullfight which is nothing less than an open air lyceum in the art of torturing helpless animals.

Id. at 350. Justice Musmanno proceeds to mock matadors who fight defenseless bulls:

There is one principle in the American way of doing things that is universally recognized, invariably defended and constantly eulogized. That is fair play, but where is the fair play in a bullfight? A fight suggests opposing forces

somewhat reasonably balanced in might. But in a bullfight the animal has no chance. He is goaded, tantalized and lanced into a state of fury, and then, when the bull, in safeguarding his dignity and, as he has reason to believe, his very life, countercharges, the brave matadors leap behind a fence or wall, and once the bellowing beast has passed by, they return to the fray to plunge their pusillanimous prongs into the vitals of a dumb beast who had never done them harm and who, under the laws of nature, is entitled to enjoy the freedom of green fields, refreshing brooks, and playful companionship with other member of the bovine family.

Id. at 350-51. In conclusion, the Judge characterizes those who abuse animals in the following manner:

A dog's life is not much of a life of itself, nor is that of a bull, a horse or any other dumb creature. But he is at least entitled to non-molestation from those who, too gross to understand the rapture of music, too shallow to appreciate the beauty of literature, too sluggish to respond to the drama and comedy of the theater, too apathetic to excite over the wholesome contests of athletics, too dull to comprehend the wizardry of painting and sculpture, must have their superficial natures titillated by the bellowing of pain of a helpless, tripping, bleeding quadruped.

Id. at 351. Justice Musmanno was in the minority. He describes his colleagues' opinion in sharp and pointed terms:

The Majority Opinion offends against public policy and then, apart from the sociological damage done to society, it commits the cruel fault of confusing the law...

It must be admitted that there are cases where the law is ambiguous and judges differ as to its proper interpretation, there are also cases where the facts are so mixed up that even black-robed Blackstone scholars reach different conclusions

as to what they actually are, but here is a case where the law is as transparent as a day in June and the facts as uncomplicated as the silhouette of a village in the rays of a descending sun. Yet, this Court, that is, the majority of it, appraises the law and the facts in a manner which defies logic, derides commons sense and makes one wonder as to what price legal education.

This decision is such an infliction on the profession that I would be happy to be invited to join an organization which could be formulated and entitled Society to Prevent Cruelty to lawyers.

Id. at 353. I have not a shred of doubt that our colleagues here at the Supreme Court of Israel would all join in Justice Musmanno's opinion on the facts.

35. Increasingly prevalent in our days is the tendency to characterize prohibitions against cruelty to animals as proper norms in a civilized society. Thus, for instance, the comments to the parliamentary bill for Prohibiting Cruelty to Animals-1992 provide:

The purpose of this statute is to prevent cruelty to animals and to supervise experiments on them. An enlightened society is judged both by its treatment of humans as well as its treatment of animals.

Likewise, MK Poraz stated the following during the Bill's reading in the Knesset:

I see this law as being of the greatest importance, for it touches on matters of morality. Clearly, an enlightened and ordered society must take care of its human members but also strive to prevent cruelty and abuse of animals.

Minutes of the Knesset 134, at 3425. On the same subject, it would be appropriate to cite Acting President Landau's statements in HCJ 281/78 *The Society for the Prevention of Cruelty to Animals in Israel v. The City*

of *Tel-Aviv-Jaffa* [2]. In that instance, the respondents sought to organize an event known as "The War of the Bulls 1978" promising that "the bulls would not be physically harmed." *Id.* at 405, and that the show was being conducted for the exclusive purpose of entertainment. The petitioner asked that the show be prohibited, but the Court rejected the appeal, ruling that it would not interfere with the city's exercise of discretion in allowing the performance. Nevertheless, the Court did not shrink from denouncing the show. As per Justice Landau:

We wish to add the following: although the petitioners failed to convince the Court that these performances must be prohibited by reason of causing harm to animals – and on these grounds alone do the petitioners base their claim – I am far from comfortable with this uncivilized behavior to which the respondents seek to privilege Israeli society, as though all the other uncivilized behaviors imported from abroad in abundance did not suffice. These performances, even in the "delicate" form to which the current respondents aspire, risks inflaming the masses and increasing the threat of violence – risks and threats that our society has enough of already.

From Cruelty to Animals to Harming Alligators

36. Having drawn the guidelines necessary for interpreting the law, let us now take a closer look at the case at bar. The issue begging the Court's attention is the following: is the respondent in fact torturing alligators, treating them cruelly or abusing them in any manner whatsoever? This question may be divided into two sub-issues, which the Court must decide. First of all, we must determine whether the struggle between man and alligator causes the latter to experience suffering and torment which exceed a *de minimis* threshold. A negative answer to this question puts an end to the matter, allowing the respondent to return home uninjured. If, on the other hand, we find that the alligator experiences suffering and torment beyond the permitted threshold, it shall be incumbent upon the Court to rule on the second sub-issue, namely: whether the respondent has any justification for the performance, justification that is capable of redeeming man's behavior towards the animal from being labeled abuse,

cruelty or torture. We shall now turn to these two sub-questions, one by one, beginning with the matter of suffering and torment.

37. What does the alligator experience during the struggle? Does it endure physical suffering? Emotional suffering? Or does it merely feel "discomfort" as a human being would feel, for instance, during a gym class? And how are we to know what it feels? The alligator is a cold-blooded being, unlike mammals that are warm-blooded creatures. Not only does the alligator not speak our language, it does not even let out cries to avert us to its pain, as would a cat or a dog. How then are we to know what it feels during the battle? Clearly, all that we can do in attempting to answer these questions is rely on the expert opinions presented to us, all the while allowing ourselves to be guided by good common sense and plain logic. The experts' statement shall guide us on our journey.

The man's battle against the alligator involves various moves, which we shall discuss individually, in order to discover and understand their impact on the alligator.

A. Pulling the Alligator's Head Upwards

The magistrate court held that this move causes the alligator pain and suffering, whereas the district court deemed that conclusion unreasonable. To which of these opposing camps do we join? Professor Mendelson testified that pulling the alligator's head upwards is not natural for the alligator. Instead, the alligator naturally moves its head from right to left – not upwards and downwards – as it hunts for prey. Dr. Tiomkin, the respondent's expert, also agreed that "alligators cannot naturally move their head backwards 90 degrees" and that alligators "are not flexible creatures." Watching the video cassette – which presents the struggle from beginning to end – taught the Court that pulling the alligator's head back and upwards is very much a forced movement, and the angle created between the animal's head and its body is not far from 90 degrees. And indeed: nature provided animals with various limbs, connected to each other, each moving – or not moving – in particular directions. A natural movement is one familiar to a particular limb,

whereas an unnatural movement naturally causes pain and torment. Try to bend your own back backwards, and you will surely see that this is so. Try to bring your feet up to your ears and it will become even clearer. Certain limbs can in fact be trained to assume certain positions and humans are free to engage in such acrobatics. However, to the best of our knowledge, the alligator did not ask the respondent to train it to pull its head back – leaving us to necessarily conclude that pulling its head back torments the animal. This doesn't merely cause the animal "discomfort" – but actual pain and suffering. This is Professor Mendelson's testimony and I see no good reason not to accept it.

B. Turning the Alligator on its Back

The man fighting the alligator shakes the creature and then proceeds to turn it on its back. Once turned over, the animal lies still, as though in a trance. In the district court's opinion, this move was not proven to cause the alligator suffering. "At most," stated the Court, "it causes the animal some discomfort." All agree that it is not natural for an alligator to lie on its back, and viewing the video reveals that the animal resists attempts to turn it over. Indeed, while it does not incur physical harm, the alligator enters a state of hypnosis of sorts. And according to one of the respondent's witnesses, Mr. Paul Rappaport: "The alligator does not exactly faint. Less blood reaches its peripheral limbs. Its metabolism slows down and it remains still. This continues for 10-15 seconds." Dr. Tiomkin added to this description, testifying that: "an alligator lying on its back feels a certain degree of stress." I, for my part, prefer to classify this stress – stress caused to the alligator, forcefully and against its will, by the man – as constituting torture, cruelty and abuse. Indeed, it may well be that this action does not cause severe suffering or terrible torment. However, as noted at the beginning of this opinion, any amount suffering is sufficient to trigger the statute's application.

C. Applying Pressure to the Alligator's Jaw

The fighter applies pressure to the alligator's jaw. In this regard, the district court notes, *inter alia*, that it is incumbent upon us to remember that we are dealing with "a large and clumsy predator and therefore the

respondent [the petitioner before this Court] failed to prove that this move causes the alligator actual pain, except for a certain measure of discomfort." This conclusion is equally difficult for me to accept. As though a "predator" – "large and clumsy" though it be – was immune from feeling pain! What justice did the district court see in interfering with the magistrate court's ruling – one that is founded on expert opinions – showing that the pressure applied to the animal's jaw causes it pain and not merely "discomfort"? The pain and degree of pain experienced are, of course, contingent upon the amount of pressure applied to the jaw. According to Mr. Rappaport, the human fighter "applies pressure equivalent to half – or perhaps a third – of his body mass. I am not exactly certain." Indeed, I found no reason to deviate from the magistrate court's conclusion that applying pressure to the alligator's jaw during the struggle causes it pain.

D. In addition to the above, it is appropriate for us to recall a few matters related to the battle in question. Thus, for instance, the alligator is under stress throughout the performance and his immune system is affected for a certain period of time thereafter. Regarding the same matter, Professor Mendelson was asked "how can depression in alligators [can] be diagnosed," to which he answered, "if they tried feeding it after the abuse, I am certain that he would refuse to eat." And indeed, Dr. Tiomkin confirms that, on the day of the performance, the alligators eat very little. In his testimony, Dr. Neri explained the reason for the stress. According to him, the alligator is a cold-blooded creature and cannot release the increased body heat that results from the battle. Consequently, stress ensues and "stress causes a decrease in the effectiveness of the immune system and exposes the animal to contracting illnesses." These points which, in my view, are of weighty importance to the facts of the case, do not even appear in the district court's judgment. I myself – a mere layman – can attest to the fact that watching the videocassette taught me that the alligator suffers from the shaking and from the other moves performed on it.

38. Now that we know that the fight between man and alligator causes the latter suffering, let us proceed to the final subject at bar, namely: does the suffering inflicted on the alligator in the context of the battle

constitute torture, cruelty or abuse of the animal? In other words: does the fight's objective justify the man's behavior – actions that cause the alligator suffering – even though the suffering is not great?

39. As noted at the beginning of this opinion, the controversial part of the performance lasts approximately forty-seven seconds – out of a thirty minute show. The show in its entirety can generally be said to have educational value. Indeed, its organizers introduce the spectators to the alligator, and provide them with explanations regarding the creature's lifestyle, body, and nutritional habits. This part of the show may be said to resemble a visit to the zoo – only, unlike an ordinary zoo, here the only animal on display is the alligator. In truth, there are those who oppose even the concept of zoos, arguing that animals should be allowed to roam free and not be locked behind bars, in tiny cages. This is true for lions and giraffes; it is true for elephants and kangaroos; it is also true for monkeys and bears, birds of all kinds and other creatures. Nevertheless, it is agreed that zoos continue to be deemed legitimate, at least for the time being, and that Hamat Gader is a zoo. What then of the infamous forty-seven seconds during which the battle between man and alligator is staged?

As we saw above, it is appropriate to distinguish between instances in which man is causing an animal pain for the animal's own good – such as a veterinarian operating on an animal – and those actions whose sole purpose is the benefit of man. Whereas deeds of the first kind are, in principle, not classified as torture, cruelty or abuse, the latter deeds must be closely examined. Nevertheless, respecting these latter actions – those whose purpose is to benefit man – we must distinguish between various purposes. Thus, there are worthy objectives that will redeem the suffering inflicted upon an animal, but there are others that will not even redeem slight discomfort. Experimentation on animals, as set out in the Experiments on Animals Law, provides an example of a redeeming purpose. An experiment performed in order to promote health, advance medicine or prevent suffering – as per the definition of “experiments on animals” in section one of the Experiments on Animals Law – is an

experiment that our society permits, subject to the limitations set out in the Experiments on Animals Law, even if animals do suffer as a result.

Such is the law regarding training dogs to become seeing-eye dogs for the blind. While I am not aware of how this training is conducted, even if the dogs do experience some suffering during the training, such suffering is redeemed by its purpose. This too, it appears, is the law applicable to zoos, where wild animals and birds, accustomed to the jungle and open spaces, are caged and cloistered behind concrete and steel. It may be argued that great educational value attaches to zoos: to teach boys and girls about lions, introduce them to tigers, and show them how a snake sheds its skin and how a giraffe picks the highest leaves from up above. Zoos are also meant to preserve species on the verge of extinction, admittedly often due to man's own deeds. Arguably, these values – education and the preservation of endangered species – have a certain redeeming social value. *Compare* Crim. App. 495/69 *Omer v. The State of Israel* [3]; HCJ 4804/94 *Station Films Co. Ltd. v. The Film and Play Review Board* [4], para. 16 (Barak, J.), para. 20 (Cheshin, J.) Needless to say, this even worthy social values cannot excuse difficult living conditions for animals.

40. For our purposes, there is no doubt that the forty-seven second long show is not meant to benefit the alligator. In any event, we have not heard any arguments as to how it may serve to advance any of the alligator's interests. Moreover: we have yet to hear what educational value this performance could possibly have. Quite the opposite is true: its purpose is exclusively commercial. The man's battle against the alligator was meant to serve as a selling point, as an amusing attraction for the audience. We may even assume that at least part of the audience is attracted to the resort because of these forty-seven seconds. Can such an objective justify the suffering that the alligator is made to endure?

Even at this early stage I will say that I do not rule out any staged fights between man and alligator. There are places on this planet where alligators roam the land, and the threat of an alligator attack is great.

Thus, for example, had we been dealing with a bona fide course, whose purpose is to teach individuals to protect themselves from such threats, I would not oppose staging a fight between man and animal. This objective may be deemed worthy, in a manner similar to the experiments conducted on animals. The case concerning us, however, merely involves amusement and entertainment. Can man's entertainment serve to justify inflicting suffering on animals? My answer, for several reasons discussed below, is no.

41. First of all, I fail to see any justification for causing a helpless and defenseless animal pain and suffering, merely in order to entertain an audience. Such entertainment is simply immoral and woe upon us if we were to condone it. An animal, like a child, is a defenseless creature. Neither are able to defend themselves, nor can either stand up for their rights, honor and dignity. Would we stand idly by upon witnessing a person harming a helpless child? If we would come to the child's rescue – and surely we would – an animal being made to endure suffering deserves no less.

Secondly, not only does the performance not embrace any educational values, but the message being sent is quite the opposite – “anti-educational,” if you will. Indeed, it is difficult to reconcile ourselves with a performance attracting men, women and children to watch a person hurt an alligator and violently cause it to surrender – all in the name of amusement and entertainment. Let us repeat that which we have already said: one who treats helpless animals cruelly shall become hard of heart and is one step away from hurling the same treatment upon his fellow man; those who watch someone abuse animals will also stand idly by as humans are being abused.

I wish to further add the following – the battle show not only inflicts suffering upon the alligator but serves to humiliate it. Let this not be taken lightly. We may never know whether the alligator actually feels humiliated as the fighter holds it by its tail, shakes it, turns it on its back and treats it as one would a lifeless stuffed animal. What we do know, however, is that had the same moves been performed on a human, they would surely depress and humiliate him. As such, that spectator is liable

to – even unknowingly – humanize the alligator, and will, in any event see its humiliation as legitimate and perhaps even proper. We shall not allow this.

Third, the struggle between man and alligator is unfair. Such unfair battles shall be not be allowed in our midst. We all know that, thankfully, the fight is not a real fight. The fight's outcome is known from the start and the alligator has no chance of emerging victorious. The fighters are experienced and trained individuals and are well aware of what they should and should not do in order to overpower the alligator. As such, the battle between man and alligator is not a battle but simply abuse of an innocent and helpless creature. Justice Musmanno deemed bull-fights unfair. See his comments in *Bravo* [9], *supra* at para. 34. Those comments, even though in a minor way, may be applied to the fight between man and alligator. We also wish to drawn attention to the provisions of section 5 of the Wild Animals Protection Law-1955, which forbids unfair hunting techniques, as far as hunting per se can be deemed to be fair.

Fourth: the performance is essentially a violent one. Violence is supplied to us in abundance and no more of it is needed, as Justice Musmanno noted in *Bravo* [9], *supra* at para. 34. and as Justice Landau warned in *The Society for the Prevention of Cruelty* [2], *supra* para. 35. What more can we add to the sage words that we have cited? In truth, certain recognized sports do involve much violence and cause suffering to the competitors. However, at least in those instances, the competitors take this risk upon themselves from the onset – whereas in the case at bar, I do not recall hearing that the alligator was consulted or its permission requested prior to having its participation.

42. The respondent further argues that issuing an order prohibiting the performance in question is liable to cause it extensive financial damage. Our answer to that is that we do not perceive these potential damages as a “redeeming” value, capable of allowing us to permit suffering to be inflicted on alligators. In this regard, let us turn our attention to the

English Court's words in *Ford* [5] and apply them to our matter. This same applies to respondent's claim that forbidding the performance constitutes an infringement of the respondent's property rights in the alligators. This argument does not deserve a response.

A Final Word

43. We quote from the testimony of Ms. Etty Altman , the spokesman for "Let the Animals Live:"

Answer: I have been doing this job for 9 years. I volunteer 24 hours a day and do not receive a penny. I see unceasing abuse. These fights lead our youth to become even more violent. This is what I want to put a stop to.

Question: How is what is being done to the alligator considered abuse?

Answer: It's the way they grab it by the head and pull it by the tail that is abuse. People come to Hamat Gader to see alligators – not fights between men and alligators. I am certain that the alligator does not enjoy the performance but cannot say what it feels since it cannot speak.

I consider myself the spokesperson of animals that cannot speak. So I speak in their names and ask that this abuse stop.
(the witness begins crying)

Words that come from one's own heart, have a way of entering the hearts of others.

44. The Court is of the opinion that in organizing the struggle, the respondent violated the "prohibition against abuse" set out in the law. Having ruled such, the performance must be banned by virtue of section 17a of the law.

It is at this juncture, however, that we encounter the following difficulty. According to section 17(a)(d) of the law, an injunction against the show the fight can only be issued for a maximum period of one year. And indeed, in its decision, the magistrate court explicitly noted that the order it issued was only in effect for one year. Thus, even if the district court had upheld the magistrate court's ruling, the order would have naturally expired, as the year in question has passed. While the reason why the legislature saw fit not to allow such orders' validity to exceed a period of one year escapes me, we are nonetheless commanded to tread the path as it is set out for us.

45. As such, we can declare that the respondent's show featuring the fight between man and alligator – a performance which includes turning the animal on its back, dragging it, shaking it, pulling its head upwards and backwards and applying pressure to its limbs – is prohibited by virtue of section 2(a) of the law. If the respondent does not desist and stop the show of its own free will, the petitioner shall be free to petition the Court for an injunction as per section 17(a) of the law.

46. Having decided to hear the petition at bar as though leave for appeal had been granted, and as though an appeal had been filed accordingly, we shall grant the appeal, strike down the district court's judgment and restore the magistrate court's decision. To this we add and declare the statements made in paragraph 45 *supra*. I will further suggest to my colleagues that the respondent be ordered to pay the petitioners' legal fees, amounting to 10,000 N.I.S.

Justice T. Or

I agree with the result reached by my colleague, Justice Cheshin.

According to the evidence presented before the magistrate's Court, the fight between man and alligator, as presented in the videocassette viewed by the Court, involved torture, abuse and cruelty. From the moment that this became clear from expert testimony – testimony which was accepted by the magistrate court – and in light of the awareness of the impact that this behavior has on the alligator, the petitioner is entitled to the injunction it requests.

I share Justice Cheshin's opinion that no worthy social purpose exists which could justify this torture, cruelty and abuse of the alligator. The performance presenting man's "victory" over the alligator is but an exploitation of the animal's weakness, accompanied by torture, cruelty and abuse. That being the case, the law is on the petitioner's side, in accordance with sections 2(a) and 17(a) of the Cruelty to Animals Law (Protection of Animals).

In light of this conclusion, I see no need to discuss the details of Justice Cheshin's enlightening and thought-provoking opinion. However, I do see quite a few difficulties associated with applying that opinion's prescriptions to several kinds of behavior, which involve animals, and which society currently views as acceptable. I prefer to leave these matters open for further discussion, pending their being brought to bar for our ruling.

Justice Y. Turkel

1. My colleague, Justice Cheshin, has sumptuously filled our plates with choice teachings about the prohibition against cruelty to animals. I place my trust in his words and merely wish to pepper his splendidly set table with a few tidbits.

2. As our sages, of blessed memory, taught, the prohibition against harming animals is a Biblical commandment, which supercedes the teachings of the Rabbis. *See infra* para. 31. So states the Talmud in Sabbath 128b [I], as well as in Baba Metzia, 32b [M: "causing pain to animals is a Biblical prohibition." The sources that the rabbis bring in support of this ruling are enlightening. Note the words of the Lord's angel to Bilaam:

And the angel of the Lord said unto him, wherefore hast thou smitten thine ass these three times?

Numbers 22: 32 [T]. Upon this verse the Midrash comments: Rabbi

Johanan said: harm to animals is a Biblical commandment for it is written: **why has thou struck thine ass?**" See Midrash HaGadol, Numbers (S. Fish edition) [21]. See also the Midrash *Lekach Tov*, known also as the *Pesikta Zutra*, at 127:1. That astonished question from the angel's mouth, upon seeing Bilaam smite his donkey, engendered this far-reaching prohibition. It seems to me that the sage's interpretation of this verse is indicative of their world-view.

Following these words, Maimonides notes in his Guide to the Perplexed:

As for rabbis dictum: The prohibition against causing suffering to animals is a Biblical prohibition – in which they refer to its dictum: 'Wherefore hast thou smitten thine she-ass' – it is set down with a view to perfecting us so that we should not acquire moral habits of cruelty and should not inflict pain gratuitously without any utility, but that we should intend to be kind and merciful

Id. at III:17. (My colleague saw fit to cite from III:48) According to Maimonides, the reason for this prohibition is not just the pain that animals endure, as my colleague noted in his opinion *infra* para.31. The prohibition also has an educational purpose, whose goal is that man may enjoy spiritual completion. Moreover, Maimonides does not ignore the social purpose behind the commandment; indeed, he states that **"[we] should not inflict pain gratuitously without any utility."**

No words could be more suited for our purpose than those of Rabbi A.Y. Kook, our Chief Rabbi during the period of the British Mandate, of which we shall cite only a fraction:

There is a shoot of human progress, one of the higher branches, that, in our present state, remains the far-flung dream of the more radical idealists. It is the aspiration of natural ethical behavior, which derives from the natural humane instincts of man, and which places concern on the fate of all living things, in the broadest sense of the term.

See Rabbi A.Y. Kook, Afikim B'Negev: Vegetarianism and Peace 6:7 [22].

3. We emphasize that performances like the present one was condemned by our sages:

Said our Rabbis. Happy is the man who does not go to stadiums to watch [spectacles of various animals].

Babylonian Talmud 18b. It is further written there:

Rabbi Simeon Ben- Pazi taught: Happy is the man who does not go to stadiums and circuses of idol worshippers. For he who does not attend such events does not tread the path of sin.

Id. Note the explanation given by the medieval commentator *Rashi* to the word "Kinigon": "the hunting of animals, by dogs, for the sake of sport and merriment." See also the *Kitzur Shulhan Aroch* 126(d) [24].

In passing, we note that participating in such performances was considered permissible when it was possible, by the roar and cheer of the crowds, to save the life of the losing gladiator, who was inevitably sentenced to death. See Tosefta Avoda Zara 2:6 [27]; S. Lieberman, *Studies in the Torah of the Land of Israel*, 379-80 [28].

4. Beautiful words, full of love for animals, were written by a contemporary physician, Dr. A. Munthe, in *The Story of St Michele*, which has been translated to numerous languages, including twice into Hebrew:

Why do not these well-meaning lovers of animals begin by concentrating their efforts on putting a stop to the exhibition of wild animals in circuses and menageries? As long as this scandal is tolerated by our laws there is little chance for us to be looked upon as civilized by a future generation. If you want to realize what a set of barbarians we really are, you have only to enter the tent of a traveling menagerie. The

cruel wild beast is not behind the cage, he stands in front of it.

A. Munthe, *The Story of San Michele*, at 76–77. He further wrote:

The time will come when they will cease to sneer, when they will understand that the animal world was placed by the Creator under our protection, and not at our mercy: that animals have as much right to live as we have, and that our right to take their lives is strictly limited to our right of defence and our right of existence. The time will come when the mere pleasure of killing will die out in man. As long as it is there, man has no right to call himself civilized, he is a mere barbarian, a missing link between his wild ancestors who slew each other with stone axes for a piece of raw flesh and the man of the future.

Id. at 97.

5. It is the petitioner's privilege to have its petition enshrined as a rule of law. This rule is not only legal, but a moral and humane imperative as well. The time is ripe for such a rule, and, indeed, our times require it.

Decided in accordance with Justice Cheshin's opinion.

22.6.1997.