[Cite as *In re Ward*, 2005-Ohio-2581.]

IN THE COURT OF CLAIMS OF OHIO

VICTIMS OF CRIME DIVISION

IN RE: KEVIN A. WARD	:	Case No. V2004-61136
KEVIN A. WARD	:	OPINION OF A THREE-COMMISSIONER PANEL
Applicant	:	

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{¶ 1} The applicant filed a reparations application seeking reimbursement of expenses incurred with respect to a November 27, 2003 hit and skip motor vehicle accident. On June 24, 2004, the Attorney General denied the applicant's claim pursuant to R.C. 2743.52(A) asserting that the applicant failed to qualify as a victim of criminally injurious conduct under the motor vehicle exception. On September 2, 2004, the Attorney General issued a Final Decision modifying his previous decision to deny the claim pursuant to R.C. 2743.60(D) and R.C. 2743.52(A). The Attorney General stated that the applicant has Medicaid, which covered all his allowable expense and that the applicant was not working at the time of the accident in order to qualify for a work loss award. On November 15, 2004, the applicant filed a notice of appeal to the Attorney General's September 2, 2004 Final Decision. Hence, this matter came to be heard before this panel of three commissioners on February 9, 2005 at 10:45 A.M.

{¶ 2} The *pro se* applicant and an Assistant Attorney General attended the hearing and presented testimony and brief comments for the panel's consideration. Kevin Ward testified via

telephone that he sustained a spinal cord injury as a result of a hit and skip accident on November 27, 2003. Mr. Ward explained that he and the offending driver were traveling in the opposite direction of each other when suddenly the offender, at approximately 20 mph, executed a turn in front of him. The applicant stated that his vehicle was immobilized and that the offender fled the scene. The applicant also noted that the offender was never captured. Mr. Ward stated that he only has partial use of his arms and hands and is now wheelchair bound. Mr. Ward explained that he receives Medicaid assistance, however he has incurred expenses which have not been recouped from Medicaid nor from his net settlement proceeds of $6,117.00.

{¶ 3} The Assistant Attorney General stated that currently she has not received any medical bills or expenses which have not been covered by Medicaid. The Assistant Attorney General suggested the applicant submit his additional expenses to her office for review. The Assistant Attorney General also noted for the panel that the Attorney General found Mr. Ward qualified as a victim of criminally injurious conduct under the motor vehicle exception, since the offending driver acted in a reckless manner when he improperly executed a turn striking the applicant's vehicle and then fled the scene after causing severe injury to the applicant.

{¶ 4} From review of the file and with full and careful consideration given to all the information presented at the hearing, this panel makes the following determination. When the Ohio General Assembly created the Ohio Victims of Crime Compensation Program in 1976, persons injured in motor vehicle accidents were excluded from participating in the program. However in July of 1990, the Ohio General Assembly amended R.C. 2743.51(C)(1) to include four motor vehicle exceptions. Therefore, an injured party who qualifies as a victim of

criminally injurious conduct, as the term is defined in R.C. 2743.51(C)(1), may now participate in the program.

{¶ 5} R.C. 2743.51(L) states:

(L) "Victim" means a person who suffers personal injury or death as a result of any of the following:
(1) Criminally injurious conduct;
(2) The good faith effort of any person to prevent criminally injurious conduct;
(3) The good faith effort of any person to apprehend a person suspected of engaging in criminally injurious conduct.

{¶ 6} R.C. 2743.51(C)(1) states:
(C) "Criminally injurious conduct" means one of the following:
(1) For the purposes of any person described in division (A)(1) of this section, any conduct that occurs or is attempted in this state; poses a substantial threat of personal injury or death; and is punishable by fine, imprisonment, or death, or would be so punishable but for the fact that the person engaging in the conduct lacked capacity to commit the crime under the laws of this state. Criminally injurious conduct does not include conduct arising out of the ownership, maintenance, or use of a motor vehicle, except when any of the following applies:
(a) The person engaging in the conduct intended to cause personal injury or death;
(b) The person engaging in the conduct was using the vehicle to flee immediately after committing a felony or an act that would constitute a felony but for the fact that the person engaging in the conduct lacked the capacity to commit the felony under the laws of this state;
(c) The person engaging in the conduct was using the vehicle in a manner that constitutes an OMVI violation;

(d) The conduct occurred on or after July 25, 1990, and the person engaging in the conduct was using the vehicle in a manner that constitutes a violation of section 2903.08 of the Revised Code.

{¶ 7} Based upon the above, if an injury or death is caused by the use of a motor vehicle, no criminally injurious conduct occurs unless the offending driver, while using the motor vehicle: 1) intended to cause personal injury or death; 2) was fleeing after committing a felonious act; 3) was driving under the influence of alcohol and/or drugs; or 4) was engaging in conduct (recklessness), on or after July 25, 1990, that constituted a violation of R.C. 2903.08 (aggravated vehicular assault and vehicular assault). The four exceptions to the motor vehicle exclusion are separate and distinct provisions.

{¶ 8} The key word under exception (a) is intended. Intent is defined in law as a design or purpose. It is a mental state which can be proven only by the circumstances of each particular case. The evidence must establish the person injuring another through the use of a motor vehicle did so with the intent to cause personal harm or death. Actual intent, rather than constructive intent, is required and must be proven to succeed under this exception. See In re Gallagher, V77-0245jud (5-2-79), In re Ahrns, V81-5675jud (12-13-82) and In re Washington (1987), 36 Ohio Misc. 2d 13. In this case, however, Mr. Ward failed to allege any circumstances that would lead this panel to conclude that the offender actually intended to injure or kill him or anyone else.

{¶ 9} With regard to exception (b), the issue is whether the offending driver used the vehicle to flee immediately after committing a felony or act that would constitute a felony. During the hearing, Mr. Ward failed to prove, by a preponderance of the evidence, that he

sustained injury because the offender had been using the vehicle to immediately flee after having engaged in felonious activity.

{¶ 10} Exception (c) concerns alcohol and/or drug use by the offender. Based upon the evidence presented, we find that the applicant failed to prove that the offender had been operating the vehicle while under the influence of alcohol and/or drugs.

{¶ 11} The last exception requires a showing that the accident occurred on or after July 25, 1990 and that the offender was using the vehicle in a manner that constituted a violation of R.C. 2903.08. R.C. 2903.08, the aggravated vehicular assault provision prohibits a person while operating or participating in the operation of a motor vehicle, from recklessly causing serious physical harm to another person or another's unborn. Consequently, more than negligence on the part of the offending driver is necessary for "criminally injurious conduct" to be achieved under this provision. In the present case, although serious physical harm was caused to the applicant, there has been no showing that the offender operated the motor vehicle in a manner that constituted recklessness.

{¶ 12} R.C. 2901.22(C) defines the culpable mental state of "recklessly" as follows:

> (C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

In In re Calhoun (1994), 66 Ohio Misc. 2d 159, a judge of the Court of Claims ruled that

> * * to establish his eligibility for an award of reparations pursuant to R.C. 2743.51(C)(1)(d) and 2903.08, it is necessary for the applicant to prove, by a

> preponderance of the evidence, that the offender operated his vehicle with "heedless indifference to the consequences" of his action. To establish this type of operation requires that the acts and risks of the offender must be known and disregarded. This proof must be established by factual evidence and probabilities, not by possibilities and speculation.

{¶ 13} Even though the Attorney General qualified the applicant as a victim of criminally injurious conduct under exception (d), this panel is unable to arrive at the same conclusion.[1] Victims of hit and run accidents typically do not qualify as victims of criminally injurious conduct under the motor vehicle exception, since the offending driver is almost never captured and therefore no evidence of the offender's intent, possible fleeing due to prior felonious conduct, or alcohol and/or drug use can usually be obtained. Although the Attorney General recently announced a change in his policy concerning victims of hit and run accidents under the Ohio Victims of Crime Compensation Program, we however note that such changes, in order to be lawful and effective, must be made by the Ohio General Assembly and not administratively by the Attorney General. Therefore, even though we believe Mr. Ward should be compensated by the program and is a true victim of crime, this panel is nevertheless bound by the law that excludes Mr. Ward from the program. The Attorney General should petition the legislature to amend the statute retroactively to allow Mr. Ward and others similarly situated to qualify for compensation under the victims' program. Based upon the above factors and analysis of the law, the September 2, 2004 Final Decision of the Attorney General shall be affirmed albeit pursuant to R.C. 2743.52(A).

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[1]Panel hearings are de novo. In re Martin (1988), 61 Ohio Misc. 2d 280.

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THOMAS H. BAINBRIDGE
Commissioner

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CLARK B. WEAVER, SR.
Commissioner

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GREGORY P. BARWELL
Commissioner

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KEVIN A. WARD	:	ORDER OF A THREE-COMMISSIONER PANEL
Applicant	:	

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IT IS THEREFORE ORDERED THAT

{¶ 14} 1) The September 2, 2004 decision of the Attorney General is AFFIRMED pursuant to R.C. 2743.52(A);

{¶ 15} 2) This claim is DENIED and judgment is rendered in favor of the state of Ohio;

{¶ 16} 3) Costs are assumed by the court of claims victims of crime fund.

THOMAS H. BAINBRIDGE
Commissioner

CLARK B. WEAVER, SR.
Commissioner

GREGORY P. BARWELL
Commissioner

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A copy of the foregoing was personally served upon the Attorney General and sent by regular mail to Summit County Prosecuting Attorney and to: