

JOURNAL OF THE SENATE

THURSDAY, January 24, 1974.

The chief clerk makes the following entries under the above date.

PETITIONS AND COMMUNICATIONS

State of Wisconsin
Claims Board

January 22, 1974

Mr. William Nugent
Senate Chief Clerk
State Capitol
Madison, Wisconsin

Dear Mr. Nugent:

Enclosed are copies of the reports and recommendations of the State Claims Board covering additional claims heard on October 15, 1973.

The Board is preparing the bill on the award over \$500 and will submit it to the Joint Finance Committee for legislative introduction.

These reports are for the information of the Legislature.

Sincerely,
EDWARD MAIN
Secretary

BEFORE THE CLAIMS BOARD OF WISCONSIN

A hearing was held on October 15, 1973, at Madison, Wisconsin, on the claim of Virginia Van DeWiel, Platteville, Wisconsin 53818, for \$6,126.80.

Facts underlying claim: The following facts have been stipulated to by the claimant and the Department of Health and Social Services. Ralph Van DeWiel, Jr., who suffered from profound mental retardation was placed in Central Colony for his care and maintenance. On January 13, 1971, while being given a bath by an aide at Central Colony portions of his body began to get red and he began to cry. The tub in which Ralph was placed did not have an automatic temperature control nor did the aide test the water with his elbow as was required by written procedure. The child began to blister. The child was taken to University Hospitals

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shortly after the incident for burn therapy and returned to Central Colony on January 15, 1971. At that time bronchial pneumonia was observed. The child's condition gradually deteriorated in spite of intensive treatment and death occurred on January 23, 1971. The stipulation further provided that the death certificate and police report and department files including the autopsy report will be admitted into evidence for use as the board may determine. The original death certificate lists as cause of death second degree burns on the arm and back, profound mental retardation. The autopsy established the cause of death was primarily related to the pneumonia. As stated in the claim submitted to the board, the expenses for maintaining the child at Central Colony were met by the State of Wisconsin because the mother, Virginia Van DeWiel, lacked sufficient funds for same. Claimant paid funeral bill, tombstone and perpetual care and claims \$1,126.80 for such expenses and an additional \$5,000 for loss of society under 895.04 (4), Wis. Stats. It is also clearly established by the record that Mrs. Van DeWiel, whose husband is deceased, is a person of limited financial means.

Claimant's theory: The claimant does not point to a single act of negligence on the part of the state but respectfully submits "that the burns could not have occurred without negligence on the part of state employees and that res ipsa loquitur applies."

Additional information: Sepsis (generalized infection spread by the blood stream) is a common complication of cases involving substantial body burns. Confluent pneumonia of the type which was suffered by the subject is a common result of sepsis. The findings of the autopsy would be consistent with the progression of an infection which initially entered the body through improperly administered dressings for the body burns.

It is also a common occurrence that individuals with poor motor coordination such as the subject in this case may cause such a sepsis by the aspiration (inhalation) of food. The entry of such a foreign object into the lungs could cause the type of pneumonia suffered in this case.

It is also to be noted that aspiration is the most common cause of both pneumonia and death among institutionalized persons with motor dysfunctions.

There is almost no possibility at this time that an individual received at University Hospitals with a similar history would be released by the hospital in less than a week or 10 days time. It is the current practice of the hospital to retain an individual in such

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condition until there is almost no chance of an infection occurring due to the change of dressing.

The above information was provided by Marv Birnbaum, M.D., Assistant Professor of Medicine and Assistant Professor of Physiology, who is the Director of the Trauma Referral Unit at the University Hospitals.

Analysis: It is a necessary consequence of the facts stipulated that state employees negligently caused the burns which covered over 30% of the claimant's body. There is also substantial probability that such burns occasioned the infection which settled partly in the subject's lungs. It also appears that the early release of the subject from University Hospitals and the subsequent dependence on Central Colony personnel to change the dressing may have increased the likelihood of this type of infection.

There is also a substantial possibility that an independent intervening cause such as aspiration may have caused the infection. If aspiration were the mechanism for the introduction of infection there would appear to be no strong grounds on which to impute state negligence.

Mrs. Van DeWiel's claim for loss of society under sec. 895.04 (4), Wis. Stats., however, raises several new issues. In a court proceeding such an award could only be made subsequent to a finding of negligence. Also cases concerning loss of society generally refer to such matters as frequency of contact and the happiness and good will that the decedent frequently provided those who are claiming such loss. The claims board has infrequently granted funds under sec. 895.04 (4).

Conclusion: There appears to be sufficient evidence on which to premise the state's moral obligation to pay for Mrs. Van DeWiel's expenses directly related to the burial of her son. There are substantial evidentiary indications of negligence and the equities appear to be on her side. It however does not appear that Mrs. Van DeWiel's claim for \$5,000 under 895.04 (4), Wis. Stats., is well grounded on either legal or equitable principles. The board does not recommend that the state honor such claim for \$5,000.

Recommendation: Grant Mrs. Van DeWiel \$1,126.80 on equitable principles.

Dated at Madison, Wisconsin, this 21st day of January, 1974.

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WALTER G. HOLLANDER
Chairman, Senate Finance
Committee

RAYMOND J. TOBIASZ
Chairman, Assembly Finance
Committee

JOSEPH SENSENBRENNER
Representative of Governor

EDWARD MAIN
Representative of Secretary of
Administration

ALLAN P. HUBBARD
Representative of Attorney
General

BEFORE THE CLAIMS BOARD OF WISCONSIN

A hearing was held in Madison, Wisconsin, on October 15, 1973, on the claim of Edward F. Kanieski in the amount of \$250,000. After the hearing briefs were submitted to the board by counsel for the claimant and counsel for the Wisconsin Department of Health and Social Services.

The claimant was convicted of first-degree murder in December 1952 and sentenced to life imprisonment. Claimant served 19 years 3 months. In a 5-2 split decision of the Wisconsin Supreme Court, the circuit court judgement was vacated and the warden of the Wisconsin correctional institution was directed to release the claimant. See State ex rel. Kanieski v. Gagnon (decided March 2, 1972), 54 Wis. 2d 108, 194 N.W. 2d 808.

Claimant spent more than 19 years in prison, even though the Wisconsin Supreme Court ultimately determined there was insufficient evidence to convict him. Claimant has lost his farm, his wife has suffered from a mental breakdown, and his two sons were placed in a foster home because his wife could not care for them. Claimant is in ill health, and even though only 55 years of age, may not be able to work again.

Claimant has filed a claim under both sec. 16.007 and sec. 285.05, Stats.

By the very nature of his claim, sec 285.05, Stats., provides the exclusive legislative remedy, and sec. 16.007, Stats., is not available as an avenue of relief for the claimant. Section 285.05, Stats., provides a specific remedy which is exclusive for this type of claim.

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Accordingly, it is not sufficient that the Wisconsin Supreme Court found an insufficiency of evidence to convict. Section 285.05 (3) and (4), Stats., requires that after hearing the evidence the claims board must find "it is clear beyond a reasonable doubt that the petitioner was innocent of the crime for which he suffered imprisonment" before it can grant relief. In addition, "the finding of the claims board shall be based only on such evidence or circumstances as have been discovered or have arisen since conviction." There does not appear to be any such newly discovered evidence. The decision of the Wisconsin Supreme Court was based upon the same evidence available at the time of the original conviction. Although that evidence may have been insufficient to convict, on the other hand there is insufficient evidence to show that it is clear beyond a reasonable doubt that the claimant was innocent of the crime for which he suffered imprisonment. Accordingly, the board finds that it is not clear beyond a reasonable doubt that the claimant was innocent of the crime for which he was convicted and imprisoned.

Section 16.007, Stats., is general in its terms and sec. 285.05, Stats., specifically relates to this type of claim. The Wisconsin Supreme Court said in State ex rel. Michael v. McGill (1953), 265 Wis. 336, at page 339:

"It is a familiar rule of statutory construction that a special statute covering a related subject takes precedence over a general one, and that when their provisions are so incompatible that effect cannot be given to both, the former must be read as an exception to the latter."

Accordingly, the board concludes that the claim can be considered only within the terms of sec. 285.05, Stats., and that sec. 16.007, Stats., is not available.

In LeFevre v. Goodland (1945), 247 Wis. 512, the Court said at pages 516-517:

". . . and when a particular remedy is prescribed by statute for the enforcement of a right created thereby, relief from an order denying such enforcement can be obtained only by resorting to that remedy."

The LeFevre case involved an action to set aside the decision of the claims commission's decision and order denying relief to a claimant under sec. 285.05, Stats. That statute both creates the right to compensation claimed and provides the remedy for vindication of that right. It provides the only remedy available to this claimant, and requires him to show he was innocent beyond a reasonable doubt. The fact that there may not have been money

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available for appeal of the circuit court conviction in 1952 does not alter the requirements of sec. 285.05, Stats.

The board concludes the claim should be denied, and it is so ordered.

Dated at Madison, Wisconsin, this 21st day of January, 1974.

WALTER G. HOLLANDER
Chairman, Senate Finance
Committee

RAYMOND J. TOBIASZ
Chairman, Assembly Finance
Committee

JOSEPH SENSENBRENNER
Representative of Governor

EDWARD MAIN
Representative of Secretary of
Administration

ALLAN P. HUBBARD
Representative of Attorney
General

State of Wisconsin
Department of State

January 22, 1974.

To the Honorable, the Senate

Gentlemen:

I have the honor to transmit to you pursuant to s. 13.67 (2), the names of the registered lobbyists for the period beginning on January 15, 1974, and ending on January 22, 1974.

Yours very truly,
ROBERT C. ZIMMERMAN
Secretary of State

Name, Address and Occupation of Lobbyist -- Name and Address of Employer -- Subject of Legislation -- Date of Employment.

Wilbur H. Emery (retired), 2220 Waunona Way, Madison, Wis. -- Wisconsin Chiefs of Police Association, Wis. Rapids, Wis. -
- All matters of interest to Wis. Chiefs of Police Association --
January 15, 1974.

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Roland B. Day (Attorney), 4806 Sherwood Rd., Madison, Wis.
-- Aetna Life and Casualty Co., 151 Farmington Ave., Hartford,
Conn. -- Insurance -- January 15, 1974.

Robert L. Gast (Managing Director), 26 Maplewood Dr.,
Stevens Point, Wis. -- Wisconsin Retail Hardware Association,
Inc., 2801 Dixon St., Stevens Point, Wis. -- Retail Hardware
Industry -- January 18, 1974.

MOTION UNDER JOINT RULE 26

The State of Wisconsin * * * Citation by the Legislature

Know you by these presents:

Whereas, Clif Tufte, better known as "Mr. Road America", provided auto racing fans throughout Wisconsin and the World with 20 years of excitement as the builder and driving force of Road America, the first major closed course specifically designed and built for road racing on the North American Continent and recognized as one of the great courses of the World; and

Whereas, Clif has received the admiration of SCCA drivers, and other drivers as an accomplished and professional road engineer whose foresight was responsible for enhancing driver and spectator safety, while maintaining the natural beauty of the Kettle Moraine Forest, has helped put real competition and thrill into the sport of racing and automobile development; and

Whereas, Mr. Tufte has paved the way for women racing fans through inauguration of the Miss Road America Contest; and

Whereas, Clif Tufte, as President of Road America, as demonstrated outstanding administrative abilities, by rallying some 100,000 persons to Elkhart Lake each summer, both from Wisconsin and the rest of the World, thereby bringing millions of dollars to Wisconsin's tourist industry and the economies of the Town of Elkhart Lake and Sheboygan County, Wisconsin; now, therefore, the Members of the Wisconsin Legislature, on the motion of Senator Keppler and Representative Bruhy, under Joint Rule 26, commend Clif Tufte for his exemplary service to the citizens of Elkhart Lake, Wisconsin and the United States and racing fans the World over, a man who has put safety into the thrill of competitive automobile racing, and wish him continued good fortune and success in his professional and private life.