

[Cite as *In re Van Horn*, 2007-Ohio-3493.]

IN THE COURT OF CLAIMS OF OHIO

VICTIMS OF CRIME DIVISION

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IN RE: BRADLEY L. VAN HORN	:	Case No. V2006-20241
GWENDOLYN S. DAVIS	:	Case No. V2006-20321
RACHEL RUMMEL	:	
TAMMY VAN HORN	:	Commissioners:
	:	Tim McCormack, Presiding
Applicants	:	Karl C. Kerschner
	:	Randi Ostry LeHoty
	:	
	:	<u>OPINION OF A THREE-</u>
	:	<u>COMMISSIONER PANEL</u>
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{¶1} The applicants filed a reparations application seeking reimbursement of expenses incurred with respect to the December 11, 2004 murder of Bradley Van Horn ("victim" or "Mr. VanHorn"). On November 2, 2005, the Attorney General denied the claim pursuant to R.C. 2743.60(F) contending that the victim had been engaging in contributory misconduct because he was attempting to purchase illegal drugs when he was assaulted and killed. On November 29, 2005, the applicants filed a request for reconsideration asserting that the Attorney General lacked sufficient proof to deny the claim. On March 1, 2006, the Attorney General denied the claim once again. On March 24, 2006, the applicants filed a notice of appeal to the Attorney General's March 1, 2006

Final Decision. On January 10, 2007 at 11:20 A.M., this matter was heard before this panel of three commissioners.

{¶2} Gwendolyn Davis ("Ms. Davis"), Tammy Van Horn ("Ms. Van Horn"), applicants' counsel, and an Assistant Attorney General attended the hearing and presented testimony, an exhibit, and oral argument for the panel's consideration. Ms. Van Horn testified that she married the victim shortly after graduating from high school and that they had a son (Joshua) together, but that they divorced in 1991. Ms. Van Horn explained that she and the victim remained in contact with one another after their divorce because of Joshua. According to Ms. Van Horn, she had no knowledge of the events surrounding the victim's death, but she stated that she never observed the victim using drugs, or under the influence of drugs, and that he never mentioned any drug use to her. Ms. Van Horn further testified that the victim was a "drinker" not a drug user and that she was unaware that he associated with people selling drugs. Ms. Van Horn explained that the victim's lifestyle settled down after the birth of his second child (Brandon) with Rachel Rummel ("Ms. Rummel"). Ms. Van Horn related that at the time of his death, the victim had been employed with a temporary agency and was residing with Ms. Rummel. Lastly, Ms. Van Horn stated that she is seeking allowable expense to cover the costs of her son's counseling bills due to his father's death.¹

¹The victim's minor children, Joshua and Brandon, each receive \$949.99 per month in Social Security Survivorship Benefits.

{¶3} Detective Robert Brown ("Detective Brown") of the Salem Police Department testified that he investigated the circumstances surrounding the victim's death. Detective Brown explained that on the evening in question, the victim was dropped off at a bar by Ms. Rummel. While at the bar, the victim consumed several alcoholic beverages. The victim was approached by acquaintances, Heather Hurst and Jon Gerbur, who asked him to purchase cocaine for them. The offenders, Richard Forrester and Shane Mitchell, then agreed to give the victim a ride to make the purchase. The offenders drove the victim around until they stopped in a local church parking lot. The offenders then viciously and repeatedly beat and stomped Mr. Van Horn. Mr. Van Horn died several hours later. Detective Brown testified that the offenders never intended to purchase drugs, but rather their intent was to rob and assault Mr. Van Horn. We find Detective Brown's testimony to be credible and reliable.

{¶4} Applicant's counsel argued that the claim should be allowed based on the egregious misconduct of the offenders. Counsel asserted that this incident was a "set-up" and that the offenders' intent was to rob and assault Mr. Van Horn. Counsel also argued that because Mr. Van Horn was extremely intoxicated, he suffered from a greatly diminished capacity that prevented him from fully appreciating the consequences of his conduct. Lastly, counsel asserted that more than the victim's mens rea is required to deny the claim, in light of the circumstances of the brutal criminally injurious conduct and the victim's resulting death.

{¶5} The Assistant Attorney General maintained that the claim must be denied based upon the victim's level of contributory misconduct. The Assistant Attorney General argued that the victim's decision and intent to purchase illegal drugs was the proximate cause of his ultimate death. The Assistant Attorney General stated that the victim's decision to engage in unlawful conduct was the foreseeable, direct, and proximate cause of his demise. The Assistant Attorney General urged the panel to consider the victim's intent.

{¶6} The goal of this program is remedial in nature. The compensation fund is designed to return victims/applicants to their status prior to the occurrence of the criminally injurious conduct. We realize the program goal is defined by certain statutory restrictions. The Ohio General Assembly created the Victims of Crime Act as a class of compensation. Certain well-defined persons have a right to participate in the reparations fund under specific statutory conditions. The right to participate in the fund is controlled via compliance with special criteria and prudent restrictions contained within the statute. In this case, we hold the victim/applicant has met that criteria to participate in the fund.

{¶7} We note after full examination of this appeal that among the most important and challenging statutory duties imposed on the Ohio Court of Claims Victims of Crime Division is to render just and balanced decisions when determining whether a victim of crime through his or her conduct, has in small or larger measures contributed to the subsequent occurrence of violent crime as a result of their contributory

misconduct. A significant number of these appeals heard by this panel involve major violent crimes committed against victims who through either minor or major violations of the law on their part contributed to the criminally injurious conduct. Our statutory duty is to weigh and balance all of the evidence on a case-by-case basis to reach a just resolution. The panel must determine whether an award should be reduced due to the degree and nature of the contributory misconduct; or whether the contributory misconduct is so substantial that it is either clearly felonious in its elements or so egregious in its relation to the subsequent crime as to preclude any award to a claimant.

{¶8} Revised Code 2743.51(M) states:

(M) "Contributory misconduct" means any conduct of the claimant or of the victim through whom the claimant claims an award of reparations that is unlawful or intentionally tortious and that, without regard to the conduct's proximity in time or space to the criminally injurious conduct, has a causal relationship to the criminally injurious conduct that is the basis of the claim.

{¶9} Revised Code 2743.60(F) states in part:

(F) In determining whether to make an award of reparations pursuant to this section, the attorney general or panel of commissioners shall consider whether there was contributory misconduct by the victim or the claimant. The attorney general, a panel of commissioners, or a judge of the court of claims shall reduce an award of reparations or deny a claim for an award of reparations to the extent it is determined to be reasonable because of the contributory misconduct of the claimant or the victim.

{¶10} With respect to the exclusionary criteria of R.C. 2743.60, the Attorney General bears the burden of proof by a preponderance of the evidence. *In re Williams*, V77-0739jud (3-26-79) and *In re Brown*, V78-3638jud (12-13-79). According to R.C. 2743.51(M) and relevant case law, there are three elements that must be established before a *prima facie* case of contributory misconduct can be met: (1) specific, unlawful or intentionally tortious conduct by the victim or applicant;² (2) a causal relationship between the specific conduct and the criminally injurious conduct and; (3) foreseeability of the likelihood of the criminally injurious conduct occurring if the victim or applicant engaged in such conduct.³ Furthermore, in order to deny an award under R.C. 2743.60(F), the Attorney General must prove that the victim's or applicant's contributory misconduct was substantial.⁴ Contributory misconduct determinations depend upon the particular facts and circumstances of each case and thereby warrant a case-by-case analysis. *In re Williams*, V2001-32691tc (10-11-02).

{¶11} In evaluating the existence and level of contributory misconduct under R.C. 2743.60(F) for this case, this panel considers the following nonexclusive list of considerations:⁰⁵

{¶12} 1. Age and corresponding mental capacity of the victim/applicant;

{¶13} 2. The victim/applicant's familiarity/relationship with the offender;

²See *In re Gary II*, V91-83761jud (11-16-94).

³See *In re Ewing* (1987), 33 Ohio Misc. 2d 48.

⁴See *In re Spaulding* (1991), 63 Ohio Misc. 2d 39.

⁵We note that review of the above list of considerations is not required for every R.C. 2743.60(F) case. The list is merely a guide when reviewing contributory misconduct issues.

{¶14} 3. The victim/applicant's mens rea;

{¶15} 4. Whether the victim/applicant suffered from diminished capacity due to intoxication or other mitigating factors;

{¶16} 5. Whether the victim/applicant suffered a disproportionate level of harm compared to the victim/applicant's level of misconduct;

{¶17} 6. Whether the victim/applicant's degree of misconduct was a de minimus or substantial violation of the law; and

{¶18} 7. Whether granting an award of reparations violates the public policy of the Victims of Crime Act. See *In re Kempton*, V06-20640tc (4-2-07), 2007-Ohio-2929.

{¶19} This panel recognizes the decisions over the past decade have generally held that in circumstances where a victim engages in illegal drug activity, the victim's contributory misconduct is substantial and the claim must therefore be denied. See, e.g., *In re Morrow*, V96-34092tc (12-5-97); *In re Hill*, V2002-51656jud (7-22-03), 2003-Ohio-4517; *In re Staaf*, V2004-61012tc (9-23-05), 2005-Ohio-5673; and *In re Suggs*, V2005-80045tc (6-3-05), 2005-Ohio-3918. The claim presently before this panel of commissioners, however, compels a contrary finding in light of the facts of this claim.

{¶20} When we apply the above considerations to the facts of this claim, we find Mr. Van Horn's misconduct warrants a reduction and not a complete denial. Even though we find that Mr. Van Horn engaged in contributory misconduct, we find the contributory misconduct was not substantial so as to deny the claim in its entirety. While Mr. Van Horn should have realized that attempting to purchase illegal drugs is inherently dangerous conduct, we find that he lacked the complete capacity to fully appreciate the consequences of his actions based upon his inebriated state. Furthermore, we find the

following facts to be significant: (1) that the victim did not have a history of illegal drug use or activity; (2) that the victim was “set up” for a robbery; and (3) that the offenders drove the victim around in circles as a ruse and then mercilessly beat him to death, taking extreme advantage of a very drunk man. Further analysis under the *Kempton* considerations leads us to conclude that Mr. Van Horn’s misconduct was minor compared to the offenders’ misconduct. The offenders escalated the incident by maliciously planning and executing a vicious attack on an obviously intoxicated victim. Due to the offenders’ excessive and unnecessary use of force, Mr. Van Horn suffered a disproportionate level of harm (and ultimately death) compared to the level of his misconduct.

{¶21} Accordingly, all these facts carefully considered together lead us to conclude that Mr. Van Horn suffered from diminished capacity, lacking the mens rea to hold him fully accountable for the consequences of his actions. In the exercise of our discretion, we find that these facts warrant an award, albeit significantly reduced by 40 percent. Finally, our decision to grant an award to these applicants does not violate the program’s public policy, because by reducing the award we acknowledge Mr. Van Horn’s misconduct.

{¶22} Based on the above factors and analysis, we find Mr. Van Horn’s misconduct warrants a reduction in the award by 40 percent under R.C. 2743.60(F). Therefore, the March 1, 2006 decision of the Attorney General shall be reversed and the

claim shall be remanded to the Attorney General for economic loss calculations consistent with the panel's decision.

TIM MC CORMACK
Presiding Commissioner

KARL C. KERSCHNER
Commissioner

RANDI OSTRY LE HOTY
Commissioner

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	:	<u>ORDER OF A THREE-</u>
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IT IS THEREFORE ORDERED THAT

- 1) The March 1, 2006 decision of the Attorney General is REVERSED and judgment is rendered in favor of the applicants;
- 2) This claim is remanded to the Attorney General for economic loss calculations and decision consistent with the panel's decision;
- 3) All future awards shall be reduced by 40 percent pursuant to R.C. 2743.60(F);
- 4) This order is entered without prejudice to the applicants' right to file a supplemental compensation application, within five years of this order, pursuant to R.C. 2743.68;

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ORDER

- 5) Costs are assumed by the court of claims victims of crime fund.

TIM MC CORMACK
Presiding Commissioner

KARL C. KERSCHNER
Commissioner

RANDI OSTRY LE HOTY
Commissioner

ID #\16-dld-tad-032807

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

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To S.C. Reporter 7-6-2007

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ORDER

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