

[Cite as *In re Dawson*, 2003-Ohio-3846.]

**IN THE COURT OF CLAIMS OF OHIO
VICTIMS OF CRIME DIVISION**

IN RE:	JAMES B. DAWSON	:	Case No. V2000-02313
	JAMES B. DAWSON	:	<u>OPINION OF A THREE-</u> <u>COMMISSIONER PANEL</u>
	Applicant	:	
	(1999-78392)	:	
		: : : : :	

{¶1} On October 24, 2000, the single commissioner denied the applicant an award of reparations pursuant to former R.C. 2743.52(A) based upon evidence that the applicant failed to qualify as a victim of criminally injurious conduct under the motor vehicle exception as defined in former R.C. 2743.51(C). On March 1, 2002, a panel of commissioners affirmed the single commissioner’s decision. On July 1, 2002, Judge Bettis set aside the panel’s decision and remanded the claim to the panel in order to allow a newly discovered witness the opportunity to testify. Hence, this appeal came to be reheard before this panel of three commissioners on April 17, 2003 at 11:10 A.M.

{¶2} The applicant, applicant’s counsel and an Assistant Attorney General attended the hearing and presented testimony, exhibits and oral argument for this panel’s consideration. This panel notes that at the previous panel hearing, the applicant provided testimony as to what transpired the night in question along with Stephanie and Bradley Webb’s affidavits concerning what they immediately observed after the crash.

{¶3} Clint Miller, eye-witness to the accident, briefly testified that on May 5, 1998 he saw the crash while sitting on the porch of his friend, Merrel Browning, whose house sits on the

corner of Wellmeir and Deanwood, which is approximately 30-50 feet away from the intersection. Mr. Miller stated that he first heard the squeal of the offender's automobile and then saw the unilluminated vehicle approach the intersection at the rate of 30-40 mph. Mr. Miller stated that the offending driver proceeded to run the posted stop sign, strike the applicant and flee the scene at a high rate of speed. Mr. Miller stated that the accident occurred so fast that the applicant did not have the opportunity to react. Mr. Miller stated that after the impact he went to assist the applicant and that shortly thereafter the police and ambulance arrived. Mr. Miller testified that he advised the responding officer as to all he observed. Mr. Miller further explained that there is a streetlight on the corner however, it was dark and that no one was able to obtain the offender's license plate number.

{¶4} Applicant's counsel asserted that the offender's acts of (1) traveling over an appropriate speed limit, (2) without illuminated headlights through a residential neighborhood, (3) running a stop sign and (4) fleeing the scene of an accident constitutes recklessness when all the facts are viewed as a whole. Counsel argued that the multiple concurring acts of negligence amounted to a heedless indifference to a known risk and accordingly in this instance the offender's conduct rose to the level of aggravated vehicular assault. Hence, counsel contended that the applicant qualified as a victim of criminally injurious conduct as defined in former R.C. 2743.51(C). Counsel also introduced Exhibits 1-3 (photographs) into evidence, which displayed the location of the collision.

{¶5} The Assistant Attorney General maintained that the applicant failed to meet his burden of proof to establish that he qualifies as a victim of criminally injurious conduct. The Assistant Attorney General stated that the only new evidence introduced at this hearing was Clint

Miller's testimony. The Assistant Attorney General argued that Mr. Miller's testimony as to what actually occurred is questionable since (1) it was dark, (2) he observed the accident from a distance, (3) the accuracy of his perception concerning the offender's rate of speed after turning the corner, and (4) the fact that the police report does not contain Mr. Miller's assertions regarding the unilluminated headlights or the offender's inappropriate traveling speed. Nevertheless, the Assistant Attorney General stated that if the panel were to find that (1) the offender was speeding, (2) that the offender failed to operate the vehicle with his headlights on and (3) that the offender ran the stop sign then that would be enough for him to concede that the offender acted recklessly.

{¶6} Following review of the claim, testimony, exhibits and oral argument presented at the hearing, this panel makes the following determination.

{¶7} R.C. 2743.51(C) states as follows:

{¶8} "(C) 'Criminally injurious conduct' means one of the following:

{¶9} "(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:

{¶10} "(a) The person engaging in the conduct intended to cause personal injury or death;

{¶11} “(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;

{¶12} “(c) The person engaging in the conduct was using the vehicle in a manner that constitutes an OMVI violation;

{¶13} “(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.”

{¶14} Former R.C. 2903.08 describes aggravated vehicular assault in the following manner:

{¶15} “(A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall cause serious physical harm of the type described in division (E)(2) or (5) of section 2901.01 of the Revised Code to another person.”

{¶16} “(B) Whoever violates this section is guilty of vehicular assault a felony of the fourth degree. * * * ”

{¶17} R.C. 2901.22(C) defines the culpable mental state of “recklessly” as follows:

{¶18} “(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.”

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

{¶20} “* * * 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.”

{¶21} Traditionally, this court has viewed injured parties of hit and skip accidents as ineligible applicants. However, there have been certain circumstances and factors where the court has allowed hit and skip applicants to participate in the fund. For example, in In re Williams, V99-65291tc (10-25-00), this panel of commissioners held that the offending driver acted recklessly when he struck the applicant while traveling through an alley and across a street at a high rate of speed, with poor visibility of intersection traffic, without illuminated headlights, in a poorly lit area. Likewise, we believe a similar fact pattern exists in this case.

{¶22} According to information in the file and the eye-witness testimony presented, the offending driver struck the applicant while traveling through a residential neighborhood at an inappropriate rate of speed, around midnight, without illuminated headlights, disregarding a visible stop sign, and fled the scene of the incident with full knowledge that he had struck and possibly severely injured an individual. We believe the offender acted not only negligently,

when viewing each factor individually, but also recklessly when all the above factors are considered collectively. Based upon the greater weight of the evidence, we believe that we are compelled to view the actions of the offender as a whole in light of the newly presented information. Therefore, we find that the applicant has proven by a preponderance of the evidence that he qualifies as a victim of criminally injurious conduct as the term is defined in former R.C. 2743.51(C). The October 24, 2000 order of the single commissioner shall be reversed and the claim remanded to the Attorney General for economic loss calculations and decision.

{¶23} IT IS THEREFORE ORDERED THAT

{¶24} 1) The October 24, 2000 order of the single commissioner (Jr. Vol. 2194, Pg. 085) is REVERSED and judgment is entered for the applicant;

{¶25} 2) This claim is remanded to the Attorney General for economic loss calculations and decision;

{¶26} 3) This order is entered without prejudice to the applicant's right to file a supplemental compensation application pursuant to R.C. 2743.68;

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

KARL H. SCHNEIDER
Commissioner

LEO P. MORLEY
Commissioner

JAMES H. HEWITT III
Commissioner

Filed 6-12-2003
Jr. Vol. 2250, Pg. 51
To S.C. reporter 7-17-2003