

ALLIANCE FOR ANIMALS, AND
PEOPLE FOR THE ETHICAL TREATMENT
OF ANIMALS,

Case No. 10CV1398

Petitioners,

REPORT AND DETERMINATION BY SPECIAL PROSECUTOR

On June 2, 2010, Dane County Circuit Court, Branch 4, appointed me as Special Prosecutor in the above-referenced matter. The Court determined that there was probable cause to believe that some individuals intentionally or negligently violated Section 951.025, Wis. Stats. Those individuals, named in Footnote 13, on Page 23 of the Court's determination, are all University of Wisconsin faculty or employees. I was appointed to exercise appropriate prosecutorial discretion in determining whether to file charges against one or more of the individuals named in the petition.

The process to arrive at this determination has taken a substantial amount of time. The reasons are many, including:

1. My private practice case load, including in-court trials;
2. Acting as my own private investigator in this matter, including establishing times to visit the Biotron facility and speaking with several individuals, including some of those named in the petition;
3. Research, including the legislative history of Chapter 951, including the history of Section 951.025, Wis. Stats.;
4. Reading comparable statutes in other jurisdictions;
5. Reading and reviewing minutes, both of closed and open sessions, for various animal care and use committees at the University of Wisconsin, which minutes encompassed several years;
6. Scientific literature relating to decompression of animals;
7. Scientific literature regarding use of sheep in decompression studies;
8. Correspondence from attorneys on both sides of the issue, including their respective legal arguments and respective legal citations;
9. Research as to statutory interpretation;
10. Federal statutes and regulations relating to animal care and federal grants; and
11. Standard of ethics for a prosecutor, as well as case law on that topic.

The above is not a conclusive set of reasons but sets forth many of the causes for the length of the investigation and the issuance of this determination. I have taken this appointment seriously and have spent many hours going over in my mind as many sides of the issue as possible. I am not a prosecutor by training and I have attempted, as I am sure all prosecutors do, to balance an objective view of the facts and the law in making this determination. As mentioned above, I have acted as my own investigator in this matter and have spoken to persons who have the facts or knowledge of what was occurring at the University of Wisconsin in the Navy-sponsored sheep experiments who were willing to talk to me. This meant coordinating any number of calendars to provide me with ample time to listen and question as it relates to this issue.

FACTS

Factually, the University of Wisconsin (UW) has conducted research for the stated purpose of determining the effects of deep sea decompression on crews of disabled submarines. This research was funded by a grant through the Department of the Navy under its Deep Submergence Biomedical Program. One or more university faculty researchers submitted proposals to the Department of the Navy for the federal sponsorship and federal monies. More recently, research has also focused on the effects of decompression on recreational divers.

The research experiments took place at a facility on the UW campus. Sheep were selected as the animals for research based upon their comparable size and lung capacity to humans. The experiments were conducted pursuant to established protocol, which is discussed in length elsewhere below. The experiments required a pair of sheep to be placed into a hyperbaric chamber. Once inside, oxygen was inserted to replicate the pressure of being under water at approximately 90-foot level.

Other tests were done to replicate lesser depth pressures. The pressure was then decompressed over a period of time while researchers or assistants observed the animals for any adverse effects which might require veterinary intervention. The UW Veterinary staff was supposedly on call during and after each hyperbaric sheep experiment. The sheep, which were kept at another UW facility, were then observed for a period of time. Ultimately, each sheep was drug-induced euthanized and a necropsy (animal autopsy) was conducted. The purpose of the necropsy was to permit researchers to study the effects of deep sea decompression on the animals. One of the reported findings was apparent osteoporosis which might occur through continual deep sea diving.

The Department of the Navy grant, which had as its purpose how to safely rescue crews of disabled submarines and to obtain scientific data on the physiological effects of decompression on certain submariners, is merely one of many scientific studies conducted at the UW using animal research. The federal monies coming to the UW require adherence by that institution to federal laws, including, but not limited to 7 U.S.C. 2143 (Standards and Certification Process for Humane Handling, Care, Treatment and Transportation of Animals). The United States Department of Agriculture (USDA) has jurisdiction in the enforcement of this statute. That agency also promulgates rules and regulations regarding the interpretation and enforcement of that statute.

One of the requirements under that statute is the establishment of at least one committee to ensure that the statute and the regulations concerning animal welfare are adhered to by that institution. With respect to the sheep grant, two committees had oversight. One was the Graduate School Animal Care and Use Committee and the other was the Veterinary School Animal Care and Use Committee. The reason for the dual oversight was that the Grad School researchers conducted the experiments, while the Veterinary School provided veterinary services in the event that the

animals became distressed. Also, the animals were kept at the Veterinary School facilities and any necropsy was performed by Veterinary School staff.

In addition to these two committees which had direct oversight, there was an All Campus Animal Care and Use Committee which had an advisory role as to all animal care and use committees.

With respect to all animal research in general and specifically with respect to the research funded by the Department of the Navy, the federal law and regulations establish specific criteria for the oversight committees. The researcher who is requesting the use of animals in the research must provide a protocol of how the research will use the animals, as well as the purpose for the animals in the research. This particular research began sometime in 1979, initially through a grant through the Department of Commerce and its Sea Grant Institute. Later, the Department of the Navy wanted the research continued. In reviewing several years of animal care and use committee minutes, both of the Grad School and the School of Veterinary Medicine, recommendations were made to the primary researcher for modifications of the protocol in the area of sheep distress. At various times, concerns were raised by committee members about failure to properly observe sheep while in the hyperbaric chamber. At other times, concerns were raised regarding the health of sheep used in the experiments, as well as the condition of sheep following removal from the hyperbaric chamber. Discussion was had, in one or more of these committees, when veterinary personal would euthanize a sheep in distress. Although the purpose of the study was to have sheep live for a period of time beyond placement and removal from the hyperbaric chamber, with the sheep eventually euthanized for study purposes, there appeared concern regarding putting sheep down if the animal appeared to be dying.

In addition to the oversight of the research by various on-campus committees, the USDA also conducted on-site routine inspections of the laboratories on campus, as well as the various protocols. Many of the inspection reports which I reviewed were concerned with the treatment of mice and primates. All inspection reports raised concerns regarding the welfare and treatment of animals on campus. No inspection report which I reviewed recommended the cessation of the sheep decompression research. In addition to the USDA inspections, the various research laboratories or facilities were also visited by other inspectors. The Office of Laboratory Animal Welfare (OLAW), a branch or agency of the National Institute of Health, conducted visits. The UW, as well, belongs to a voluntary association, Association for Assessment and Accreditation of Laboratory Animal Care International (ALAAC), which conducted visits. In my research and review, I was not aware of any concerns raised by these last two agencies regarding the decompression studies or research.

On June 17, 2008, necropsies indicated that a number of sheep died from decompression. Among other tentative diagnoses for each death, the veterinary pathologist listed, "complications of decompression?" These and other tentative diagnoses would appear to be consistent with death by decompression. The protocol, as approved and continually revised by the animal care committees, required procedures to intervene prior to death by decompression. In other words, if an animal was in distress and it appeared to be life-threatening, drug-induced euthanasia was the recommended procedure.

In review of the animal care committee minutes, which refer to the protocol for the sheep decompression research, absent is any reference to Section 951.025, Wis. Stats. The minutes often refer to inspections by the federal agencies and the recommendations in those inspection reports.

There appears acknowledgment of the underlying federal laws and regulations regarding research. The protocol, itself, is a reflection of an acknowledgment of the federal requirements.

In speaking with UW legal personnel, information was obtained that the legal department was unaware of Section 951.025, Wis. Stats., until the Petitioners first raised the issue when documents were received through the Freedom of Information Act (FOIA). In making the FOIA request, the Petitioners, or individuals in support of Petitioners' position, received the animal care committee meeting notes. Additionally, supporters of Petitioners attended open sessions of these committee meetings.

Apparently, UW legal and administration leave it up to the committee chair or committee members to understand the applicable criminal or civil laws and regulations that may apply to particular research and protocol over which it has oversight. With respect to the Grad School and Veterinary School committees, there are no members from UW legal. There is no consistent or systematic review of statutes, particularly state statutes, by UW legal to determine whether there are violations of any laws, let alone those applicable to animal research.

The UW procedure with respect to proposed legislation is that some intermediary reviews legislative proposals and passes the information on to the UW administration or the legal department. There is no apparent watchdog of the watchdog. In reviewing the legislative history which resulted in the passage of what is currently Section 951.025, Wis. Stats., no one from the UW attended the public hearing on the proposed legislation. Since that hearing was May 23, 1985, no one from legal could answer whether the UW was aware of this proposed legislation or, if so, why the UW was not in attendance.

In interviewing potential witnesses, there is a factual dispute regarding whether the animal and use committee members, or some of them, were aware of the existence of Section 951.025, Wis. Stats. Some committee members who were interviewed indicated they were unaware of the existence of that statutory section until Petitioners raised the issue in 2010. Other persons indicated that there was discussion among members and UW personnel engaged in or around the decompression studies that the statutory provision did exist. However, even if there was knowledge, the belief was that the provision did not apply to this research since there was a statutory exemption for animal cruelty in other parts of the statute. Moreover, UW legal and faculty interviewed were of the opinion that federal law and regulation was the only applicable law.

ANALYSIS

The above is a synopsis of some of the pertinent facts arrived at through research, interviews and visits on-site. These were believed necessary to obtain some background as to the issues. Left out of the analysis is any personal belief as to whether the research is of any merit or whether the use of animals in research is warranted. Although that information or opinions were provided by both sides, they were not pertinent to the final decision. What was necessary and pertinent was a review of the ethical guidelines for a prosecutor, as well as a statutory interpretation of Section 951.025, Wis. Stats.

In determining whether to prosecute an individual for any crime, the person must look at the statute to determine what it means so that the statute is given its full, proper and intended effect. *Noffke v. Bakke*, 315 Wis.2d 350, 361 (2009). Just as a court begins with the language in the statute, so should a person making the determination whether to prosecute. If the meaning of the statute is plain, the inquiry ordinarily stops. The language is given its common, ordinary and accepted meaning

except that technical or specially defined words or phrases are given their respective meaning. *Id.* In determining the plain meaning, a dictionary may be utilized. *Id.* Statutory interpretation involves the determination of the meaning of the statute; it is not a search for ambiguity. *Department of Revenue v. River City Refuse Removal*, 299 Wis.2d 561, 576-577 (2007). There is ambiguity only if the statute reasonably gives rise to two or more interpretations.

In addition to the foregoing, the context and structure of a statute are also important to the meaning. *Noffke* at 361. Statutory language is interpreted in the context in which it is used and not in isolation but as part of a whole, taking into account its relation to and the language of surrounding or closely related statutes. *Id.* Therefore, a statute's purpose may be apparent from its plain language or relationship with the surrounding or closely-related statutes. In other words, the purpose may be apparent from the context of the statutory language or structure of the statute as a coherent whole. *Id.* at 362.

Taking into account the foregoing, if there is a plain and clear statutory meaning there is no ambiguity. If the language is unambiguous, there is no need to look at other sources outside of the statute itself. The test for ambiguity is whether well-informed persons should have become confused, that is, the language reasonably gives rise to different meanings. *Id.* at 362.

Having the foregoing in mind, a prosecutor should use the court analysis of statutory construction as a template. The inquiry then shifts to the language of Chapter 951. That chapter is a composite statute, namely, various provisions were incorporated over time by different legislative acts. Section 951.025, was added to the existing crimes against animals by legislation in 1985. That section reads as follows:

951.025. Decompression prohibited. No person may kill an animal by means of decompression.

Standing alone, one interpretation is that the statute is plain. The issue is, however, what is decompression? The term “decompression” does not have a common or ordinary meaning since the word has several meanings. A dictionary may be used and the *American Heritage Dictionary* is frequently used by courts. *Noffke* at 365.

The term “decompression”, as set forth in the *American Heritage Dictionary of the English Language 4th* (2006), is defined as follows:

1. a gradual reduction in atmospheric pressure experienced by divers, construction workers, etc., after working in deep water or breathing compressed air.
2. The act or process of releasing from pressure.
3. Surgery. The procedure of relieving increased cranial, cardiac or orbital pressure.
4. A state of relief from pressure; a return to normalcy after a stressful period or situation.

The decompression studies conducted at the UW fall within the first definition of decompression. There is a reduction in atmospheric pressure and then oxygen is replaced in the hyperbaric chambers to recompress the animals. Rapid recompression is what caused the bends in divers or in the research sheep.

The second definition of decompression is commonly referred to as hypoxia and is the decompression which often occurs at high altitudes. In this form of decompression, air is thin or, in a hyperbaric chamber, is removed resulting in distress or death. Both have similar physiological effects on the person suffering either form of decompression.

The third definition is self-explanatory, namely, a medical procedure to relieve pressure.

With the above definitions in mind, the inquiry is whether the statutory language is ambiguous. If any decompression is a crime, is it criminal activity for a veterinarian to attempt a life-

saving surgery on an animal by relieving pressure on the brain if the animal dies? Similarly, is it a crime for a humane society to place a cat or dog in a hyperbaric chamber and use high altitude decompression as a form of euthanasia? Lastly, is it a crime for the UW researchers to use a hyperbaric chamber for research which results in the death of an animal, but where the intent is not to kill the animal by the decompression but, rather, have the animal survive?

In analyzing the above scenarios, it is not clear that the statutory purpose was to eliminate all of the activities. It is hard to imagine that the legislation was to prohibit veterinarians from attempting life-saving procedures on animals. It is as perhaps as implausible that the legislative purpose was to prohibit experiments where the intent is not to kill the animal by decompression.

As set forth above, the statute's purpose or scope may be apparent not only from the plain language but from its relationship to surrounding or closely-related statutes so that the statute is a coherent whole. Chapter 951 is a comprehensive statute dealing with crimes against animals. As previously stated, and as is common with many statutes, various sections of the statute were added or amended over time as different legislatures were concerned with different issues. Section 951.025 was enacted in 1985. Immediately preceding that section is Section 951.02, which reads as follows:

951.02 Mistreating Animals. No person may treat any animal, whether belonging to the person or another, in a cruel manner. This section does not prohibit bona fide experiments carried on for scientific research or normal and accepted veterinary practices.

Section 951.01(2), defines "cruel" as "causing unnecessary and excessive pain or suffering or unjustifiable injury or death." (Emphasis added.) Those latter two sections were part of the statutory enactment in 1973. The bona fide experiments carried on for scientific research

encompassed the concept of death within the meaning of cruel. That statutory section was enacted approximately twelve (12) years prior to the section relating to decompression.

One argument that was urged is that the legislature, knowing the term "cruel" in Section 951.02, created Section 951.025 with the purpose of removing decompression killing from the statutory exemption. Another argument that was presented was since the term "cruel", including death, was already part of the statute, the decompression killing was consumed in the statutory exemption. In other words, the broader general language is incorporated by reference into the specific language. In this situation, since the bona fide exemption applies to any aspect of cruel, it also applies to killing by decompression.

Either is a reasonable interpretation. In other words, reasonable minds differed in my various discussions as to what the statutory language meant. The bases for this differing interpretation, besides the political or ethical biases, are that the term "decompression" has several meanings and a purpose is not readily apparent from the integration of Section 951.025 into the other statutory provisions.

Given that there may be ambiguity in the statute, a person could then resort to extrinsic evidence to determine what was the legislative purpose in enacting the statute. Where there is ambiguity when the statutory language is viewed, either under a plain meaning or within the context of the statute, reliance on extrinsic evidence is appropriate. With statutes, reference is made to the legislative history to determine or ascertain the legislative purpose.

On December 3, 1984, the Legislative Reference Bureau (LRB) received a drafting request which indicated that the subject was, "Ban Use of Decompression Chambers." The requesting legislator was Senator Otte. Under the instructions provision in that document was the following,

“prohibit use of decompression chambers to kill animals.” In reviewing the LRB documentation, there was included a copy of the *California Humane Laws Handbook*, revised 1981. In particular, that statute contained a provision Pen. 597w, “euthanasia by high altitude decompression”. The California statute prohibited any person, peace officer, officer of a humane society or officer of a pound or animal regulation department of any public agency to kill any dog or cat by use of any high altitude decompression chamber.

In researching the issue, at the time the aforementioned was submitted to the Legislative Reference Bureau as 1985 Wisconsin Act 48, other states had or were enacting laws to prohibit animals by hypoxia or high altitude rapid decompression. A number of humane societies throughout the country were employing hyperbaric chambers to kill primarily cats and dogs through high altitude decompression. This is the second definition of decompression set forth in the *American Heritage Dictionary*. Numerous scientific studies and papers took positions on either side of the use of hypoxic procedures as humane methods of inducing euthanasia in animals. Several states, including California, enacted laws in the late 1970's and early 1980's prohibiting such use.

These laws were the models which were available to the authors of what became 1985 Act 48. That original legislation, which was introduced as 1985 Senate Bill 2, was sponsored by Senator Otte. The first papers in the LRB are dated December 1984. In reviewing the LRB records, the stated intent was to create an act relating to prohibiting the killing of any animal by means of decompression and providing a penalty.

The Legislative Council records indicate that on April 23, 1985, a public hearing on Senate Bill 2 was held. Among those present was Senator Otte. Also present was a representative from the Alliance for Animals who spoke in favor of the bill. That individual indicated that decompression

chambers for the killing of animals were obsolete and that the process painful. Injections which caused euthanasia cost less than twenty-five cents per dose. It was also noted that within a few months prior to the hearing, only two areas in Wisconsin were using hyperbaric chambers for euthanasia, one in Wausau and one in Rhinelander. The argument was that it was more humane to euthanize animals through injection. Ultimately, the Committee on Judiciary and Consumer Affairs voted for approval of the bill, which then went on to the full Senate. Ultimately, it was enacted as 1985 Act 48.

It is clear from the legislative history that the concern was the rapid decompression of animals by hypoxia or high altitude decompression. The legislative purpose was to prohibit that form of euthanasia. The public hearing records indicate that the concern was that it was more humane to kill animals through injection rather than through high altitude decompression.

DETERMINATION

Based on the foregoing, I have determined not to file a criminal complaint in this matter. I am aware that others may or will disagree with this determination but I have attempted to be impartial in arriving at my decision. Section 951.025, Wis. Stats., is ambiguous since the term "decompression" has several different meanings. I have listened to proponents on both sides as to what the term decompression means within the statutory context. I have found all of these individuals to be reasonable and articulate. As referenced in the case law, if reasonable people can vary on the meaning, a term may very well be ambiguous.

Moreover, in reviewing Section 951.025 in context with the entire Chapter 951, there is an internal inconsistency. The more general term "cruel", which is defined to include killing, is permitted under Section 951.02 if the killing is for bona fide experiments carried on for scientific

research. As previously stated, this statute's purpose may be determined from the structure of the statute as a coherent whole. Since there is this inconsistency, it is then appropriate to look at the legislative history which indicates that the legislative purpose was to stop the use of hyperbaric chambers to kill animals by hypoxia, namely, high altitude decompression.

Having made this determination, however, this does not mean that the UW or the individuals involved in the decompression research, whether as the researchers, veterinarians or animal use and care committee members should receive a free pass. The Petitioners have raised, in this suit and in their activities relating to other animal research at the UW, the ethical bases for the use of animals in scientific studies. What was pointed out, by Petitioners and through interviews with UW personnel, including legal, is that, at best, some were aware of the decompression provisions in Chapter 951 but believed the exemption for scientific research applied and, at the worst, that they were unaware that the statute existed.

It belies common sense that a research university, such as the UW, does not have a consistent review of both state and federal laws and regulations which apply to activities which take place on the campus and within research laboratories or facilities. It is unfair and irresponsible to place on professors or researchers, who are not lawyers, the burden to know all of the laws which may apply to a particular research study. Millions of dollars of research funds from the federal government come into the UW every year by way of grants. One of the requirements for continued funding is adherence to both state and federal laws. The consequences for failure to follow all laws applicable to any research are the loss of that grant, repayment of prior grant monies or discontinuation of future federal funds. With the requirement of a sworn statement that the UW adheres to all applicable laws and those consequences, it is hard to fathom that neither legal staff nor an outside consultant reviews

the various protocols to ensure compliance. The Petitioners, through their actions, hopefully have created a change within the UW as it relates to this oversight of the oversight committees and drafting of protocols to conform to legal standards.

Moreover, the Petitioners' actions have brought into question the necessity of the continuation of the decompression research. The Department of the Navy has pulled its grant and the research using the sheep has stopped. In reviewing the more recent literature, it appears that the efficacy of these types of studies is now in question. The research, at least at the UW, began in 1979. Proponents have urged that the research was valuable and has led to data which was useful in treating humans who have suffered from underwater decompression such as the bends or resulting osteoarthritis. Again, my purpose is not to take sides but to analyze legally whether there was a violation of Section 951.025.

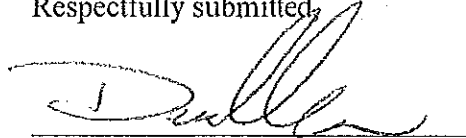
With that said, if the research has run its course, a reinstatement of these or similar studies may bring into question, not a violation of Section 951.025, but whether that continuation would constitute a violation of Section 951.02. There is no doubt that the studies constitute activities which would be "cruel" under the definition of that term in Section 951.01(2). The end result of the decompression studies is to kill the sheep, not by decompression but, rather, through drug injected euthanasia. Only on dead animals can a researcher determine what effects the decompression had on organs or bones. There is no doubt that the animal suffers during the period from leaving the chamber until the ultimate injection to euthanize the animal. The protocol has provisions relating to lessening animal suffering. If studies or research similar to this are no longer needed, then the exemption may not apply. In other words, if all information or data already is determined or there is some other scientific method available which would not include the use of animals, the exemption

under Section 951.02 may no longer apply since the scientific research very well may no longer be bona fide.

This determination, as referenced above, was done as impartially as possible, taking into account the ethical standards of a prosecutor to bring charges. Attorneys representing Petitioners, as well as the attorneys representing the UW or potential defendants, made themselves available for conferences and provided much information. Proponents on both sides passionately presented their respective positions. However, this determination was made on the basis of whether I could ethically file charges. That ethical standard included and was primarily reliant on whether anyone violated Section 951.025, Wis. Stats. It is ultimately my determination that the potential defendants did not violate that provision.

Dated this 17th day of May, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. Geier", written over a horizontal line.

David A. Geier