VICTIMS OF CRIME COMPENSATION APPEALS OUTLINE

I. ELIGIBILITY

A. Who May File and Qualify as a Claimant

1. Any U.S. citizen injured in the state of Ohio as the result of criminal conduct or terrorism, or a victim of human trafficking as defined by R.C. 2905.32; or injured trying to prevent or apprehend a person engaged in criminal conduct. (R.C. 2743.51(A) and R.C. 2743.51(C)(1), (2) and (3))

a. Premature baby. *In re Baby Girl Williams*, 62 Ohio Misc.2d 153, 593 N.E.2d 518 (Ct. of Cl. 1990)

b. A victim who experienced ongoing systemic domestic violence and aggravated menacing for a two-year period should be classified for filing purposes as a single incident of criminally injurious conduct. *In re Shook*, Ct. of Cl. No. V2006-20348tc (April 16, 2007), aff'd jud (September 18, 2007), 2007-Ohio-5696

2. Any Ohioan who is injured out-of-the state if:

a. The person had a permanent place of residence in the state of Ohio at the time of the criminally injurious conduct or terrorist act and any one of the following apply: (R.C. 2743.51(A)(2)(a))

(1) Had a permanent place of employment in this state; (R.C. 2743.51(A)(2)(a)(i))

(2) Was a member of the regular armed forces of the United States or of the United States coast guard or was a full-time member of the Ohio organized militia or of the United States army reserve, naval reserve, or air force reserve; (R.C. 2743.51(A)(2)(a)(ii)) *In re Cooper*, 62 Ohio Misc.2d 133, 593 N.E.2d 506 (Ct. of Cl. 1990), wife residency follows husband's in military.

(3) Was retired and receiving social security or any other retirement income; (R.C. 2743.51(A)(2)(a)(iii))

(4) Was sixty years of age or older; (R.C. 2743.51(A)(2)(a)(iv))

(5) Was temporarily in another state for the purpose of receiving medical treatment; (R.C. 2743.51(A)(2)(a)(v))

(6) Was temporarily in another state for the purpose of performing employment-related duties required by an employer located within this state as an express condition of employment or employee benefits; (R.C. 2743.51(A)(2)(a)(vi))

(7) Was temporarily in another state for the purpose of receiving occupational, vocational, or other job-related training or instruction required by an employer located within this state as an express condition of employment or employee benefits; (R.C. 2743.51(A)(2)(a)(vii))

(8) Was a full-time student at an academic institution, college, or university located in another state; (R.C. 2743.51(A)(2)(a)(viii))

(9) Had not departed the geographical boundaries of this state for a period exceeding thirty days or with the intention of becoming a citizen of another state or establishing a permanent place of residence in another state. (R.C. 2743.51(A)(2)(a)(ix)) *In re Ott*, 61 Ohio Misc.2d 818, 585 N.E.2d 586 (Ct. of Cl. 1990) dual resident. *In re Berresford*, 63 Ohio Misc.2d 379, 629 N.E.2d 1134 (Ct. of Cl. 1993) interprets "or" in R.C. 2743.51(A)(2)(a)(ix) to read "and."

3. A resident of a foreign country the laws of which permit residents of this state to recover compensation as victims of offenses committed in that country. (R.C. 2743.51A(1)(a)(ii)). See *In re A.C.*, Ct. of Cl. No. 2014-00496VItc (October 20, 2014) aff'd, jud (March 2, 2015). Brazil does not have a victims of crime compensation program that would compensate Ohioans, accordingly applicant's claim was denied.

4. A dependent of a deceased victim. (R.C. 2743.51A(1)(b))

5. A third-party other than a collateral source, who legally assumes or voluntarily pays the obligations of a victim or of a dependent of a victim which obligations were incurred as the result of the criminally injurious conduct. (R.C. 2743.51A(1)(c))

   An insurance company which administers the health benefit plan of the injured party's mother is not a natural person and is a collateral source, even if it is a fully self-funded employee benefit plan. *In re Rayle*, Ct. of Cl. No. V92-90672sc (September 12, 1995) aff'd tc (November 29, 1995).

6. A person who is authorized to act on behalf of a victim, dependent, or third party. (R.C. 2743.51A(1)(d))

   a. Expenses incurred as a result of injuries to a minor are the responsibility of both parents regardless of which parent's name is listed on the billing statement. *In re Williams*, Ct. of Cl. No. V93-46570tc (January 20, 1995) and *In re Cadaret*, Ct. of Cl. No. V93-78579tc (August 18, 1995). See also, *In re Miles*, Ct. of Cl. No. V94-37108tc (December 29, 1995).

   b. Unpaid support, applicant lacks standing to request an award of reparations even though support obligor was given an award for work loss. *In re McKinley*, 61 Ohio Misc.2d 209, 577 N.E.2d 143 (Ct. of Cl. 1988).

7.The estate of a deceased victim. (R.C. 2743.51(A)(1)(e))

B. <u>Who May be Granted Payment of an Award of Reparations.</u>

1. Claimant

a. Victim (R.C. 2743.51(A)(1)(a)(i) and (ii))

b. Dependent (R.C. 2743.51(A)(1)(b))

c. A third person, other than a collateral source, who legally assumes or voluntarily pays the obligations of a victim, or a dependent of a victim which obligations were incurred as a result of the criminally injurious conduct and may include but not be limited to, medical and burial expenses. (R.C. 2743.51(A)(1)(c))

d. A person who is authorized to act on behalf of any person. (R.C. 2743.51(A)(1)(d) and (R.C. 2743.66(E))

e. The estate of a deceased victim. (R.C. 2743.51(A)(1)(e))

2. Providers

a. Any person who provides a victim or claimant with a product, service or accommodations that are an allowable expense or a funeral expense. (R.C. 2743.51(V))

> *In re Shipp*, Ct. of Cl. Nos. V2003-40526, V2003-40534, V2003-40542jud (March 10, 2004), 2004-Ohio-1896. Where a funeral director filed a claim on his own behalf for reimbursement of funeral expenses, due to the initial applicants being excluded pursuant to the felony exclusions. The judge of the court of claims held although R.C. 2743.191(B)(1) authorizes the attorney general to pay service providers directly, payments are made for expenses incurred by either a victim or eligible claimant and are not paid as a benefit for a provider. Accordingly, a service provider may not qualify as a claimant.
>
> Reasonable expenses and necessary fees to obtain a guardian's bond pursuant to R.C. 2109.04 when the bond is required to pay an award to a fiduciary on behalf of a minor or incompetent. R.C. 2743.51(F)(4)(a).
>
> Attorney fees for successfully obtaining a restraining order, custody order, or other physical separation of a victim from an offender may not exceed $1,000.00 at a rate not to exceed $100 per hour. However, this fee may only be awarded if the attorney is <u>not</u> seeking attorney fees pursuant to R.C. 2743.65. (R.C. 2743.65(H)). Travel time incurred to attend court hearings, not in excess of three hours round trip in an amount not to exceed $30 per hour.

b. Medical, psychological, dental, chiropractic, hospital, physical therapy, and nursing services provided may have their fee bills audited by the attorney general and adjusted in accordance with the appropriate cost containment and reimbursement guidelines adopted by the administrator of workers compensation. (R.C. 2743.521(A))

c. A medical provider that accepts payment for medical care - related allowable expenses shall not seek reimbursement for any part of those allowable expenses from a victim or claimant who was granted an award. Medical providers can seek reimbursement from collateral sources. (R.C. 2743.521(B))

3. Both claimants and providers may receive awards of reparations only if the amount of the award is $50 or more. (R.C. 2743.191(B)(1)) *In re Simpson*, Ct. of Cl. No. V2010-50825tc (March 9, 2011), 2011-Ohio-4355. See also, *In re Jones*, Ct. of Cl. No. 2015-00087-VIjud (June 15, 2015).

C. Criminally Injurious Conduct

1. Any conduct that occurs or is attempted which poses a substantial threat of personal injury or death and is punishable by fine, imprisonment or death or is an act of terrorism. (R.C. 2743.51(C)(1), (2) and (3))

a. Law Enforcement Personnel. (R.C. 2743.51(L)(1), (2) & (3)

In re Coss, Ct. of Cl. No. V91-83524tc (September 22, 1993) an arson investigator who was injured at the scene of the fire qualifies as a victim.

A police officer who slipped and fell prior to the execution of a search warrant was not a victim. *In re May*, Ct. of Cl. No. V94-43540tc (February 29, 1996) aff'd jud (May 10, 1996).

A police officer who was securing the back of a residence in an attempt to serve a warrant for felony rape when he stepped in a hole and injured his foot is not a victim since this was an intervening act not causally related to the criminally injurious conduct. *In re Kallay*, 91 Ohio Misc.2d 148, 698 N.E.2d 132 (Ct. of Cl. 1997). A police officer who slipped and fell on a snow and ice-covered courtyard while carrying a battering ram was not a victim where there was no confrontation with the suspect and the suspect was not at home. *In re Haverstick*, Ct. of Cl. No. V2009-40285tc (November 12, 2009), 2009-Ohio-7218.

However, a police officer injured in a fall while chasing an alleged offender after a routine traffic stop is a victim. *In re Walling*, 91 Ohio Misc.2d 181, 698 N.E.2d 154 (Ct. of Cl. 1997). See also, *In re Box*, Ct. of Cl. No. V2004-60601tc (December 17, 2004), 2004-Ohio-7343.

A police officer who was injured while chasing a suspect who had driven his vehicle left of center, ran a red light, sped into a driveway, fled on foot, became combative and had to be subdued with handcuffs was victim of criminally injurious conduct, even though the initial reason for stopping the suspect was for failure to display a front license plate. *In re Rudin*, Ct. of Cl. No. V2002-51923tc (April 17, 2003), 2003-Ohio-2499.

Officer was injured while trying to keep a disorderly and intoxicated

offender out of the street. Offender's conduct was criminally injurious conduct. *In re Bolt*, Ct. of Cl. No. V2004-61268tc (May 20, 2005), 2005-Ohio-3320.

A police officer was a victim of criminally injurious conduct when he fell while trying to apprehend a suspect whose license plate check revealed he failed to appear for a felony drug trafficking charge. The injury occurred while trying to apprehend a parole violator who was known to be armed and dangerous, ran with his hand inside the waistband of his pants, and fled upon the mere approach of the officers. *In re Kashmiry*, Ct. of Cl. No. V2003-40585tc (October 16, 2003), 2003-Ohio-6137.

A police officer who observed a drug transaction, gave chase in his vehicle and was injured while chasing the suspects on foot, was a victim of criminally injurious conduct. The driver of the fleeing vehicle had run two vehicles off the road and attempted to crash into the officer's vehicle before the ensuing foot chase occurred. *In re Miller*, Ct. of Cl. No. V2003-40593tc (January 14, 2004), 2004-Ohio-934.

A police officer who justifiably discharged his weapon killing an offender and was subsequently, pursuant to department policies, placed on administrative leave, suffered constructive injury due to the application of this policy. The applicant's use of deadly force was necessitated by the offenders' preceding criminally injurious conduct which led to his placement on administrative leave. *In re McMillan*, Ct. of Cl. No. V98-66102tc (September 9, 2000). See also, *In re Leon*, Ct. of Cl. No. V2000-01783tc (May 31, 2001); *In re Follmer*, Ct. of Cl. No. V2002-50986tc (October 30, 2002).

Police officer qualified as a victim of criminally injurious conduct when he broke down a door to execute a narcotics warrant and an ensuing struggle occurred with the offender. It was held that the officer sustained and aggravated his injury in the unbroken chain of events from execution to apprehension. *In re Bassett*, Ct. of Cl. No. V2005-80096jud (February 10, 2006), 2006-Ohio-1322.

b. Private Citizens. (R.C. 2743.51(L)(1))

A person who sustains injury as the result of a good faith effort of self-defense qualifies as a victim. *In re Friscoe*, Ct. of Cl. No. V97-45799tc (October 29, 1998). See also, *In re Madhat*, Ct. of Cl. No. V2000-92372tc (March 16, 2001).

A person who dies while chasing after a thief who stole his car was not a victim of criminally injurious conduct. *In re Mrozinski*, Ct. of Cl. No. V93-26935tc (October 25, 1994).

A victim of stalking as defined in R.C. 2903.21 qualifies as a victim of

criminally injurious conduct. *In re Miller,* Ct. of Cl. No. V98-48805sc (May 14, 1999).

A person is a victim of menacing by stalking when the offender sends e-mails, makes threatening telephone calls, and appears at the victim's home, even though the victim's husband has all contact with the offender. *In re Kinkoff-Wrenn,* Ct. of Cl. No. V2004-60083tc (June 1, 2004), 2004-Ohio-4175. See, also *In re Blough*, Ct. of Cl. No. V2009-40714jud (December 1, 2010), 2010-Ohio-6706.

Although the initial claim was filed as a victim of sexual abuse, if sufficient evidence is presented that the victim's injuries are consistent with a physical assault the requirements for criminally injurious conduct have been met. *In re Lowe*, Ct. of Cl. No. V2002-50501tc (November 11, 2002).

A child who witnesses his mother being a victim of domestic violence is a victim in his own right. *In re Webb*, Ct. of Cl. No. V97-63665sc (May 18, 1998).

Vandalism does not pose a substantial threat of personal injury or death. Accordingly, any psychological injury sustained is not compensable. *In re B.A.H.*, Ct. of Cl. No. V2010-50345jud (November 15, 2011), 2011-Ohio-7086. See also, *In re Vince*, Ct. of Cl. No. 2014-00632-VI (January 16, 2015).

Applicant fell into an open manhole while delivering papers in the early morning hours. Since removal of a manhole cover is a misdemeanor of the first degree, applicant qualifies as a victim of criminally injurious conduct. *In re Martin*, Ct. of Cl. No. V2007-90145tc (July 5, 2007), 2007-Ohio-4510.

An applicant who initially told urgent care providers that his injuries occurred as the result of a skateboard accident, but days later reported the incident as an assault to police and applicant's witness testified to the occurrence of the assault, qualified as a victim of criminally injurious conduct. *In re White*, Ct. of Cl. No. 2015-00312-VI (October 22, 2015).

Victim was the target of dissemination of matter harmful to juveniles and suffered psychological injury as a result qualified as a victim of criminally injurious conduct. *In re Masetta*, Ct. of Cl. No. V2004-60431tc (December 1, 2004), 2004-Ohio-7336.

Attempted suicide does not constitute criminally injurious conduct. *In re Raymond,* 91 Ohio Misc.2d 82, 698 N.E.2d 92 (Ct. of Cl. 1994).

A person who sustains severe emotional harm as the result of systematic forgery and theft is not a victim of criminally injurious conduct. *In re Dowdell,* Ct. of Cl. No. V2002-50749tc (September 30, 2002).

Identity theft does not pose a substantial threat of personal injury or death, accordingly it does not qualify as criminally injurious conduct. *In re Tittl*, Ct. of Cl. No. V2006-20909tc (February 16, 2007), 2007-Ohio-1405.

2. A good faith effort of any person to prevent criminally injurious conduct. (R.C. 2743.51(L)(2))

In re Seifert, 61 Ohio Misc.2d 258, 577 N.E.2d 172 (Ct. of Cl. 1988), one who intervenes in an altercation as a peacemaker to prevent criminally injurious conduct may qualify as a victim.

Applicant, mother-in-law, qualified as a victim when she walked into a hostage situation where her daughter and grandchild had been murdered and she attempted to talk the offender out of killing her other two grandchildren and suffered emotional distress. *In re Berry*, 91 Ohio Misc.2d 104, 698 N.E.2d 105 (Ct. of Cl. 1995).

Victim and friend went to a bar. Friend became involved in an altercation with offender. Offender struck friend. Victim attempted to restrain offender from behind to prevent him from striking his friend again. Victim stated offender inadvertently "head butted" him in the mouth causing dental injuries. Victim was attempting in good faith to prevent his friend from being further assaulted by the offender when he sustained an injury; accordingly, he qualified as a victim pursuant to R.C. 2743.51(L)(2). *In re Lockwood*, Ct. of Cl. No. V2005-80797tc (July 21, 2006), 2006-Ohio-4028.

Decedent's actions of trying to prevent further criminal actions by attempting to confront a juvenile who was throwing rocks from a trestle qualifies him as a victim pursuant to R.C. 2743.51(L)(2). Decedent's subsequent death resulting from being struck by a train was causally connected to his attempt to prevent future criminally injurious conduct. *In re Sutkowy*, Ct. of Cl. No. V2001-30663tc (September 28, 2001).

3. A good faith effort of any person to apprehend a person suspected of engaging in criminally injurious conduct. R.C. 2743.51(L)(3).

In re Fristoe, 66 Ohio Misc.2d 144, 643 N.E.2d 622 (Ct. of Cl. 1994) applicant who was injured by an offender engaged in vandalism when she attempted to detain him for police qualifies as a victim. But, see also *In re Douglas*, 86 Ohio Misc.2d 7, 684 N.E.2d 753 (Ct. of Cl. 1996). Where the decedent chased the suspected thieves of his Christmas decorations and subsequently suffered a heart attack. The judge of the Court of Claims found the underlying theft offense did not constitute criminally injurious conduct and decedent did not physically confront thieves.

A person who is injured while attempting to apprehend an individual recklessly operating a motor vehicle qualifies as a victim of criminally injurious conduct.

In re Jeffcut, Ct. of Cl. No. V2002-51451tc (January 16, 2003).

4. Terrorism that occurs within or outside the territorial jurisdiction of the United States. (R.C. 2743.51(R)(1)-(4).

   Victims of Terrorism (effective March 10, 1998)

   (1) Terrorism involves a violent act or an act that is dangerous to human life. (R.C. 2743.51(R)(1))

   (2) The act appears to be intended to do any one of the following:

      (i) Intimidate or coerce a civilian population, (R.C. 2743.51(R)(3)(a))

      (ii) Influence the policy of any government by intimidation or coercion, or (R.C. 2743.51(R)(3)(b))

      (iii) Affect the conduct of any government by assassination or kidnaping. (R.C. 2743.51(R)(3)(c))

   (3) The activity can take place in this state, any other state, within or without the territorial jurisdiction of the United States. The activity must be a violation of criminal laws of the United States, this state, or any other state and if committed outside the territorial boundaries of the United States would violate the criminal laws of the United States, this state, or any other state if committed within the territorial jurisdiction of the United States.

   (4) Applicant who arrived on the scene of the terrorist attack in New York City of September 11, 2001, several months later did not qualify as a victim of terrorism since he was not present during the attack or its immediate aftermath, and while he discovered body parts, he did not have a close personal relationship with any of the remains. *In re Zerkle*, 2016-00313-VI (September 15, 2016), 2016-Ohio-8612 adopted jud (October 7, 2016), 2016-Ohio-8610. See also, *In re Storozuk*, Ct. of Cl. No. V90-58992sc (May 28, 1993).

5. Causation--between criminally injurious conduct and injury or death.

   The court of claims stated in *In re Toney*, Ct. of Cl. No. V79-3029jud (September 4, 1981): "Accordingly a determination of whether a Victim of Crime's claimant is entitled to an award of reparations for economic loss arising from criminally injurious conduct requires application of principles of traditional proximate cause standards. The trier of the fact, at a minimum, must be provided with evidence that a result is more likely to have been caused by an act, in the absence of any intervening cause. The quantum of evidence required is a preponderance of competent, material and relevant evidence of record on that issue."

There is a positive requirement of long standing in the law of evidence in Ohio that damages for claimed personal injuries are recoverable only for injuries directly resulting from and as a natural consequence of the injury sustained. It is not permissible to establish a claimant's claim to certain bodily disorders unless it is established such were connected with the accident. Evidence that the complaint "might" or "may" result from the injury is not competent. The evidence must tend to show that reasonable certainty of such a result exists. *In re Saylor*, 1 Ohio Misc.2d 1, 437 N.E.2d 321 (Ct. of Cl. 1982).

In re Lewis, 61 Ohio Misc.2d 542, 580 N.E.2d 538 (Ct. of Cl. 1990), coroner report vs. other medical evidence complements coroner's report.

The applicant has the burden of proof to provide the court with reliable and authoritative evidence which establishes it is more likely than not that the decedent's death was caused by criminally injurious conduct. *In re Kinamon*, Ct. of Cl. No. V2008-30464tc (November 21, 2008), 2008-Ohio-6092.

6. Four Types

a. Nonvehicular (R.C. 2743.51(C)(1) and (2))

(1) Offender (minimal role)

(2) Preponderance of evidence, (R.C. 2743.52(A) and (B))

(3) Capacity

(i) *In re Terry*, Ct. of Cl. No. V77-0613sc (January 30, 1978), shooting by 5-year-old criminally injurious conduct.

(4) Criminal negligence

(i) *In re Franklin*, Ct. of Cl. No. V85-61506tc (October 10, 1986), negligent discharge of firearm.

(ii) *In re Terrell*, Ct. of Cl. No. V91-57795tc (July 30, 1993), reckless assault.

(5) Dogs

(i) *In re Dodds*, Ct. of Cl. No. V77-0614sc (February 24, 1978), owner violated animal control law.

(ii) *In re Williams*, 91 Ohio Misc.2d 118, 698 N.E.2d 114 (Ct. of Cl. 1995), failure to control dog on common area of apartment complex.

(iii) *In re Logan*, Ct. of Cl. No. V79-3460jud (June 25, 1981), stray dog; See also, *In re Burton*, Ct. of Cl. No. V93-74921tc (March 31, 1995).

(iv) A dog running at large in violation of R.C. 955.22 in and of itself does not pose a threat of personal injury or death. *In re Leonard*, Ct. of Cl. No. V2011-60565tc (October 26, 2011).

b. Vehicular (R.C. 2743.51(C)(1)(a), (b), (c), (d), and (e) and (C)(2)(a), (b), (c), (d), and (e))

Criminally injurious conduct does not include conduct arising out of the ownership or use of a motor vehicle except when any of the following apply:

(1) The offending driver of the vehicle intended to cause injury or death; R.C. 2743.51(C)(1)(a) and (C)(2)(a).

(i) Specific Intent
In re Pollard, Ct. of Cl. No. V86-48805sc (April 22, 1987) and *In re Marshall*, 61 Ohio Misc.2d 816, 585 N.E.2d 585 - circumstantial evidence (Ct. of Cl. 1990).

(ii) Imputed Intent
In re Gierowski, 61 Ohio Misc.2d 301, 578 N.E.2d 899 (Ct. of Cl. 1988) trying to run car off road; lost control and struck another vehicle.

(2) Fleeing Felony R.C. 2743.51(C)(1)(b) and (C)(2)(b).

(i) Immediate defined; *In re Colbert*, Ct. of Cl. No. V89-85221tc (June 17, 1993); See also, *In re Hugley*, 63 Ohio Misc.2d 383, 629 N.E.2d 1136 (Ct. of Cl. 1993), victim injured 30 to 45 minutes after theft of auto qualifies.

Effective July 1, 2000, OMVI was changed to OVI.

(i) OVI violations R.C. 2743.51(P)(1)-(4).

(a) Violation of 4511.19. Prohibiting the operation of any vehicle while under the influence of alcohol, a drug of abuse, or a combination of both.

(b) A violation of division (A)(1) of section 2903.06 of the Revised Code. (Aggravated vehicular homicide-vehicular homicide-vehicular manslaughter).

(c) Violation of 2903.06(A)(1)(a). No person while operating a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft shall recklessly cause the death of another or the unlawful termination of another's pregnancy, if the offender is under the influence of alcohol, a drug of abuse or both.

(d) Violation of 2903.06(A)(1)(b). No person while operating vessel, water skis, aquaplane, or similar device shall negligently cause the death of another or the unlawful termination of another's pregnancy, if the offender is under the influence of alcohol, a drug of abuse or both.

(e) Violation of 2903.06(A)(1)(c). A death of another person or the unlawful termination of another's pregnancy by the unsafe operation of an aircraft if the offender was under the influence of alcohol, drug of abuse, or a combination of both.

The offending driver's state of intoxication can be established by his history of OMVI violations, alcoholic beverages found in the vehicle after the incident, Highway Patrol's investigation concerning alcohol use, and the sentencing judge's opinion that the offender was under the influence of alcohol at the time of the incident; even though the offender fled the scene of the accident and was not apprehended until hours after the incident. *In re Howard*, Ct. of Cl. No. V2002-50731tc (September 30, 2002).

A father who directs his son, a fourteen-year-old who did not possess a driver's license, to drive his vehicle due to the father's intoxicated state, participates in the operation of the vehicle while intoxicated and acts in heedless indifference to the safety of others. Such actions directly and proximately caused the accident and subsequent death of the victim. The 14-year-old acted recklessly by operating a vehicle without a valid driver's license and failing to yield right of way. *In re Littler*, Ct. of Cl. No. V2004-60172tc (July 1, 2004), 2004-Ohio-4612.

(4) For conduct occurring on or after July 25, 1990, a violation of

2903.08. The reckless operation of a motor vehicle, motorcycle, snowmobile, locomotive, water craft, or air craft which causes serious physical harm to another person or another's unborn. *In re Rainbow*, 66 Ohio Misc.2d 134, 634 N.E.2d 616 (Ct. of Cl. 1993). Aggravated vehicular assault is a lesser included offense of aggravated vehicular homicide.

In re Reck, Ct. of Cl. No. V91-70295tc (January 12, 1993). If the offender acted with a heedless indifference to known consequences and perversely disregarded a known risk that his conduct may result in serious physical injury to persons. See also, *In re Tomassetti*, Ct. of Cl. No. V2002-50510tc (October 11, 2002).

In re Calhoun, 66 Ohio Misc.2d 159, 643 N.E.2d 631 (Ct. of Cl. 1994). Applicant must 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.

The unidentified offending driver acted with a heedless indifference to the consequences of this action when he operated his vehicle at an inappropriate speed, through a neighborhood, without headlights, ran a stop sign, struck the victim, and subsequently fled the scene. *In re Dawson*, Ct. of Cl. No. V2000-02313tc (June 12, 2003), 2003-Ohio-3846.

A driver who speeds through an intersection, runs a red light and who has not held a valid driver's license for eight years is acting with heedless indifference and such actions qualify as reckless operation of a motor vehicle. *In re Plant*, Ct. of Cl. No. V2006-20135tc (November 22, 2006), 2006-Ohio-6843 aff'd jud (April 24, 2007), 2007-Ohio-2950.

Husband and wife injured in a motor vehicle incident when offender driver lost control of her vehicle on the berm of a divided highway, crossed both lanes of traffic, crossed the median and struck the applicants' vehicle which was traveling in the opposite direction. Offending driver engaged in reckless operation of a motor vehicle by operating her vehicle without a driver's license, with no training or experience and acting with heedless indifference to herself and other motorists by being unable to control her vehicle and by doing nothing to avoid the collision. *In re Balish*, Ct. of Cl. No. V2005-80428tc (March 7, 2006), 2006-Ohio-2162. *In re Balish*, Ct. of Cl. No. V2005-

80436tc (March 7, 2006), 2006-Ohio-2194.

Effective July 1, 2000, a violation of R.C. 2903.08 (aggravated vehicular assault, vehicular assault) the use of alcohol or a drug of abuse or a combination of both is not element for the violation of R.C. 2903.08.

(5) Effective April 4, 2007 hit and skip accidents which cause serious harm to a person. R.C. 2743.51(C)(1)(e) and (C)(2)(e).

A victim who suffers an amputated leg, multiple bodily fractures, and a separated shoulder sustained serious harm pursuant to R.C. 2743.51(C)(1)(e). *In re Campbell*, Ct. of Cl. No. V2004-60075tc (June 15, 2007), 2007-Ohio-3487.

a. Exceptions

In re Misorski, 61 Ohio Misc.2d 485, 580 N.E.2d 93 (Ct. of Cl. 1989), victim's injuries were proximately caused by avoiding an assault; being struck by a car was an intervening not a superseding cause of his injuries.

In re Thorpe, 62 Ohio Misc.2d 122, 593 N.E. 2d 499 (Ct. of Cl. 1990), illegal purchase and consumption of alcohol by a minor.

c. Indirect Victims of Crime

(1) *In re Clapacs*, 58 Ohio Misc.2d 1, 567 Ohio Misc.2d 1351 (Ct. of Cl. 1989),

Paugh v. Hanks, 6 Ohio St.3d 72, 451 N.E.2d 759 (1983),

Person's proximity to the location of the crime,

Relationship to victim – coworkers and friends do not qualify as a close personal relationship. See *In re Schneider*, Ct. of Cl. No. 2016-00572-VI (February 10, 2017) adopted jud (March 1, 2017).

Shock attributed to sensory or contemporaneous observation of incident, and emotional distress and anxiety due to direct awareness of criminal incident is personal injury qualifies as victim in their own right.

(2) *In re Fife*, 59 Ohio Misc.2d 1, 569 N.E.2d 1078 (Ct. of Cl. 1989)

R.C. 2743.51(L)(1) no distinction between direct and indirect victims.

Psychological injury must be of such a debilitating nature so as to impede or prohibit the resumption or enjoyment of day-to-day activities.

a. Post-traumatic stress disorder severe enough to impair day-to-day functioning and requiring therapy satisfy the psychological injury requirement. *In re Gilbert*, Ct. of Cl. No. V93-59124tc (March 29, 1996).

Mere sorrow, concern or mental distress not sufficient.

(1) *In re Franck*, 61 Ohio Misc.2d 824, 585 N.E.2d 589 (Ct. of Cl. 1990), discovery of murder/suicide of parents.

(2) Receiving a phone call regarding the murder of her husband does not satisfy the requirement that the applicant had to have direct awareness of the crime scene or arrive immediately after its occurrence. *In re Steele*, Ct. of Cl. No. V2001-32526jud (July 25, 2002).

In re Racey, 62 Ohio Misc.2d 317, 598 N.E.2d 896 (Ct. of Cl. 1991), parents of murder victim cannot qualify as victims in their own right where they were not present at the time or had no direct awareness of the criminally injurious conduct.

(3) Exception to direct awareness/immediate aftermath requirement.

In re Anderson, 62 Ohio Misc.2d 268, 598 N.E.2d 223 (Ct. of Cl. 1991), limited to sensory perception--exception coming on scene shortly after incident.

Applicant was determined to be a victim in her own right when her mother murdered her father and placed his body parts in trash bags in their basement. After learning of the murder, applicant realized the gruesome contents of the trash bags she observed in her basement before the bags were subsequently discovered along a road in Pennsylvania. *In re Poling*, Ct. of Cl. No. V2001-31953tc (December 28, 2001).

A mother who arrives at the hospital within fifteen minutes of her son being stabbed and observed his severely wounded and bloody body prior to his death satisfied the requirements as a secondary victim; even though the body was observed at the hospital rather than the crime scene. *In re Freeman*, Ct. of Cl. No. V2000-02330tc (January 14, 2002) aff'd jud (April 23, 2002).

A person who learned of her estranged husband's murder from a television report and observed the murder scene two days after the incident satisfied the direct awareness/immediate aftermath requirement. The crime scene was unchanged, only her husband's body had been removed. *In re Hill*, Ct. of Cl. No. V2003-41158tc (March 24, 2004), 2004-Ohio-1892 aff'd jud (June 9, 2004), 2004-Ohio-4169.

The claims made in *Fife*, *Clapacs*, and *Anderson* were made by indirect victims of criminally injurious conduct whose claims were granted after the judge determined the injured parties had suffered emotional distress that rose to the level of "personal injury." Typically, an indirect victim of criminally injurious conduct suffers no physical harm as a result of an offender's criminal conduct (or they would be considered a direct victim of

criminally injurious conduct themselves). Indirect victims of criminally injurious conduct usually suffer emotional distress after having observed the criminally injurious conduct or the results of such.

A mother who observed her daughter in a hospital room shortly after she sustained a gunshot wound to the head and subsequently stayed with her for three days while the daughter was brain dead and on life support satisfied the direct awareness/immediate aftermath requirement. *In re Santiago*, Ct. of Cl. No. V2007-90668tc (January 31, 2008), 2008-Ohio-2767 aff'd jud (May 23, 2008). See also, *In re E.P.*, Ct. of Cl. No. V2008-30774tc (May 4, 2009) 2009-Ohio-7215, where the minor child of the victim observed her father covered with blood in the ER and subsequently suffered psychological trauma.

Although R.C. 2743.51(L)(1) makes no distinction between direct and indirect victims, case law has created a four prong analysis to determine an indirect victim qualifies as a victim of criminally injurious conduct. An indirect victim's claimed emotional injury is examined utilizing a heightened standard of proof, which is outlined in *Clapacs*, *Fife* and *Anderson* cases.

Applicant viewed her murdered son's body in a hospital setting after he died. However, applicant did not view the crime scene or its aftermath. Accordingly, applicant's claim as a secondary victim was denied. *In re Bradley*, Ct. of Cl. No. 2012-70416-VItc (Jun 19, 2014).

(4) *In re Kaman*, 62 Ohio Misc.2d 288, 598 N.E.2d 236 (Ct. of Cl. 1991);

Unique circumstances which arise when a child is sexually abused;

Physical & temporal distance between the incident and the parents' awareness; and

Causal connection between parents' emotional distress and anxiety and the incident involving the child.

Even if parents cannot qualify as victims in their own right, counseling expenses for parents are allowable expense pursuant to R.C. 2743.51(F) if victim's well-being is contingent upon the well-being of the parents and parent's ability to function as a nurturing parent. See also, *In re Kennedy*, 91 Ohio Misc.2d 96, 698 N.E.2d 100 (Ct. of Cl. 1995).

In re McCullom, Ct. of Cl. No. V90-42891tc (December 23, 1992) and *In re Herman*, Ct. of Cl. No. V95-35095tc (December 30, 1996), follow the rationale of *Kaman*.

Rationale under *Kaman* expanded to a sibling who acted as a caretaker to the victim and who suffered emotional distress as the result of the acts perpetuated against her sibling and her sibling's emotional and physical health as the result of being an abuse victim. *In re Mueller*, Ct. of Cl. No. V98-36491tc (November 30, 2000).

D. Recoverable Economic Loss

A claimant can receive reimbursement for out-of-pocket expenses incurred as the result of criminally injurious conduct reduced by benefits received or expected to be received from a collateral source.

The determination of whether a claimant is entitled to an award of reparations for economic loss arising from criminally injurious conduct requires application of principles of traditional proximate cause standards. The trier of the fact, at a minimum, must be provided with evidence that a result is more likely to have been caused by an act, in the absence of any intervening cause. The quantum of evidence required is a preponderance of competent, material, and relevant evidence of record on that issue. *In re Toney*, Ct. of Cl. No. V79-3029jud (September 4, 1981).

1. Factors

(a) Causation - *In re Bailly*, Ct. of Cl. No. V78-3484jud (August 23, 1982) (reasonable degree of medical certainty)

Where a victim suffered a severe head injury as the result of the criminally injurious conduct and a secondary knee injury which was not reported until 2-3 months after the incident, the knee injury was found to be causally related to the criminally injurious conduct. The causal connection was supported by medical documentation, the victim's testimony, and the fact that the severe head injury required immediate attention and treatment, whereby, the knee injury was overlooked. *In re Shorter*, Ct. of Cl. No. V2003-40623tc (April 1, 2004), 2004-Ohio-3238.
The out-of-pocket expenses must be reasonably related to the criminally injurious conduct.

In re Cox, 61 Ohio Misc.2d 366, 579 N.E.2d 312 (Ct. of Cl. 1989), intervening medical problems related to criminally injurious conduct.

(b) Incurred - *In re Eader*, 70 Ohio Misc. 17, 434 N.E.2d 757 (Ct. of Cl. 1982)

Regardless of the specific terms in a divorce settlement agreement, a parent has an equal duty to support an injured child. This duty cannot be negated by any adjustment between the parties to the agreement. Accordingly, a parent, applicant, can receive an award for medical expenses incurred by an injured minor child. *In re Simmers*, Ct. of Cl. No. V96-36036tc (July 18, 1997).

(c) Unreimbursed

(1) (R.C. 2743.51(B)): **"<u>Collateral Source</u>" means a source of benefits or advantages for economic loss otherwise reparable that the victim or claimant has received, or that is readily available to the victim or claimant, from any of the following sources:**

(i) The offender; (R.C. 2743.51(B)(1))

A settlement received by the victim from an insurance carrier under an uninsured motorist provision which only mentions the victim, is not a collateral source for medical expenses incurred by victim's father, since the settlement only concerned the victim. In *Stalter*, Ct. of Cl. No. 2015-00757VI (January 15, 2016) adopted in part jud (April 20, 2016).

(ii) The government of the United States or any of its agencies, a state or any of its political subdivisions, or an instrumentality of two or more states, unless the law providing for the benefits or advantages makes them excess or secondary to benefits under sections 2743.51 to 2743.72 of the Revised Code; (R.C. 2743.51(B)(2))

In re Talley, Ct. of Cl. No. V89-70038sc (May 17, 1990), bankruptcy discharges debts. See *In re Reed*, Ct. of Cl. No. V90-57198tc (September 22, 1993). The Bureau of Children with Medical Handicaps pursuant to R.C. 3701.022(D)(2)(c) is not a collateral source. *In re Stripe*, 91 Ohio Misc.2d 112, 698 N.E.2d 110 (Ct. of Cl. 1995).

Pursuant to the clear undisputed language contained in 42 U.S.C. Section 3796(5)(f) (2002) and The United States Department of Justice, Bureau of Justice Assistance Fact Sheet, money received from the Public Safety Officers Death Benefits Program is not a collateral source. *In re Clark*, Ct. of Cl. No. V2001-32500tc (January 31, 2003).

A person who qualifies for free services under the Ohio Hospital Care Assurance Program (HCAP) does not incur any expense for treatment, accordingly, he or she does not incur any economic loss as defined by R.C. 2743.51(E) and, therefore, does not qualify for an award of reparations for the cost of services rendered by HCAP participating hospitals. *In re Stalla*, Ct. of Cl. No. V92-71597sc (September 30, 1994); *In re Phillips*, Ct. of Cl. No. V93-37872sc (July 25, 1994); and *In re Wilson*, Ct. of Cl. No. V92-83935jud (November 30, 1994).

The attorney general's duty shall be to investigate and provide the court with the necessary information concerning the income level of the applicant and his or her eligibility for HCAP benefits at the time the services were rendered by those hospitals that are or were participating in the HCAP program. *In re Wilson*, Ct. of Cl. No. V92-83935jud (November 30, 1994).

(iii) Social security, Medicare, and Medicaid; (R.C. 2743.51(B)(3)) *In re Helman*, 61 Ohio Misc.2d 382, 579 N.E.2d 542 (Ct. of Cl. 1989), inapplicable if provider will not accept Medicaid and informs

prior to rendering service.

The program does not require that an applicant be forced to apply for welfare or other public assistance before the eligibility for an award is determined. *In re Johnson-Derks*, Ct. of Cl. No. V92-85270tc (November 18, 1996).

However, if the victim is eligible for Medicaid and has applied, it is the victim's obligation to provide this information to the medical provider. *In re Griffith*, 66 Ohio Misc.2d 139, 643 N.E.2d 618 (Ct. of Cl. 1994).

Social Security survivorship benefits received as the result of the death of her husband but unrelated to the criminally injurious conduct should not be considered a collateral source. *In re Smith*, Ct. of Cl. No. V2007-90501tc (September 13, 2007), 2007-Ohio-5695.

Social Security Disability benefits are not a readily available collateral source since their receipt is speculative and applicant is not required as a pre-condition to receiving an award to apply for them. *In re Rankin*, 2015-00545-VI (November 3, 2015), 2016-Ohio-8631 adopted jud (March 24, 2016), 2016-Ohio-8632.

(iv) State-required, temporary, non-occupational disability insurance; (R.C. 2743.51(B)(4))

(v) Workers' compensation; (R.C. 2743.51(B)(5))

Workers' Compensation benefits constitute a collateral source after the amount for attorney fees is deducted. *In re Stepter*, 91 Ohio Misc.2d 158, 698 N.E.2d 139 (Ct. of Cl. 1997).

A permanent partial disability award granted by the Bureau of Workers' Compensation is not a collateral source which would offset work loss. Rather, this type of award recognizes that, with certain injuries, some loss of working capacity will continue permanently. The award is in the nature of pain and suffering compensation. *In re Waszkiewicz*, Ct. of Cl. No. V95-29818tc (January 14, 1998). But see also *In re Kaplan*, Ct. of Cl. No. V90-71697tc (December 27, 1996) aff'd jud (April 14, 1997).

(vi) Wage continuation programs of any employer; (R.C. 2743.51(B)(6)) Non-cumulative benefits are a collateral source.

Cumulative benefits see *In re Semmens*, 61 Ohio Misc.2d 203, 577 N.E.2d 139 (Ct. of Cl. 1988). (Not a collateral source)

(vii) Proceeds of a contract of insurance payable to the victim for loss that he sustained because of the criminally injurious conduct; (R.C.2743.51(B)(7)).

Community Mutual Insurance Company even though it is a fully self-funded Employee Retirement Income Security Act benefit plan was a collateral source since it was substantially akin to an insurance contract. *In re Hirt, Jr.*, Ct. of Cl. No. V94-53138tc (February 29, 1996) aff'd jud (April 30, 1996).

Proceeds for uninsured motorist insurance coverage is a collateral source. *In re Bongiovanni*, Ct. of Cl. No. V92-54145tc (April 28, 1995) aff'd jud (July 19, 1995).

However, while funds received by the Victims of Crime Program cannot be subrogated to an insurance company, any payment received by an applicant, whether from an uninsured motorist settlement or some other source, is considered a collateral source only to the extent to which an applicant receives the benefit of the payment. If a portion of the settlement is transferred to a health insurance carrier, the amount from the health insurance carrier was effectively reduced by that amount as a readily available collateral source. That amount cannot, at the same time, be considered a collateral source as part of the settlement and the health insurance benefit. *In re Dungey*, Ct. of Cl. No. V92-49877jud (February 23, 1999).

The transfer of money received from a settlement to Medicaid effectively reduces the amount of the readily available collateral source. The applicant was deprived the full benefit of the proceeds of his uninsured motorist coverage, a readily available collateral source, by transferring of a portion of this settlement to Medicaid. *In re Ward*, Ct. of Cl. No. V2004-61136tc (January 15, 2009), 2009-Ohio-7217 aff'd and modified jud (April 30, 2009).

Proceeds received from a policy of insurance written by American Family Life Assurance Company (AFLAC) is a collateral source even though it is an insurance event policy and pays a flat monthly rate rather than reimburses specific economic loss. *In re Rinkus*, Ct. of Cl. No. V2006-20119tc (April 2, 2007), 2007-Ohio-2928 jud aff'd in part/reversed in part 2007-Ohio-4691.

In re Fout-Craig, Ct. of Cl. No. V93-27851tc (February 5, 1999), allowed an apportionment of a settlement received by a crime victim between non-economic loss and economic losses. A victim's life prior to the criminal incident as opposed to the current living situation, severity of injuries,

its residual effects, and ongoing medical needs will determine the appropriate apportionment of the settlement. See *In re Jeffery*, 2015-00286-VI (December 1, 2015) adopted jud (December 21, 2015); *In re Torres*, 2015-00372-VI (February 18, 2016) adopted jud (March 9, 2016).

(viii) A contract providing prepaid hospital and other health care services, or benefits for disability; (R.C. 2743.51(B)(8)).

In re Hanratty, 61 Ohio Misc.2d 355, 579 N.E.2d 306 (Ct. of Cl. 1989), transportation to nonparticipating medical provider. See also *In re Ulatowski*, 91 Ohio Misc.2d 121, 698 N.E.2d 116 (Ct. of Cl. 1996).

(ix) That portion of the proceeds of all contracts of insurance payable to the claimant on account of the death of the victim that exceeds fifty thousand dollars; (R.C. 2743.51(B)(9)).

Applicant received settlement proceeds from a wrongful death case filed as the result of the decedent's death, resulting from an aggravated vehicular homicide incident. Applicant received $25,440.10 and incurred funeral expenses of $5,721.15. It was held since the wrongful death settlement received from two insurance carriers was less than $50,000.00, its proceeds were not a collateral source and applicant should receive an award for reimbursement of the funeral expense. *In re Thomas*, V2006-20925tc (March 2, 2007), 2007-Ohio-2270 aff'd jud (June 29, 2007), 2007-Ohio-7280.

(x) Any compensation recovered or recoverable under the laws of another state, district, territory, or foreign country because the victim was the victim of offense committed in that state, district, territory, or country; (R.C. 2743.51(B)(10)).

In re Roser, 86 Ohio Misc.2d 1, 684 N.E.2d 749 (Ct. of Cl. 1994), Michigan's victims of crime program is a collateral source to Ohio's; however, to determine whether another program is a collateral source in a particular case applicant's action must be judged pursuant to R.C. 2743.60(H).

In re Singleton, Ct. of Cl. No. V95-45376tc (December 30, 1996), there is no requirement that Ohio residents injured in another state are mandated to file an application for compensation with the state where they sustained their injury.

(xi) Effective June 26, 2003, the section was amended to state: "Collateral source" does not include any money, or the monetary value of any property, that is

subject to sections 2969.01 to 2969.06 of the Revised Code or that is received as a benefit from the Ohio public safety officer's death fund created by section 742.62 of the Revised Code.

(d) Applicant has burden of proof.

Applicant's failure to submit signed releases necessary for the attorney general to conduct its investigation pursuant to R.C. 2743.59 will result in a denial of applicant's claim pursuant to R.C. 2743.52(A). *In re Martin*, V93-34431tc (June 30, 1994). See also, *In re Dameron*, Ct. of Cl. No. 2014-00171-VIjud (February 20, 2015).

E. Categories of Economic Loss

1. **(R.C. 2743.51(F)(1)): Allowable expense means reasonable charges incurred for reasonably needed products, services, and accommodations including those for medical care, rehabilitation, rehabilitative occupational training, and other remedial treatment and care and including replacement hearing aids, dentures, retainers, and other dental appliances; canes, walkers, and other mobility tools; and eyeglasses and other corrective lenses. It does not include that portion of a charge for a room in a hospital, clinic, convalescent home, nursing home, or any other institution engaged in providing nursing care and related services in excess other than semiprivate accommodations, unless other than semiprivate accommodations are medically required.**

a. Traditional Care Providers
In re Hensley, 61 Ohio Misc.2d 405, 579 N.E.2d 557 (Ct. of Cl. 1989), child born to rape victim, victim's prenatal, delivery, and postnatal expenses but no postnatal care for child

b. In order for eyeglasses to be a compensable loss they must be prescription glasses. *In re Edgell*, Ct. of Cl. No. V2010-50744tc (January 21, 2011); *In re Estrada*, 2015-00061-VI (May 1, 2015) adopted jud (May 20, 2015).

c. Hand Controlled Vehicles

d. Home Modifications

e. Housing at Battered Women's Shelter

f. Relocation Expense

In re Skala, Ct. of Cl. No. V88-40437sc (January 20, 1989), hotel expenses; *In re Webb*, 62 Ohio Misc.2d 3, 587 N.E.2d 980 (Ct. of Cl. 1990), minor child (no incidental expenses); *In re Fields*, 61 Ohio Misc.2d 376, 579 N.E.2d 318 (Ct. of Cl. 1989), minor child *(In re Heery*) rationale. Rape victim's relocation expenses constituted rehabilitation needed for recovery, where relocation supported by victim's counselor and enable victim to

recover from trauma of rape. *In re Dillon*, 63 Ohio Misc.2d 185, 620 N.E.2d 302 (Ct. of Cl. 1993).

Storage facility and mailbox fees are not allowable expenses under the definition of the statute. A housing expense also is not an allowable expense since no evidence had been presented to show the expense was incurred or related to the injuries the applicant sustained at the time of the criminally injurious conduct. *In re Timson*, Ct. of Cl. No. V2002-50790jud (September 4, 2003) adopted (September 25, 2003), 2003-Ohio-5510.

Applicant and her husband were the victims of a home invasion. As a result, applicant was hospitalized for her injuries and a heart attack she suffered. Upon leaving the hospital her doctor advised her not to return to the apartment to avoid the risk of having another heart attack. Applicant moved in with her stepson for a three-month period until another apartment could be found and sought reimbursement for storage fees. Based on the fact this was an elderly couple who could not protect themselves from another home invasion and a doctor supported their relocation, it was reasonable to reimburse storage and relocation expenses for the three-month period. *In re Miller*, Ct. of Cl. No. V2006-20780tc (March 2, 2007), 2007-Ohio-2268 aff'd jud (June 25, 2007), 2007-Ohio-7279.

g. A privacy fence constitutes an allowable expense when it provides reduced physical and visual contact between the victim and his offender. *In re A.M.N.*, Ct. of Cl. No. V2009-40803tc (November 19, 2010), 2010-Ohio-6717.

h. An award for allowable expense cannot be considered a collateral source for payment of child support arrearages pursuant to R.C. 2743.66(D)(2). *In re McLean*, 2016-00383-VI (October 12, 2016) adopted jud (November 1, 2016).

i. Counseling Expenses:

Expenses incurred for the services of the victim's counselor fees at the negotiations of the offender's visitation rights constitutes an allowable expense. The counselor's relationship with the victim and his understanding of her fear of the offender, his presence at the negotiation of the offender's visitation rights was reasonably needed for the medical care and rehabilitation of the victim. *In re Chilcote*, Ct. of Cl. No. V89-63066tc (August 19, 1994).

Pre-disclosure expenses, *In re Peters*, Ct. of Cl. No. V91-23734tc (January 14, 1994), where victim, a minor, was sexually abused, entered counseling and during the course of counseling reported the sexual abuse; the pre-disclosure expenses were related to the criminally injurious conduct and are compensable as allowable expense. Pre-disclosure expenses are also compensable for parent of victim. *In re Speaks*, 91 Ohio Misc.2d 138, 698 N.E.2d 126 (Ct. of Cl. 1996). Counseling expenses eligibility for reimbursement do not solely depend upon when the crime was reported. *In re Rectenwald*, 62 Ohio Misc.2d 147, 593 N.E.2d 515 (Ct. of Cl. 1990).

Charges for counseling services to minor victim for preparation of testimony for a custody hearing are reimbursable. *In re Jakubek*, Ct. of Cl. No. V2001-31392tc (October 26, 2001).

Counseling expenses for parent if victim's well-being contingent on parent's ability to function as nurturing parent. *In re Kaman*, 62 Ohio Misc.2d 288, 598 N.E.2d 236 (Ct. of Cl. 1991), *In re Evans*, 62 Ohio Misc.2d 109, 593 N.E.2d 491 (Ct. of Cl. 1990) and *In re Kennedy*, 91 Ohio Misc.2d 96, 698 N.E.2d 100 (Ct. of Cl. 1995). Counseling expenses for grandparent in certain situations. *In re Gess*, Ct. of Cl. No. V2003-40755tc (December 3, 2003), 2003-Ohio-7326.

Applicant, who was a victim of sexual abuse as a child, entered therapy as an adult. Due to the nature of child sexual abuse it has a profound influence on the rest of the victim's life, accordingly, 100% of the counseling expenses were related to the criminally injurious conduct. *In re George*, Ct. of Cl. No. V2002-50927tc (August 31, 2007), 2007-Ohio-4694. See also, *In re Smith*, Ct. of Cl. No. V2005-80126tc (January 6, 2006), 2006-Ohio-1371.

The determination to reimburse applicant 50% for her own personal counseling expenses took into consideration her role as a parent assisting the victim in her recovery as well as the applicant's preexisting psychological condition. *In re A.M.C.*, V2001-32780tc (November 15, 2002) aff'd jud (March 6, 2003).

The hypnotherapy received by the minor victim was causally connected to the sexual abuse suffered. The hypnotherapy qualifies as "other remedial care and treatment of care "as listed in R. C. 2743.51(F)(1). *In re G.R.*, 2016-00029-VI (June 3, 2016), 2016-Ohio-8609 adopted jud (September 22, 2016), 2016-Ohio-8608.

j. Other compensable expenses

Time lost from work for care and treatment of victim. *In re Krieg*, Ct. of Cl. No. V78-3680jud (April 6, 1981). Loss equal to or less than wages or cost of similar treatment by third party.

Travel expenses-medical. *In re Hathman*, 61 Ohio Misc.2d 827, 585 N.E.2d 591 (Ct. of Cl. 1990), applicant's travel expenses for medical treatment.

Security expenses, *In re Kaiser*, Ct. of Cl. No. V90-56922tc (October 25, 1991), security bar, medically necessary for emotional well-being; *In re Guffey*, 62 Ohio Misc.2d 116, 593 N.E.2d 496 (Ct. of Cl. 1990), alarm system reduction of emotional trauma, support by medical evidence. Monthly monitoring fee of security system is also compensable. *In re Benedetti*, Ct. of Cl. No. V91-73324sc (January 28, 1999), a security system is compensable if it provides a

sense of well-being to the applicant regardless of the status of the particular offender who initially injured the applicant. *In re Benedetti*, Ct. of Cl. No. V2009-40170tc (November 20, 2009), 2009-Ohio-7221. Private School Tuition, *In re Weber*, 61 Ohio Misc.2d 357, 579 N.E.2d 307 (Ct. of Cl. 1989), if rehabilitative and medically necessary. See also, *In re J.A.W.*, Ct. of Cl. No. V2004-60121tc (June 16, 2004), 2004-Ohio-4183.

Expenses compensable if reasonably related to victim's remedial treatment, care and recovery. See *In re Murphy*, Ct. of Cl. No. V91-27551tc (March 18, 1997) and *In re Poeppelman*, Ct. of Cl. No. V97-61468tc (December 15, 1998).

Central air conditioning is a compensable expense if supported by medical documentation *In re Krancevic*, Ct. of Cl. No. V2007-90757tc (January 29, 2009), 2009-Ohio-7212.

A mother had to leave her home to care for her severely injured son while he recovered in the hospital. Her travel expenses from her home to Columbus, travel expenses from hospital to hospital, hotel accommodations and all food and clothing for the victim, applicant and applicant's minor daughter were reasonably and necessarily related to the remedial care and treatment of the victim. The expenses for the minor daughter were reasonable since the daughter could not be left home alone. *In re Piscioneri*, Ct. of Cl. No. V2002-50277tc (September 4, 2002) aff'd jud (January 9, 2003). See also, *In re Lewis*, Ct. of Cl. No. V2002-50595tc (September 4, 2002) aff'd jud (January 9, 2003).

Applicant chose to attend physical therapy sessions at Bally's rather than a hospital is compensable, since physical therapy was recommended by her physician. Bally's offered the same type of services to the applicant but at a lower price than a hospital. *In re Zimmer*, Ct. of Cl. No. V2003-40186tc (August 1, 2003), 2003-Ohio-4985.

R.C. 2743.51(F)(2) states:

An immediate family member of a victim of criminally injurious conduct that consists of a homicide, a sexual assault, domestic violence, or a severe and permanent incapacitating injury resulting in paraplegia or a similar life-altering condition, who requires psychiatric care or counseling as a result of the criminally injurious conduct, may be reimbursed for that care or counseling as an allowable expense through the victim's application. The cumulative allowable expense for care or counseling of that nature for each family member of a victim of that type shall not exceed two thousand five hundred dollars in the aggregate for all immediate family members of a victim of that type.

R.C. 2743.51(W) states:
"Immediate family member" means an individual who resides in the same permanent household as a victim at the time of the criminally

injurious conduct and who is related to the victim by affinity or consanguinity.

The panel determined that the phrase immediate family member included siblings who seek reimbursement of counseling expenses. The victims of crime compensation act is a remedial act and requires a broader interpretation than provided under R.C. 2105.03, probate law. *In re Turner*, V2003-40062tc (May 29, 2003), 2003-Ohio-2810. See also, *In re Annarino*, Ct. of Cl. Nos. V2003-40259tc, (August 14, 2003), 2003-Ohio-4991. R.C. 2743.51(W) defines immediate family member as an individual who resides in the same permanent household as the victim or who is related to the victim by affinity or consanguinity.

R.C. 2743.51(F)(3) A family member of a victim who died as a proximate result of criminally injurious conduct may be reimbursed as an allowable expense through the victim's application for wages lost and travel expenses incurred in order to attend criminal justice proceedings arising from the criminally injurious conduct. The cumulative allowable expense for wages lost and travel expenses incurred by a family member to attend criminal proceedings shall not exceed five hundred dollars for each family member of the victim and two thousand dollars in the aggregate for all family members of the victim.

Family member is defined in R.C. 2743.51(X). **"Family member" means: an individual who is related to a victim by affinity or consanguinity.**

l. Required attendance at offender's trial. *In re Ross*, Ct. of Cl. No. V83-51171jud (June 4, 1984).

m. Time lost from work to attend trial of minor. *In re Lyon*, 36 Ohio Misc.2d 22, 521 N.E.2d 1155 (Ct. of Cl. 1987).

n. Work loss/moving expense. *In re Segebart*, 61 Ohio Misc.2d 428, 579 N.E.2d 796 (Ct. of Cl. 1989), landlord/offender.

R.C. 2743.51(F)(4)(a) states:
"Allowable expense" includes reasonable expenses and fees necessary to obtain a guardian's bond pursuant to section 2109.04 of the Revised Code when the bond is required to pay an award to a fiduciary on behalf of a minor or other incompetent.

R.C. 2743.51(F)(4)(b) states:
"Allowable expense" includes attorney's fees not exceeding one thousand dollars, at a rate not exceeding one hundred dollars per hour, incurred to successfully obtain a restraining order, custody order, or other order to physically separate a victim from an offender. Attorney's fees for the services described in this division may include an amount for reasonable travel time incurred to attend court hearing, not exceeding three hours

round-trip for each court hearing, assessed at a rate not exceeding thirty dollars per hour.

Where an applicant filed for a Civil Protection Order, but no order was granted since the offender could not be located, a second CPO was filed after the offender was located and successfully served. A panel of commissioners determined since the initial CPO was dismissed due to no fault of the applicant, and it considered the same criminal conduct, the same offender, and the same victim and successfully separated the applicant from the offender all attorney fees associated with the two CPO's should be awarded. *In re Swetnam*, Ct. of Cl. No. 2013-00455-VItc (January 17, 2014).

A panel of commissioners found that a Civil Protection Order with addendums that allowed applicant and offender to attend school functions for minor children with the provision offender shall have no contact with the victim and the offender must remain 25 feet away; contact could be made pursuant to a court hearing, hospital contact if minor child is injured and requires medical treatment, and text message communication for the exclusive purpose of informing or advising concern medical or health issues of the minor children, met the requirements of R.C. 2743.51(4)(b). Accordingly, attorney fees were granted. *In re Richards*, Ct. of Cl. No. 2013-00700-VItc (June 19, 2014) aff'd jud (October 13, 2014). See also, *In re Hanning*, Ct. of Cl. No. 2014-00615-VItc (January 14, 2015) aff'd jud (July 14, 2015).

When the General Assembly amended R.C. 2743.51(F) to include R.C. 2743.51 (F)(4), it limited compensability of attorney fees, as an allowable expense, only to those situations where a successful restraining order, custody order, or other order physically separated a victim from an offender. *In re Jastrzebaski*, Ct. of Cl. No. V2009-40188tc (May 14, 2010), 2010-Ohio-2373.

Attorney fees for no-contact order were compensable where the order successfully separated the victim from the offender. *In re Mason*, Ct. of Cl. No. V2005-80410tc (September 30, 2005), 2005-Ohio-5680.

Guardian ad litem expenses are not compensable pursuant to R.C. 2743.51(F)(4) since they provide for the representation of the child but did not assist in the separation of the child from the alleged offending parent. These expenses are not compensable pursuant to R.C. 2743.51(F)(1) because they did not provide for the remedial treatment and care of the child. *In re A.N.B.*, Ct. of Cl. No. V2009-40781tc (May 14, 2010), 2010-Ohio-2375.

Reimbursement of attorney fees was not warranted when anti-stalking order was not granted. *In re K.D.*, Ct. of Cl. No. V2007-90447tc (February 14, 2008), 2008-Ohio-5679.

Attorney fees for a divorce are not compensable since the applicant failed to show the divorce was necessary for her continued safety, well-being, rehabilitation, treatment, and care. Moreover a divorce decree terminates the marital relationship but does not order physical separation between the parties. *In re*

Gregory, Ct. of Cl. No. V2006-20810tc (April 16, 2007), 2007-Ohio-2945.

Future Services-Remedial Treatment and Care Agreement

If the applicant has not yet incurred an economic loss, the applicant may incur an expense either by having the services actually performed or by entering into an agreement with the provider whereby the provider agrees to perform and the applicant agrees to pay for the services at some definite time in the future. The agreement may be conditioned upon the granting of an award of reparations for the expense. *In re O'Brien*, V77-0904sc (June 16, 1981) and (December 21, 1981).

Requirements:

(1) Agreement between provider and applicant,

(2) Provider agrees to provide specific product, service or accommodation at a specific price, and

(3) Applicant agrees to give portion of the award based on the contract to the provider at the time of performance.

The attorney general has subrogation rights if applicant does not pay the provider as required by the agreement.

A contract entered into by the applicant and a medical provider for future services cannot be rescinded or altered unless such rescission or altercation is reasonable under general contract standards (good faith, clean hands, honesty in fact, etc.) The contract cannot be unilaterally altered. *In re Sabrowski*, Ct. of Cl. No. V2002-50544tc (August 15, 2002).

3. Work Loss

(R.C. 2743.51(G)): **Work loss means loss of income from work that the injured person would have performed if the person had not been injured and expenses reasonably incurred by the person to obtain services in lieu of those the person would have performed for income, reduced by any income from substitute work actually performed by the person, or by income the person would have earned in available appropriate substitute work that the person was capable of performing but unreasonably failed to undertake.**

a. Employed at the time of the criminally injurious conduct

There are two elements necessary to prove work loss. First, one must prove work loss was sustained by showing an inability to work. Second, one must prove the monetary amount of the work loss. Both elements must be proved by corroborating evidence. *In re Berger*, 91 Ohio Misc.2d 85, 698 N.E.2d 93 (Ct. of Cl. 1994).

Proof. *In re Butler*, Ct. of Cl. No. V89-83822tc (November 8, 1991), work history was established by evidence, notwithstanding the victim's failure to file tax returns and pay taxes on a regular basis.

Net not gross income is awarded. *In re Eader*, 70 Ohio Misc. 17, 434 N.E.2d 757 (Ct. of Cl. 1982); see also, *In re Cleavenger*, 61 Ohio Misc.2d 342, 579 N.E.2d 298 (Ct. of Cl. 1989).

Substitute work is the same or similar work that the applicant was performing prior to the criminally injurious conduct. Replacement work is work performed in a completely different field of work. An applicant can be reimbursed for the difference between replacement and substitute work. *In re Monfort*, Ct. of Cl. No. V2004-60806tc (February 11, 2005), 2005-Ohio-1453.

The applicant's long term back injury resulted in work loss was supported by testimony of her treating physician and her own testimony. *In re Tucker*, Ct. of Cl. No. V2001-32445tc (October 11, 2002).

In re Gardner, 63 Ohio Misc.2d 192, 620 N.E.2d 307 (Ct. of Cl. 1993), an applicant was allegedly raped by a co-worker at her place of employment, but her employer refused to take any action against co-worker. The panel found applicant's voluntary termination of her employment was the result of the criminally injurious conduct. Accordingly, applicant's claim for work loss was granted until she secured another position. See also, *In re Carmon*, Ct. of Cl. No. V92-71660tc (August 18, 1995).

The applicant suffered personal injury from criminally injurious conduct which resulted in two and one-half days of work loss. The attorney general contended the applicant should not be awarded work loss since the applicant's average monthly earnings during the month he was injured were actually higher than his average monthly earnings for any other month that year. The panel rejected the attorney general's rationale since it had been irrefutably established that the applicant had sustained a work loss of two and one-half days, regardless of his previous monthly earnings. *In re Calderon*, Ct. of Cl. No. V2002-51320tc (December 12, 2002).

Applicant who suffered three days of work loss due to the injuries sustained, should be allowed to use three working days off, rather than weekend days. *In re Cannon*, 2015-00803-VI (March 11, 2016), 2016-Ohio-8636 adopted jud (March 31, 2016), 2016-Ohio-8635.

The amount of work loss awarded and the length of the victim's disability period must be considered in light of the applicant's work history. It cannot be assumed that the applicant would have worked every day during his disability period when his work history indicated the contrary. *In re Torres*, 61 Ohio Misc.2d 324, 578 N.E.2d 914 (Ct. of Cl. 1989).

Applicant sustained work loss as the result of safety concerns posed by an at-large offender when his employer refused to allow him to work for fear of the safety of other employees and the applicant developed Post Traumatic Stress Disorder, depression and a drinking problem as the result of witnessing the murder of his cousin. *In re Stiggers*, Ct. of Cl. No. V2006-20216tc (May 3, 2007), 2007-Ohio-2985.

Ordinarily medical documentation is necessary to prove work loss but in *In re Rust*, Ct. of Cl. No. V2003-40275tc, (February 5, 2004), 2004-Ohio-1097, work loss was allowed when the employer would not allow the applicant to work because of her appearance. *In re Tucker*, Ct. of Cl. No. V2004-60415tc (November 2, 2004), 2004-Ohio-7265, work loss was allowed when victim missed work due to medical appointments and court dates or her employer requested she lie about the cause of her injuries, requested she work part-time or go on FLMA and a negative work environment developed over rumors about her injury. Work loss was granted for the period of time she worked part-time and when she quit her job to secure other employment.

Work loss was based on the testimony of the applicant and a victim's advocate as to the psychological injury sustained. *In re Hoffman*, V2011-60174tc (February 28, 2012) aff'd jud (August 31, 2012).

In re Peaco, Ct. of Cl. No. V2004-61250tc (April 21, 2005), 2005-Ohio-2652. Applicant's work loss period was determined by father's working during applicant's disability period. They had worked as a team. Based on evidence granted applicant slightly less hours than father had worked.

When an applicant closed her daycare business to care for her abused child for a period of time based on the advice of counselors, such work loss was compensable since it was incurred for the remedial treatment and care of the victim. *In re Jakubek*, Ct. of Cl. No. V2001-31392tc (October 26, 2001).

An applicant sustained injury as the result of criminally injurious conduct. Her physician allowed her to return to work but only perform light duty tasks. When no light duty work was available she was sent home. Regardless of whether the applicant's employer purposely or involuntarily prevented her from working light duty is irrelevant, because but for her injury she would have not incurred any work loss. Accordingly, work loss was granted. *In re Woodford*, Ct. of Cl. No. V2004-60130tc (December 17, 2004), 2004-Ohio-7342.

Victim was injured as the result of a bank robbery. She suffered from Post-Traumatic Stress Disorder as the result of the criminally injurious conduct and was advised by her psychologist not to perform any banking job with contact with the public or money. She unsuccessfully sought substitute employment for over four and one-half years. Victim received work loss for this period because she was unable to secure substitute employment which satisfied her medical limitations. *In re Lewis*, Ct. of Cl. No. V2005-80169tc (July 21, 2006), 2006-Ohio-4027.

An applicant cannot receive an award for work loss while he is receiving unemployment benefits, since one of the requirements to receive unemployment benefits is that the recipient of these benefits must meet the able to work and the actively seeking employment requirements. *In re Mitchell*, Ct. of Cl. No. 2014-00614-VItc (November 12, 2014).

The panel found when determining work loss sustained for a partnership in the retail industry expert testimony is necessary to determine actual vs. projected sales; then calculate what percentage the cost of merchandise for sale is of the actual sales, and finally, the income lost by the business can be calculated by multiplying the percentage times the difference between projected sales and actual sales. This result is then divided by the number of members in the partnership to arrive at the amount of work loss. *In re Jeffcut*, Ct. of Cl. No. V2002-51451tc (April 21, 2004), 2004-Ohio-3220.

A judge of the court found a stipend given to the victim for participation in a ROTC program college was lost as the result of criminally injurious conduct. Accordingly, loss of the stipend constitutes work loss as defined in R.C. 2743.51(G). *In re Langwasser*, Ct. of Cl. No. V2009-40790jud (June 8, 2011). However, see also, *In re Sullivan*, Ct. of Cl. No. 2016-00498-VI (November 3, 2016) adopted jud (November 29, 2016), wherein it was determined a housing allowance based on past performance does not constitute work loss.

When a police officer sustains injury as the result of criminally injurious conduct while working his special duty job, his unreimbursed work loss from his regular job as a police officer is work loss and may be reimbursed. There were collateral sources available to reimburse lost wages from his special duty job but none for the wages lost from his regular employment. *In re O'Malley*, Ct. of Cl. No. V2001-31333tc (December 28, 2001).

A police officer was placed on administrative leave as the result of using deadly force. The panel found that applicant sustained constructive personal injury as the result of the application of this policy. The administrative leave policy was both remedial and investigative in purpose. Accordingly, the applicant also suffered work loss from his special duty job during his period of mandatory administrative leave. *In re McMillan*, Ct. of Cl. No. V98-66102tc (September 8, 2000).

Applicant's police officer's overtime lost wages must consider a change in his seniority rank in the department. *In re Sharpless*, Ct. of Cl. No. V2008-31002tc (May 13, 2009), 2009-Ohio-7214.

The panel found the appropriate method to calculate work loss in a startup business is to add net profits from Line 31 of Schedule C tax returns by vehicle expenses and an appropriate yearly increase based upon the evidence. *In re Austin*, Ct. of Cl. No. V2006-21182tc (March 26, 2008), 2008-Ohio-5711. In calculating work loss for a self-employed individual in an ongoing business it is appropriate to calculate work loss by averaging income for a four-year period and adjusting a

depreciation deduction that was taken only as a result of the criminally injurious conduct. *In re Groll*, Ct. of Cl. No. V2007-90374tc (October 26, 2007), 2007-Ohio-6287.

Self-employment income must be calculated on a base-by-case basis. The current earning capacity of the applicant at the time of the injury is the best evidence of work loss. *In re Becraft*, Ct. of Cl. No. V2009-40862tc (November 19, 2010), 2010-Ohio-6718.

b. Loss of a job expectation is compensable if:

(1) An agreement existed between the prospective employer and employee for employment.

The applicant has the burden to prove that a particular job opportunity was unavailable solely due to the injuries that were sustained at the time of the criminally injurious conduct, being a member of the "ready to work force" is insufficient to prove work loss. *In re Dandy*, Ct. of Cl. No. V2010-50426tc (July 22, 2011), 2011-Ohio-4158. See also, *In re Barnes*, Ct. of Cl. No. V2011-60654tc (January 17, 2014).

(2) Terms of employment i.e. wages, hours, and specific conditions of employment were agreed upon.

(3) The sole reason the person was not able to take the job was because he was incapacitated by personal injury suffered as the result of criminal conduct. Where applicant was disabled as the result of criminally injurious conduct and during his disability period a layoff occurs at his employment, the layoff date controls the extent of compensable work loss. *In re Nicholson*, Ct. of Cl. No. V94-33081jud (March 29, 1996). See also, *In re Hawthorne*, Ct. of Cl. No. V97-72966tc (March 18, 1999). Applicant has the burden to prove he had secured a specific job commencing at a known date after the criminally injurious conduct or was in the process of negotiating a job he was likely to get. *In re Wilson*, 61 Ohio Misc.2d 369, 579 N.E.2d 314 (Ct. of Cl. 1989).

c. Future Work Loss - *In re Caminiti*, 17 Ohio Misc.2d 9, 478 N.E.2d 1327 (Ct. of Cl. 1984).

(1) Victim permanently unable to return to former occupation.

Where a victim suffered severe injuries at the age of fourteen months which rendered him unable to be gainfully employed a commuted work loss can be granted even though it was not possible for the victim to establish a work history. Victim's work loss was based on minimum wage as projected by a vocational report. The victim was granted a lump sum award for a portion of the work loss which equaled three years of work loss and the remainder would be paid in

equal increments each year upon the filing of a supplemental reparations application. *In re Somers*, Ct. of Cl. No. V81-53088tc (December 30, 1982).

The victim sustained severe injuries as the result of an aggravated vehicular assault leaving him totally and permanently disabled and in a coma. Attorney general argued it was inappropriate to commute work loss since victim may not survive the next 30-40 years, accordingly, the better approach would be for the applicant to file supplemental applications on a yearly basis. The panel stated that the facts indicated that victim will never work again, nor should the applicant be required to file supplemental applications on a yearly basis when a lump sum award could be used to improve the overall quality of the victim's life. *In re Azbell*, Ct. of Cl. No. V2004-60059tc (June 1, 2004), 2004-Ohio-4182.

(2) Willingness to return to gainful employment.

The victim sustained permanent injuries as the result of criminally injurious conduct. His enrollment in his school's employability program satisfied the requirement that the victim had the desire to be gainfully employed and justified a commuted work loss based upon minimum wage earnings. *In re Carter*, Ct. of Cl. No. V2001-31929tc (September 4, 2002) aff'd jud (February 21, 2003).

(3) Work History

In re Pruitt, Ct. of Cl. No. V90-60521tc (October 25, 1991), nurse.

In re Dotson, 91 Ohio Misc.2d 100, 698 N.E.2d 103 (Ct. of Cl. 1995). It is reasonable to take into consideration applicant's earnings before and after his injury, where at the time he was injured he was engaged in starting a new business which did not succeed due to his injury.

3. Replacement Services Loss

(R.C. 2743.51(H)): **Replacement services loss means expenses reasonably incurred in obtaining ordinary and necessary services in lieu of those the injured person would have performed not for income, but for the benefit of the person's self or family, if the person had not been injured.**

a. Household Duties.

In re Richardson, Ct. of Cl. No. V94-31959sc (January 30, 1995) aff'd jud (January 10, 1996), babysitting costs due to applicant's husband changing his work schedule to accompany applicant to work after she has been assaulted constitutes replacement services loss.

b. Proof Problems.

Affidavit will be considered as any other evidence, *In re Rea*, 61 Ohio Misc.2d 732, 584 N.E.2d 1350 (Ct. of Cl. 1989).

Where the applicant presented medical documentation of her injuries and the physical limitations imposed by her injuries, testified to the services and amount given per month to her care giver and the care giver's testimony corroborated the testimony of the applicant, sufficient evidence was presented to prove replacement services loss was incurred. Lack of documentation evidence although preferable is not mandatory. *In re Evans*, Ct. of Cl. No. V2001-32003tc (November 30, 2001).

c. Legally Indebted.

The victim suffered severe personal injury as the result of the criminally injurious conduct rendering her unable to care for herself or her three minor children. Applicant provided around the clock care for the victim and her children and took them into her household. The panel determined a quasi-contractual obligation for payment existed because the services provided were so substantial that they precluded the care giver from being gainfully employed. The value of the services should be calculated by what it would cost to hire another person in the applicant's community to perform the services in question. *In re Myers*, Ct. of Cl. No. V95-53620tc (May 26, 1999).

Where applicant was severely injured and required 24-hour care for 6 weeks, his future wife took time from her job and performed the care and was paid 3 years later. It was found the care was ordinary and necessary, but far exceeding what could reasonably be expected, and the fact that compensation was not paid at the time the services were rendered did not prevent recovery. Replacement services would be based on evidence presented by a health care professional. *In re Brill*, Ct. of Cl. No. V2005-80207tc (December 30, 2005), 2005-Ohio-7137.

See also, *In re Sziber*, 2015-00850-VI (April 21, 2016), 2016-Ohio-8640 adopted jud (June 27, 2016), 2016-Ohio-8639.

4. Unemployment Benefits Loss

(R.C. 2743.51(O)): **Unemployment benefits loss means a loss of unemployment benefits pursuant to Chapter 4141. of the Revised Code when the loss arises solely from the inability of a victim to meet the able to work, available for suitable work, or the actively seeking suitable work requirements of division (A)(4)(a) of section 4141.29 of the Revised Code.**

5. Crime Scene Cleanup

R.C. 2743.51(T)(1) and (2) states:
(T) Cost of crime scene cleanup means any of the following:
(1) The replacement cost for items of clothing removed from a victim in order to make an assessment of possible physical harm or to treat physical harm;

(2) Reasonable and necessary costs of cleaning the scene and repairing, for the purpose of personal security, property damaged at the scene where the criminally injurious conduct occurred, not to exceed seven hundred fifty dollars in the aggregate per claim.

Victim's key fob was stolen at the time of the criminally injurious conduct, accordingly a reprogramming expense for a new fob was necessary to prevent the offender from gaining access to the applicant's vehicle and potentially placing her in danger and therefore was compensable. *In re Turocy*, Ct. of Cl. No. V2008-30481tc (November 21, 2008), 2008-Ohio-6093.

6. Evidence Replacement

R.C. 2743.51(U) states: **Cost of evidence replacement means costs for replacement of property confiscated for evidentiary purposes related to the criminally injurious conduct, not to exceed seven hundred fifty dollars in the aggregate per claim.**

A towing expense incurred by the applicant was a reasonable evidentiary collection expense. The applicant's vehicle was towed at the request of police to retrieve fingerprints. The statute should be interpreted broadly to reimburse applicants for expenses related to evidence collection. *In re Lawrence*, Ct. of Cl. No. V2002-50111tc (May 31, 2002).

Personal property that was lost or stolen from a vehicle crime scene that was not taken as evidence, is property loss. Property loss which does not qualify pursuant to R.C. 2743.51(U) is not compensable under the Act. *In re Carter*, 2015-00808-VI (March 16, 2016), 2016-Ohio-8638, adopted jud (April 1, 2016), 2016-Ohio-8637.

7. Dependent's Economic Loss

(R.C. 2743.51(I)): **Dependent's economic loss means loss after a victim's death of contributions of things of economic value to the victim's dependents, not including services they would have received from the victim if the victim had not suffered the fatal injury, less expenses of the dependents avoided by reason of the victim's death. If a minor child of a victim is adopted after the victim's death, the minor child continues after the adoption to incur a dependent's economic loss as a result of the victim's death. If the surviving spouse of a victim remarries, the surviving spouse continues after the remarriage to incur a dependent's economic loss as a result of the victim's death.**

a. Defacto dependency *In re Dubics*, Ct. of Cl. No. V77-1065jud (August 17, 1979). See also, *In re Kirkle*, Ct. of Cl. No. V2000-91333tc (June 13, 2002).

Decedent was from Romania and working in Ohio at the time he was killed. Decedent had a wife and two children who continued to reside in Romania. The applicant testified that she and other members of the Romanian community in Cleveland carried money back to Romania for the decedent to give to his wife and children. Applicant testified approximately $300.00 per month was provided although there was no documentary evidence supporting these transactions. While sufficient evidence was submitted to prove dependency, insufficient evidence was provided to prove the amount of support. *In re Rosca*, Ct. of Cl. No. V97-47953tc (September 10, 1999).

After born child. *In re Kristanc*, Ct. of Cl. No. V79-3585tc (May 17, 1983).

Applicant was a dependent of the decedent to the extent of an outstanding joint tax liability. Applicant and decedent were divorced at the time of the decedent's death and applicant signed the tax return which was based solely on decedent's income. *In re Fleming*, Ct. of Cl. No. V93-21071tc (August 31, 1995) aff'd jud (December 1, 1995).

b. De Jur dependency insufficient to qualify for dependent economic loss.

The Court of Claims has consistently held an award can only be granted if it is established that there is dependency in fact rather than dependency in theory. The applicant must show the decedent was contributing things of economic value for the care and support of the alleged dependents. Even arguments that a legal obligation to pay child support constitutes dependency have been rejected, because while such obligations may create a right of action, they do not constitute actual dependency. *In re Dubics*, Ct. of Cl. No. V77-1065jud (August 17, 1979); *In re Maddox*, Ct. of Cl. No. V77-0844jud (August 22, 1979); and *In re Anderson*, Ct. of Cl. No. V77-1323jud (November 14, 1979).

If a decedent was not financially supporting the spouse and children at the time of decedent's death there is a presumption that the failure to support would have continued with regard to an after-born child. *In re Garrett*, Ct. of Cl. No. V80-41612jud (June 22, 1983).

Child support arrearages are not a proper basis for calculating dependent's economic loss, since the dependents' obligation is to prove they were receiving things of economic value from the decedent prior to his death. *In re Nicholson*, Ct. of Cl. No. V2008-30596tc (November 21, 2008), 2008-Ohio-6087.

c. Calculation made by attorney general.

(i) Current occupation, plus average prior years for dependent's economic loss. *In re Basel*, Ct. of Cl. No. V87-83396tc (October 28, 1988). See also, *In re Zenni*, 63 Ohio Misc.2d 68, 619 N.E.2d 1218 (Ct. of Cl. 1992), five-year work history can be used depending on employment situation of the decedent. See also, *In re Patel*, 91 Ohio Misc.2d 127, 698 N.E.2d 120 (Ct. of Cl. 1996).

Death of dependent terminates dependent's economic loss. *In re Battle*, 63 Ohio Misc.2d 108, 619 N.E.2d 1243 (Ct. of Cl. 1993).

(ii) Working life expectancy;

(iii) Less benefits received from a collateral source; and

(iv) Cost avoided.

In re Wiseman, 62 Ohio Misc.2d 20, 587 N.E.2d 991 (Ct. of Cl. 1990) collateral source benefits already used in calculating dependent's economic loss cannot be used again to offset dependent's replacement services loss.

The court has no equitable authority to apportion an award among dependents of a decedent that is contrary to the provisions of R.C. 2743.51. *In re Dyer*, Ct. of Cl. Nos. V2004-60261, V2004-60270, V2004-60288, V2004-60296jud (October 5, 2005), 2005-Ohio-6047.

8. Dependent's Replacement Services Loss

(R.C. 2743.51(J)): **Dependent's replacement services loss means loss reasonably incurred by dependents after a victim's death in obtaining ordinary and necessary services in lieu of those the victim would have performed for their benefit if the victim had not suffered the fatal injury less expenses of the dependents avoided by reason of the victim's death and not subtracted in calculating dependent's economic loss. If a minor child of a victim is adopted after the victim's death, the minor child continues after the adoption to incur a dependent's replacement services loss as a result of the victim's death. If the surviving spouse of a victim remarries, the surviving spouse continues after the remarriage to incur dependent's replacement services loss as a result of the victim's death.**

Dependents replacement services loss must be incurred prior to reimbursement. *In re Eader*, 70 Ohio Misc. 17, 434 N.E.2d 757 (Ct. of Cl. 1982). Actual costs incurred are the best measure of dependent's replacement services loss. *In re Harden*, 63 Ohio Misc.2d 151, 620 N.E.2d 275 (Ct. of Cl. 1993); *In re Lawson*, 61 Ohio Misc.2d 223, 577 N.E.2d 151

(Ct. of Cl. 1988), average hourly cost of care in community or hourly rate requested by applicant.

In re Wells, 62 Ohio Misc.2d 11, 587 N.E.2d 985 (Ct. of Cl. 1990), if disabled parent has sole responsibility for child care and cannot perform it, giving daughter and sister-in-law rent-free living quarters constituted dependent's replacement services loss.

If, as the result of her husband's murder, applicant had to cut back her work hours and resign from a part-time job to care for her children and also had to pay her daughter to watch the children when she could not be there, she has incurred dependent's replacement services loss. *In re Dysert*, 91 Ohio Misc.2d 107, 698 N.E.2d 107 (Ct. of Cl. 1995).

Decedent, an on-duty police officer, was killed in the line of duty leaving a wife and three children. Although the applicant-wife was legally blind she was able to be employed part-time and provided child care with the assistance of her husband and her father. Due to her husband's murder and a subsequent serious illness to her father, applicant was forced to terminate her employment and hire third parties to assist her with her transportation needs and routine maintenance. Based on the circumstances, the best measure of applicant's dependent's replacement services loss was her lost wages until her youngest child reached the age of majority. *In re Clark*, Ct. of Cl. No. V2001-32500tc (January 31, 2003).

Awards for dependent's replacement services loss may be granted directly to care providers if they have terminated their care of the minor children. *In re Ndiritu*, Ct. of Cl. No. V82-32157jud (October 30, 1984). See also, *In re Smith*, 91 Ohio Misc.2d 123, 698 N.E.2d 117 (Ct. of Cl. 1996). Calculations for dependent's replacement services loss should be based on local day care facility charges. *In re Amos*, Ct. of Cl. No. V82-46107sc (July 8, 1983). See also, *In re Visnich*, Ct. of Cl. No. V81-52570sc (June 28, 1983) for calculations concerning teenage children.

In re Lynch, Ct. of Cl. No. V86-39792tc (November 15, 1995), applicant's remarriage does not shift to applicant's new spouse the responsibility of performing services covered under dependent's replacement services loss.

a. Quasi-contractually incurred dependent's replacement services loss is suffered when:

(i) A minor child must reside with a person other than his natural parent.

(ii) Quasi-contractual obligation arises between the decedent's dependents and their custodians. The measure of the loss incurred by the dependents as a result of a quasi-contractual obligation is the lesser of either the wages lost by the children's custodians if they were required to resign the previous employment, or the expenses that

would have been incurred if another person had been hired to care for the children. The applicant need not actually relinquish present employment in order to incur dependent's replacement services loss. *In re Kerr*, Ct. of Cl. No. V80-47688sc (May 12, 1986).

(iii) The amount of the award based on quasi-contractual dependent's replacement services loss will vary depending upon the age of the dependents, amount care required, or other special circumstances.

9. Noneconomic Detriment

R.C. 2743.51(K) states:

"Noneconomic detriment" means pain, suffering, inconvenience, physical impairment, or other nonpecuniary damage.

Further, R.C. 2743.51(E) in pertinent part states:

. . .Noneconomic detriment is not economic loss; however, economic loss may be caused by pain and suffering or physical impairment.

10. Funeral Expense

(R.C. 2743.51(N)): **Funeral expense means any reasonable charges that are not in excess of five thousand dollars per funeral and that are incurred for expenses directly related to the victim's funeral, cremation, or burial.**

(2743.51(N)(1)): **Funeral expense means any reasonable charges that are not in excess of seven thousand five hundred dollars per funeral and that are incurred for expenses directly related to a victim's funeral, cremation, or burial and any wage lost or travel expenses incurred by a family member of a victim in order to attend the victim's funeral, cremation, or burial.**

(2743.51(N)(2)): **An award for funeral expenses shall be applied first to expenses directly related to the victim's funeral, cremation, or burial. An award for wages lost or travel expenses incurred by a family member of the victim shall not exceed five hundred dollars for each family member and shall not exceed in the aggregate the difference between seven thousand five hundred dollars and expenses that are reimbursed by the program and that are directly related to the victim's funeral, cremation, or burial.**

Based upon local custom and religious practices airfare incurred and a payment to an Iman were reasonable incurred funeral expenses. *In re Perez*, Ct. of Cl. No. V2010-50892tc (June 24, 2011), 2011-Ohio-4267.

11. Maximum Award

(R.C. 2743.60(I)): **Reparations payable to a victim and to all other claimants**

sustaining economic loss because of injury to or the death of that victim shall not exceed fifty thousand dollars in the aggregate. If the attorney general or the court of claims reduces an award under division (F) of this section, the maximum aggregate amount of reparations payable under this division shall be reduced proportionately to the reduction under division (F) of this section.

Where the applicant was both an indirect victim, as the result of the death of her husband, and a direct victim based upon menacing and the incidents involved the same offender, the panel of commissioners accepted the agreement of the parties that it was impossible to attribute the applicant's ongoing psychiatric treatment to one event or the other, the two claims were consolidated and the maximum award was limited in the consolidated case to $50,000. *In re Rowles*, Ct. of Cl. No. V2010-50647tc (May 27, 2011), 2011-Ohio-4314.

II. DISQUALIFYING FACTORS

A. Failure to Timely File the Reparations Application

R.C. 2743.56(A) and (B)

(A) A claim for an award of reparations shall be commenced by filing an application for an award of reparations with the attorney general. The application may be filed by mail. If the application is filed by mail, the post-marked date of the application shall be considered the filing date of the application. The application shall be in a form prescribed by the attorney general and shall include a release authorizing the attorney general and the court of claims to obtain any report, document, or information that relates to the determination of the claim for an award of reparations that is requested in the application.

(B) All applications for an award of reparations may be filed at any time after the criminally injurious conduct.

The judge of the court of claims has interpreted former R.C. 2743.56(C) and 2743.60(A) to be mandatory and jurisdictional. *In re Clark,* 8 Ohio Misc.2d 34, 457 N.E.2d 965 (Ct. of Cl. 1983).

B. Failure to Report the Criminal Conduct

R.C. 2743.60(A) states:

(A) The attorney general or the court of claims shall not make or order an award of reparations to a claimant if the criminally injurious conduct upon which the claimant bases a claim never was reported to a law enforcement officer or agency.

The purpose of the reporting requirement is to: (1) verify the occurrence; and (2) ensure the investigation and/or prosecution of the offender. *In re Ries*, Ct. of Cl. No. V93-69316tc (January 31, 1995).

In re Ross, Ct. of Cl. No. V2003-40933tc (April 21, 2004), 2004-Ohio-3233, hospital staff; *In re Michaelis*, Ct. of Cl. No. V90-36182tc (May 14, 1991), store manager; satisfies the reporting requirement if the person would be perceived as having an independent duty of make such report. *In re Miller*, 63 Ohio Misc.2d 124, 619 N.E.2d 1254 (Ct. of Cl. 1993), reporting to transit authority; *In re Kramer*, 86 Ohio Misc.2d 4, 684 N.E.2d 751 (Ct. of Cl. 1995), reporting sexual abuse to county children services board.

The filing of a CPO may satisfy the reporting requirement when evidence reveals the police were not responsive to the victim's needs. *In re McCray*, Ct. of Cl. No. V2009-40226tc (April 30, 2010), 2010-Ohio-2645, aff'd jud (September 8, 2010), 2010-Ohio-6708.

A victim suffered personal injury as the result of an assault committed by a client of the

Department of Mental Retardation and Developmental Disabilities (MRDD). The victim satisfied the reporting requirement by reporting the incident to his employer, since MRDD has a confidentiality policy that prohibits employees from disclosing information concerning MRDD clients. The panel found it was MRDD's responsibility to evaluate the situation and determine whether criminal proceeds were appropriate. *In re Mack*, Ct. of Cl. No. V98-49399tc (October 27, 1999); *In re Jenkins*, Ct. of Cl. No. V2002-51397tc (December 27, 2002).

The victim need not personally make the report if the incident has already been reported by a third party. *In re McQueen*, Ct. of Cl. No. V84-33657sc (January 10, 1985).

An oral report to a police officer satisfies the reporting requirement. *In re Rea*, 61 Ohio Misc.2d 732, 584 N.E.2d 1350 (Ct. of Cl. 1989).

The reporting requirement is satisfied by calling 911 and orally reporting the incident to law enforcement, even if the applicant did not personally report the incident. *In re Steel*, 85 Ohio Misc.2d 43, 684 N.E.2d 115 (Ct. of Cl. 1996).

Filing a reparations application does not satisfy the reporting requirement. *In re Anderson*, 57 Ohio Misc.2d 31, 566 N.E.2d 714 (Ct. of Cl. 1989).

C. The Offender or An Accomplice of the Offender Cannot Benefit From An Award

R.C. 2743.60(B)(1)

(B)(1) The attorney general or the court of claims shall not make or order an award of reparations to a claimant if any of the following apply:

(a) The claimant is the offender or an accomplice of the offender who committed the criminally injurious conduct, or the award would unjustly benefit the offender or accomplice.

An award will not be granted if the offender, who is obligated to pay the medical expenses of the victim, would be relieved of that obligation. *In re Pomersky*, Ct. of Cl. No. V80-36457sc (March 5, 1981); *In re Lawson*, 62 Ohio Misc.2d 119, 593 N.E.2d 497 (Ct. of Cl. 1990).

D. A Passenger in a Motor Vehicle With OVI Driver Cannot Benefit From an Award

R.C. 2743.60(B)(1)(b)

(B)(1)(b) Except as provided in division (B)(2) of this section, both of the following apply:

(i) The victim was a passenger in a motor vehicle and knew or reasonably should have known that the driver was under the influence of alcohol, a drug of abuse, or both.

(ii) The claimant is seeking compensation for injuries proximately caused by the driver described in division (B)(1)(b)(i) of this section being under the influence of alcohol, a drug of abuse, or both.

R.C. 2743.60(B)(1)(c)

Both of the following apply:

(i) The victim was under the influence of alcohol, a drug of abuse, or both and was a passenger in a motor vehicle and, if sober, should have reasonably known that the driver was under the influence of alcohol, a drug of abuse, or both.

(ii) The claimant is seeking compensation for injuries proximately caused by the driver described in division (B)(1)(b)(i) of this section being under the influence of alcohol, a drug of abuse, or both.

An award will not be granted where applicant was injured as the result of voluntarily riding with an offender he knew was intoxicated since applicant's action aided, abetted or encouraged the violation of DUI by the offender. *In re McCray*, Ct. of Cl. No. V95-23003sc (October 20, 1995). See also, *In re Pence*, 91 Ohio Misc.2d 133, 698 N.E.2d 124 (Ct. of Cl. 1996).

The use of the term "accomplice" in R.C. 2743.60(B) does not require the court to analyze the conduct of an applicant using the Ohio Criminal Code definition of complicity, under section R.C. 2923.03. If an applicant accepts a ride with a legally impaired driver and when the preponderance of the evidence indicates that applicant has knowledge of the driver's impaired condition, the applicant was an accomplice as defined in R.C. 2743.60(B). *In re Jan*, Ct. of Cl. No. V97-57941jud (March 15, 1999); *In re Welton*, Ct. of Cl. No. 2015-00638-VI (November 3, 2015) adopted jud (December 2, 2015).

However, the Attorney General has the burden of proof to establish that the passenger had prior knowledge that the offending driver was under the influence. Mere speculation does not satisfy the Attorney General's burden of proof. *In re Stover*, 2015-01029-VI (January 6, 2017) adopted jud (January 30, 2017).

It must be established that the passenger in a vehicle had the ability to observe the driver of the vehicle prior to the accident. The doctrine of transfer intent does not apply. Simply because the passenger can tell a fellow passenger is intoxicated does not imply that he would also be able to ascertain that the driver of the vehicle, who he never observed drinking and who he was not at the party with, was also under the influence of alcohol. *In re Hanley*, Ct. of Cl. No. V2002-51362tc (August 28, 2003), 2003-Ohio-4993. See also, *In re Fix*, Ct. of Cl. No. V2004-60369tc (August 30, 2004), 2004-Ohio-5086; *In re Wiles*, Ct. of Cl. No. 2011-60123jud (March 1,

2013).

However, where injured person was an underage drinker, was drunk, and had limited exposure to the offender and due to his age, lack of experience, and had made a good choice by refusing to be a passenger on a motorcycle without a helmet immediately prior to accepting a ride with the impaired driver, he assumed no recognizable risk. Accordingly, R.C. 2743.60(B) did not result in a denial of the claim. *In re Garza*, Ct. of Cl. No. V2004-60610tc (November 2, 2004), 2004-Ohio-7266.

1. Exceptions

R.C. 2743.60(B)(2)

Division (B)(1)(b) of this section does not apply if on the date of the occurrence of the criminally injurious conduct, the victim was under sixteen years of age or was at least sixteen years of age but less than eighteen years of age and was riding with a parent, guardian, or care-provider.

E. Failure to Cooperate with Law Enforcement Officer or Agencies

R.C. 2743.60(C)

The attorney general or the court of claims, upon a finding that the claimant or victim has not fully cooperated with appropriate law enforcement agencies, may deny a claim or reconsider and reduce an award of reparations.

Any action, inaction or inexcusable neglect by an applicant which substantially impedes or impairs an investigation or prosecution proceedings which have been initiated by the law enforcement authorities, or which would have been initiated but for the action, inaction or inexcusable neglect, constitutes a failure to fully cooperate as required by R.C.2743.60(C). *In re Dray*, 61 Ohio Misc.2d 417, 579 N.E.2d 788 (Ct. of Cl. 1989). See also, *In re Colbert III*, Ct. of Cl. No. V92-54501jud (June 29, 1995).

Failure to prosecute will not, in and of itself, support a finding of failure to cooperate. *In re Bolster*, Ct. of Cl. No. V77-0964jud (May 2, 1979); See also, *In re Kent*, 61 Ohio Misc.2d 321, 578 N.E.2d 911 (Ct. of Cl. 1989); *In re Sims*, Ct. of Cl. No. V95-50361tc (October 3, 1997).

Although the victim initially lied to police and hospital personnel about the incident, the next day victim gave a truthful recollection of the facts surrounding the incident. The panel held the initial lie did not impair or impede the police investigation or prosecution. *In re Coverdale*, Ct. of Cl. No. V93-24657tc (September 28, 1994).

Applicant's request to dismiss charges against the offender in a domestic violence case does not constitute a failure to cooperate if the dismissal was favored by the prosecutor, contingent upon the offender completing counseling, and absent of any further violence between the offender and the victim for a period of sixty days. *In re Smith*, 91 Ohio Misc.2d 142, 698 N.E.2d 129 (Ct. of Cl. 1997).

The applicant filing an ex parte civil protection order the day after the criminally injurious conduct and communicating with police satisfies her obligation to cooperate. Furthermore, the applicant has no obligation or duty to direct or instruct law enforcement on how to best conduct an investigation in a criminal matter. *In re Perkins*, Ct. of Cl. No. V2009-40048tc (July 1, 2009), 2009-Ohio-4072.

In re Lazzara, Ct. of Cl. No. V91-80720tc (October 29, 1993) aff'd jud (March 29, 1994), applicant's failure to attend the pre-trial was excusable because the applicant had been threatened and intimidated by the offender at three previous court appearances and the prosecution had done nothing to allay the applicant's fears.

A 10% reduction in an award to the applicant resulted when the victim refused to divulge the name of the offender to police. Victim suffered severe mental distress, was diagnosed with post-traumatic stress disorder, and had been hospitalized on numerous occasions as a result of the criminally injurious conduct. However, the victim's refusal to disclose the name of the offender did not substantially impede the investigation/ prosecution of the offender, accordingly a reduction was warranted in this situation. *In re Blake*, Ct. of Cl. No. V2003-40429tc (July 13, 2004), 2004-Ohio-4614.

If a victim signed a waiver of prosecution it must be determined whether it was signed voluntarily and with full appreciation of the import of the waiver. *In re Tomer*, Ct. of Cl. No. V77-0265tc (November 16, 1978).

Refusal to appear at trial despite previously assuring prosecutor that he would appear was a failure to cooperate. *In re Simmons*, 61 Ohio Misc.2d 364, 579 N.E.2d 311 (Ct. of Cl. 1989); *In re Rodgers*, 61 Ohio Misc.2d 242, 577 N.E.2d 162 (Ct. of Cl. 1988).

Where the victim, who is the only eye witness to an event, chooses not to proceed with prosecution of the offender, the victim has not fully cooperated pursuant to R.C. 2743.60(C) and shall not be eligible for compensation. *In re Colbert III*, Ct. of Cl. No. V92-54501jud (June 29, 1995).

However, domestic violence cases must be treated on a case-by-case basis, the victim changing her story based on fear, harassment and stalking must be taken into consideration before a decision is rendered. *In re Moore*, Ct. of Cl. No. V2009-40544tc (May 14, 2010), 2010-Ohio-2374.

If the applicant and her attorney/prosecutor attempt to circumvent the system by having her attorney dismiss the charges against the offender in order for the applicant to recover under the victims of crime compensation statute, the applicant is precluded from utilizing the advice of counsel to evade the mandate of cooperation. *In re Bischoff*, Ct. of Cl. No. V99-65614tc (November 9, 2001).

Applicant's agreement to drop charges against the offender in return for a $15,000 settlement is a failure to cooperate since not only has applicant failed to aid in the prosecution but also has leveraged the prosecutorial discretion of the state against the offender for the applicant's own gain to the exclusion of the community's interest in

protecting itself from further aggression by the criminal offender. *In re Hardtle*, Ct. of Cl. No. V92-66992tc (March 24, 1995).

The failure or refusal to respond to an affirmative request by law enforcement authorities to aid in prosecuting a criminal offender constitutes failure to cooperate. *In re Bolster*, Ct. of Cl. No. V77-0964 jud (May 2, 1979).

If the applicant has failed to respond to an affirmative request to view mugshots, the injured party's ability to identify the offender is another factor which should be considered in determining whether the failure to view photographs constitutes a failure to cooperate fully within the meaning of R.C.2743.60(C). *In re Knights*, Ct. of Cl. No. V82-31339sc (November 15, 1982).

The attorney general investigative function is administrative in nature and does not constitute "law enforcement" within the meaning and intent of R.C. 2743.60(C). *In re Harris*, 86 Ohio Misc.2d 54, 684 N.E.2d 1320 (Ct. of Cl. 1997).

F. Collateral Source Reimbursement

(R.C. 2743.60(D)): **The attorney general or the court of claims shall reduce an award of reparations or deny a claim for an award of reparations that is otherwise payable to a claimant to the extent that the economic loss upon which the claim is based is recouped from other persons, including collateral sources. If an award is reduced or a claim is denied because of the expected recoupment of all or part of the economic loss of the claimant from a collateral source, the amount of the award or the denial of the claim shall be conditioned upon the claimant's economic loss being recouped by the collateral source. If the award or denial is conditioned upon the recoupment of the claimant's economic loss from a collateral source and it is determined that the claimant did not unreasonably fail to present a timely claim to the collateral source and will not receive all or part of the expected recoupment, the claim may be reopened and an award may be made in an amount equal to the amount of expected recoupment that it is determined the claimant will not receive from the collateral source.**

In re Crowley, 63 Ohio Misc.2d 131, 620 N.E.2d 263 (Ct. of Cl. 1993), allowable expense, work loss, replacement services loss, dependent's economic loss, dependent's replacement services loss, funeral expense and unemployment benefits loss comprise economic loss. Any excess of categorically specific collateral source benefits may and should be used to offset other categories of incurred economic loss. See also *In re Roseboom*, 61 Ohio Misc.2d 315, 578 N.E.2d 908 (Ct. of Cl. 1988).

In re Martin, 63 Ohio Misc.2d 82, 619 N.E.2d 1227 (Ct. of Cl. 1993) when the victim or applicant receives benefits, from whatever source, after the criminally injurious conduct, that were not received prior to the incident, the receipt of those benefits offsets lost wages and are deemed collateral sources. This would include, but is not limited to, social security disability, worker's compensation, welfare, aid to dependent children, and food stamps.

Where both the applicant and the Attorney General's office paid the same bill to a medical provider and the medical provider refused repayment to the applicant, the applicant should be granted an award in the amount of the overpayment. *In re Zicari*, Ct. of Cl. No. V2008-30081tc (June 13, 2008), 2008-Ohio-4262.

1. Other Persons Constituting a Collateral Source.

R.C. 2743.60(D): **The attorney general or the court of claims shall reduce an award of reparations or deny a claim for an award of reparations that is otherwise payable to a claimant to the extent that the economic loss upon which the claim is based is recouped from other persons, including collateral sources.**

A recovery received from a negligent third party, not the offender, whose actions or inactions contributed to the criminally injurious conduct is a recoupment from other persons and will reduce the award of reparations. *In re Norek*, Ct. of Cl. No. V85-51799jud (March 5, 1987).

Informal money gifts made by friends of the decedent to a spouse do not constitute a collateral source or recoupment from other persons. *In re Braggs*, Ct. of Cl. No. V77-1218sc (February 23, 1982).

A memorial fund contributed to by anonymous donors and not earmarked for a specific purpose does not constitute a collateral source. *In re Patricy*, Ct. of Cl. No. V2010-50485tc (May 6, 2011), 2011-Ohio-4351. However, if a memorial fund is established with the purpose of paying the funeral expense, it is a collateral source. *In re Mwangi*, 2015-00991-VI (February 25, 2016) 2016-Ohio-8642 adopted jud (March 15, 2016), 2016-Ohio-8641.

G. Felony Exclusion

1. Felony conviction of victim or claimant R.C. 2743.60(E)(1)(a) & (b)

(E)(1) **Except as otherwise provided in division (E)(2) of this section, the attorney general or the court of claims shall not make an award to a claimant if any of the following applies:**

(a) The victim was convicted of a felony within ten years prior to the criminally injurious conduct that gave rise to the claim or is convicted of a felony during the pendency of the claim.

(b) The claimant was convicted of a felony within ten years prior to the criminally injurious conduct that gave rise to the claim or is convicted of a felony during the pendency of the claim.

The felony exclusion contained in R.C. 2743.60(E) is not a violation of equal protection or a bill of attainder, *In re Cowan*, 27 Ohio Misc.2d 12, 499 N.E.2d 937 (Ct. of Cl. 1986); see also, *State ex rel. Matz v. Brown*, 37 Ohio St.3d 279, 525

N.E.2d 805 (1988).
The amendment to the felony exclusion contained in Sub H.B. 363 was constitutional since it did not retroactively affect a substantive right, does not create a suspect classification which violates equal protection and, accordingly, could be applied retroactively. *In re Vaughn*, 91 Ohio Misc.2d 172, 698 N.E.2d 148 (Ct. of Cl. 1997). See also, *State of Ohio ex rel. Debi Geisinger v. The Court of Claims of Ohio*, 10th Dist. No. 97APD08-992 (1998).

The amendments to R.C. 2743.60(E) contained in Sub. H.B. 363, effective August 1, 1996, apply to all claims pending on the effective date of the amendments in which no final order has been issued. A final order is issued when the judge's decision is journalized by the Court of Claims. *In re Robinson*, 86 Ohio Misc.2d 9, 684 N.E.2d 754 (Ct. of Cl. 1996) and *In re Snow*, 86 Ohio Misc.2d 14, 684 N.E.2d 757 (Ct. of Cl. 1996).

The applicant's felony conviction in California precludes an award of reparations. *In re Wilson*, 66 Ohio Misc.2d 154, 643 N.E.2d 628 (Ct. of Cl. 1994).

Juvenile Court proceedings do not result in an actual felony conviction, but rather, the juvenile is adjudicated delinquent. However, the conduct in which the minor injured party engaged was felonious conduct. One of the primary differences between adult and juvenile criminal proceedings is the nature and extent of the penalty; however, the conduct is the same. Therefore, the felony exclusion applies to a juvenile who is found delinquent of conduct that would constitute a felony if they were an adult. *In re Miller*, 91 Ohio Misc.2d 135, 698 N.E.2d 124 (Ct. of Cl. 1996). See also, *In re Hayes*, Ct. of Cl. No. 2015-00512-VI (September 3, 2015) adopted jud (September 29, 2015); *In re Dothard*, Ct. of Cl. No. 2015-00743-VI (November 23, 2015) adopted jud (December 21, 2015).

Where the victim sustained injury as the result of criminally injurious conduct and subsequently engaged in felonious conduct and was convicted of a felony, the victim's claim was denied pursuant to R.C. 2743.60(E)(1). *In re Robinson*, 86 Ohio Misc.2d 9, 684 N.E.2d 754 (Ct. of Cl. 1996).

The felony exclusion applies on the date the sentence for the criminal offense is imposed, not the date of the criminal incident or the subsequent trial. *In re Code*, Ct. of Cl. No. V2010-50329tc (August 27, 2010), 2010-Ohio-6714.

An applicant whose felony conviction has been expunged, records sealed, and where the felonious conduct occurred prior to ten years before the occurrence of the criminally injurious conduct is eligible to participate in the reparations fund. *In re Maye*, Ct. of Cl. No. V94-38112jud (January 8, 1997). However, if the applicant's record is expunged but the felonious conduct occurred within 10 years of the criminally injurious conduct, then the claim is denied pursuant to the felony conduct exclusion. *In re Cheatwood*, 86 Ohio Misc.2d 65, 684 N.E.2d 1326 (Ct. of Cl. 1997).

However, where applicant was convicted of a felony within ten years of the criminally injurious conduct, but applicant's record was expunged and all records concerning the felony conviction were sealed, the attorney general could not satisfy the burden of proof necessary to deny the claim pursuant to R.C. 2743.60(E)(1). *In re Wilcoxson*, Ct. of Cl. No. V2002-50374, V2002-50391tc (November 15, 2002) aff'd jud (March 6, 2003).

(R.C. 2743.51(Q)): **"Pendency of the claim" for an original reparations application or supplemental reparations application means the period of time from the date the criminally injurious conduct upon which the application is based occurred until the date a final decision, order or judgment concerning that application or supplemental reparations application is issued.**

If the victim is convicted of a felony or engages in felonious conduct during the pendency of the claim, pursuant to R.C. 2743.51(Q), the felony exclusion applies. *In re Robinson*, 86 Ohio Misc.2d 9, 684 N.E.2d 754 (Ct. of Cl. 1996). See also, *State of Ohio ex rel. Debi Geisinger v. The Court of Claims of Ohio* (1988), 10th Dist. No. 97APD08-992 (1988). *In re Rouse*, Ct. of Cl. No. 2016-00021-VI (June 14, 2016), 2016-Ohio-8644 adopted jud (July 5, 2016), 2016-Ohio-8643. If pending felony charges have not been resolved prior to a final determination in a claim, it is appropriate to hold the initial award in abeyance until the charges are resolved. *In re Hopson*, 2016-00828-VI (May 19, 2017) adopted jud (June 7, 2017).

2. Felonious conduct of victim or claimant

(c) It is proved by a preponderance of the evidence that the victim or claimant engaged, within ten years prior to the criminally injurious conduct that gave rise to the claim or during the pendency of the claim, in an offense of violence, a violation of section 2925.03 of the Revised Code, or any substantially similar offense that also would constitute a felony under the laws of this state, another state, or the United States.

Felonious conduct need be established only by a preponderance of the evidence in order to preclude a victim or claimant from receiving an award of reparations. *In re Perez*, 63 Ohio Misc.2d 66, 619 N.E.2d 1217 (Ct. of Cl. 1992). But see also, *In re McKnight*, Ct. of Cl. No. V96-67039jud (October 29, 1998).

However, if the applicant presents credible evidence at the hearing, the applicant was found not guilty of the violence felony, the Attorney General failed to present any eyewitness testimony or compelling evidence to rebut the applicant's testimony, the alleged victim's credibility is questionable due to his past criminal behavior, and no physical evidence links the applicant to the crime, the Attorney General has not met the burden of proof necessary under R.C. 2743.60(E)(1)(c). *In re Bazazpour*, Ct. of Cl. No. V2007-90102tc (October 12, 2007), 2007-Ohio-6285.

In re Jackson, 63 Ohio Misc.2d 99, 619 N.E.2d 1238 (Ct. of Cl. 1993), a combination of an outstanding active capias for a felony coupled with a felony arrest record is sufficient to warrant a denial pursuant to the felony exclusion.

Applicant's admission of engaging in felonious conduct, which was a condition precedent to applicant's participation in a diversion program, was sufficient to establish by a preponderance of the evidence, that the applicant had engaged in felonious conduct within ten years prior to the criminally injurious conduct. *In re Holtgreven*, 63 Ohio Misc.2d 196, 620 N.E.2d 310 (Ct. of Cl. 1993). See also, *In re Boyed*, Ct. of Cl. No. V91-85128jud (October 17, 1995); *In re Whaley*, Ct. of Cl. No. V94-33994jud (February 26, 1996); *In re Samples*, Ct. of Cl. No. V94-30685jud (January 18, 1996); and *In re Strum*, 85 Ohio Misc.2d 31, 684 N.E.2d 109 (Ct. of Cl. 1996).

If a person engaged in conduct which would constitute a felony, and then became a victim of crime, a subsequent felony conviction would bar the person from receiving an award of reparations. *In re Peiu*, 61 Ohio Misc.2d 515, 580 N.E.2d 522 (Ct. of Cl. 1990).

Applicant's claim was denied pursuant to former R.C. 2743.60(E)(3), when the applicant, during the pendency of her case, engaged in felonious conduct in violation of R.C. 2921.03, even though applicant's criminal conviction under 2921.04 was dismissed on appeal. An independent review of the underlying facts revealed applicant had been wrongfully charged under R.C. 2921.04, but nevertheless her conduct constituted a violation of R.C. 2921.03. Accordingly, applicant's pending claim was denied pursuant to the felony exclusion. *In re Earley*, Ct. of Cl. No. V2002-50102tc (May 26, 2004), 2004-Ohio-3519.

Applicant who had a number of criminal charges pending against her including child endangerment was denied an award until the criminal charges were resolved. *In re Baker*, Ct. of Cl. No. 2014-00816-VI (May 20, 2015).

A mere felony indictment on a finding of probable cause followed by a guilty plea to a lesser offense, a misdemeanor, without a police report, witness statement or other investigative report regarding the felony, is not sufficient to prove, by a preponderance of the evidence, the applicant engaged in felonious conduct. *In re Faris*, 85 Ohio Misc.2d 37, 684 N.E.2d 112 (Ct. of Cl. 1997). However, if a police report exists which indicates by a preponderance of the evidence that the applicant engaged in felonious conduct, but later pleas to a misdemeanor, the felony exclusion applies. *In re Sawyer*, Ct. of Cl. No. V93-61412tc (January 20, 1995) and *In re Adams*, Ct. of Cl. No. V96-60191jud (July 24, 1998). But see also, *In re Carver*, 91 Ohio Misc.2d 178, 698 N.E.2d 151 (Ct. of Cl. 1997).

3. Claimant conviction pursuant to R.C. 2919.22 or 2919.25

(d) The claimant was convicted of a violation of section 2919.22 or 2919.25 of the Revised Code, or of any state law or municipal ordinance substantially similar to either section, within ten years prior to the criminally injurious conduct that gave rise to the claim or during the pendency of the claim.

A judge of the court of claims reversed the decision of the panel where the decedent had been convicted of domestic violence within ten years prior to the criminally injurious conduct. The court found the applicant's claim was improperly denied because the exclusionary language of former R.C. 2743.60(B)(4) applies only to claimants who were convicted of domestic violence and in this case the applicant had never been convicted. *In re Drees*, Ct. of Cl. No. V2002-50285jud (October 15, 2002).

Where an applicant is convicted of domestic violence, he cannot re-litigate the conviction with the presentation of additional evidence which seeks to explain or mitigate the criminal offense. *In re Kohen*, Ct. of Cl. No. V2002-50323tc (March 17, 2003), 2003-Ohio-2246 aff'd jud (July 11, 2003), 2003-Ohio-4515.

4. Victim engaged in conduct in violation of R.C. 2925.11.

(e) It is proved by a preponderance of the evidence that the victim at the time of the criminally injurious conduct that gave rise to the claim engaged in conduct that was a felony violation of section 2925.11 of the Revised Code or engaged in any substantially similar conduct that would constitute a felony under the laws of this state, another state, or the United States.

In re Dawson, 63 Ohio Misc.2d 79, 619 N.E.2d 1225 (Ct. of Cl. 1993), the positive evaluation on the toxicology report for the presence of cocaine proves, by a preponderance of the evidence, that the applicant has engaged in felonious conduct.

a. A presumption of knowing and voluntary ingestion of drugs exists where a victim's toxicology report indicates a positive test result for cocaine, and the victim has offered no evidence to the contrary. *In re Trice*, Ct. of Cl. No. V92-83781tc (April 26, 1995).

b. The court will accept the initial results from a drug screen in accordance with *Dawson* and if a victim or applicant wishes to challenge the positive results of a drug screen, the burden is upon them to resolve that challenge while the questionable blood sample is still available for future testing. *In re Darden*, Ct. of Cl. No. V96-20075tc (June 12, 1997).

c. Where a drug test is performed for employment, this test may not be used against an applicant where no evidence has been presented concerning the nature or procedures used when collecting a specimen nor any evidence as how such records are maintained. *In re Treadwell, Sr*., Ct. of Cl. No. V97-32891tc (October 20, 1998).

d. However, absent a showing that there was substantial evidence concerning a defect in the collection process or the maintenance of records which would demonstrate a defect in the report or the result, or which would otherwise challenge or impugn the scientific integrity of the testing methodology or its conclusions, *In re Dawson* should be followed. *In re France*, Ct. of Cl. No. V2001-31201tc (October 15, 2001) aff'd jud (January 10, 2002).

e. A physician's letter (expert opinion) was sufficient evidence to find that the results of a toxicology report were questionable and the basis for the reversal of the claim. *In re Ware*, Ct. of Cl. No. V2001-31091tc (December 28, 2001) aff'd jud (August 20, 2002).

f. The decedent/victim was raped and murdered. At the time of her death a toxicology evaluation revealed the presence of ecstasy in her system. An expert witness testified that the ecstasy had been ingested a short time before her death and that ecstasy is commonly used to facilitate rape. The panel determined the *Dawson* case did not establish a conclusive presumption, but rather a rebuttable presumption. The Attorney General met their burden by producing a positive toxicology screen, then the burden shifted to applicant, who based on the decedent's healthy life style and the expert testimony of a chief toxicologist in the coroner's office, prove that decedent/victim did not knowingly or willingly ingest the illegal substance. The ecstasy was used by the offender to aid in the criminal violation of the victim. Accordingly, the claim should not be denied pursuant to former R.C. 2743.60(E)(3). *In re Parrish*, Ct. of Cl. No. V2002-51915tc (August 1, 2003), 2003-Ohio-4982.

The holding in *In re Dawson* is not binding for a positive toxicology report for prescription medications, which had been previously prescribed to an individual. Accordingly, R.C. 2743.60(E)(1)(e) does not apply in such situations. *In re Roland*, Ct. of Cl. No. V2008-30243tc (December 19, 2008), aff'd jud (March 13, 2009).

When the Attorney General presents a positive toxicology report for cocaine the applicant must present sufficient evidence that: 1) he did not knowingly and voluntarily ingest cocaine; 2) the toxicology results were faulty due to unprofessional or improper sample collection procedure; or 3) he did not engage in felonious drug use at the time of the criminally injurious conduct. *In re Ferry*, Ct. of Cl. No. V2007-90188tc (August 3, 2007), 2007-Ohio-4704.

A decedent who tested positive for cocaine metabolites at the time of the autopsy engaged in a violation of R.C. 2925.11 at the time of the criminally injurious conduct. *In re Murphy*, Ct. of Cl. No. V2010-50167jud (September 29, 2011).

A minor victim who engages in felonious conduct which was directly attributable to prior sexual abuse should not be denied pursuant to former R.C. 2743.60(E)(3). The causal connection between the felonious acts and the prior sexual abuse has to be established by expert testimony. *In re Hollar*, Ct. of Cl. No. V94-69891tc (December 29, 1999); *In re Howe*, Ct. of Cl. No. V2001-31881tc (January 30, 2002); *In re Zinn*, Ct. of Cl. No. V2004-60733tc (January 6, 2006), 2006-Ohio-1370.

Decedent, at the time of his death, had constructive possession of cocaine when evidence revealed that drug and drug paraphernalia was located in his residence. *In re Brown*, Ct. of Cl. No. V2010-50949tc (August 25, 2011).

The victim was a 67-year-old postal worker and a medical report indicated he was

under the influence of PCP. The victim was able to rebut the presumption of drug use by presenting evidence concerning the unprofessional and unsanitary conditions at the hospital, his spotless history with his employer, the submission of a second drug test which was negative and a disclaimer at the bottom of the medical report which stated the detection of any drugs is only presumptive. *In re Wilson*, Ct. of Cl. No. V2004-60997tc (April 21, 2005), 2005-Ohio-2648.

h) *Dawson* did not create a conclusive presumption in all cases involving positive toxicology reports. *Dawson* shall bar a claim where no testimony or other evidence had been offered by an applicant to indicate the manner in which the controlled substance was consumed or where no evidence was presented to indicate a faulty toxicology result. All affirmative defenses are available to the applicant and the attorney general has to prove each element of the offense, by a preponderance of the evidence. Once the attorney general has met his burden of establishing that the victim or applicant in fact tested positive for an illegal drug on a toxicology screening, then the burden shifts to the applicant to rebut the presumption that felonious conduct had occurred. Furthermore, former R.C. 2743.60(F) is a rebuttable presumption. Accordingly, it is the attorney general's burden to prove a causal connection between the felonious conduct if established, and the criminally injurious conduct; only then may a claim be denied. *In re Smith*, Ct. of Cl. No. V2003-41123tc (June 16, 2004), 2004-Ohio-4179, aff'd jud (October 19, 2004).

5. Minor dependent child exception

Effective June 26, 2003, R.C. 2743.60(E) was amended to add section (2) which states:

(2) The attorney general or the court of claims may make an award to a minor dependent of a deceased victim for dependent's economic loss or for counseling pursuant to division (F)(2) of section 2743.51 of the Revised Code if the minor dependent is not ineligible under division (E)(1) of this section due to the minor dependent's criminal history and if the victim was not killed while engaging in illegal conduct that contributed to the criminally injurious conduct that gave rise to the claim. For purposes of this section, the use of illegal drugs by the deceased victim shall not be deemed to have contributed to the criminally injurious conduct that gave rise to this claim.

H. Contributory Misconduct

(R.C. 2743.51(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.**

(R.C. 2743.60(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 or 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.

Contributory misconduct determinations depend heavily on the particular facts involved with each particular claim. See *In re Williams*, Ct. of Cl. No. V2001-32691tc (October 11, 2002).

It is the court's obligation to independently analyze the facts to determine if it is in agreement with the Attorney General's decision. *In re Schultz*, Ct. of Cl. No. V2008-30260tc (July 18, 2008), 2008-Ohio-4269 aff'd jud (October 30, 2008).

1. Unlawful or Intentionally Tortious Conduct Causally Connected to Criminally Injurious Conduct.

Contributory misconduct must be based on a specific unlawful or intentionally tortious act, not merely on decedent's past behavior and animosity it engendered. *In re McGary II*, Ct. of Cl. No. V91-83761tc (July 29, 1994) aff'd jud (November 16, 1994).

A victim's age and corresponding capacity can be considered in analyzing contributory misconduct and may be a factor used in reducing rather than denying an award. *In re Beach*, 91 Ohio Misc.2d 91, 698 N.E.2d 97 (Ct. of Cl. 1994).

The exercise of self-defense does not constitute contributory misconduct. *In re Marshall*, 57 Ohio Misc.2d 24, 566 N.E.2d 198 (Ct. of Cl. 1989).

Abusive language alone does not constitute contributory misconduct. *In re Baber*, Ct. of Cl. No. V82-32670tc (October 21, 1983).

Applicant was intoxicated and had engaged in underage drinking prior to entering the vehicle, there was no evidence applicant was aware the offender was intoxicated and consequently applicant's illegal conduct was not causally related to the offender's drunk driving which subsequently caused her injury. *In re Mitchell*, Ct. of Cl. No. V95-49142tc (February 20, 1997).

The applicant's failure to wear a seat belt as a front seat passenger of an automobile driven by an offender who was later convicted of an OMVI violation, whether lawful or unlawful, does not constitute contributory misconduct as defined in 2743.51(M). The essence of contributory misconduct is the causal connection between the injured party's conduct and the offender's conduct rather than the injuries arising from that conduct. The offender's decision to drive drunk was not motivated or instigated by the applicant's decision not to wear a seatbelt. *In re Sotak*, 61 Ohio Misc.2d 808, 585 N.E.2d 580 (Ct. of Cl. 1990).

2. Foreseeability

When determining if the unlawful or intentionally tortious conduct of the victim was

causally related to the criminally injurious conduct, foreseeability is a necessary element. *In re Ewing*, 33 Ohio Misc.2d 48, 515 N.E.2d 666(Ct. of Cl. 1987). See also, *In re Uhnak*, 61 Ohio Misc.2d 312, 578 N.E.2d 906 (Ct. of Cl. 1988).

Where evidence exists to show a victim has been involved with organized crime sixteen months prior to the criminally injurious conduct which causes victim's death, and where proof of victim's suspected continued involvement in organized crime, other than circumstantial evidence, was not readily available, the court applied the presumption that a state of facts once shown to exist is presumed to continue to exist unless shown otherwise. The applicant has the burden to show that the presumed state of facts no longer exists. *In re DeCerbo*, 5 Ohio Misc.2d 11, 449 N.E.2d 526 (Ct. of Cl. 1982).

Given the pervasive violence associated with involvement in illegal drug transactions, it was foreseeable that the decedent would suffer personal injury or death while working as the crack house doorman. *In re Lockhart*, Ct. of Cl. No. V95-44540tc (December 30, 1996).

Applicant a passenger in a vehicle driven by a drunk driver, who was subsequently injured, was denied an award due to contributory misconduct. The applicant violated R.C. 4301.62, the open container law, such violation was causally related to the motor vehicle accident that gave rise to this claim. *In re Ferrell*, Ct. of Cl. No. V95-31855tc (January 16, 1998).

The actions of the offender driving under the influence of alcohol through a red light constitute an intervening cause that breaks the sequence of events put in motion by applicant driving under the influence of alcohol. Hence, applicant's actions are not the proximate cause of the accident and as there is no causal relation between applicants driving under the influence of alcohol and the accident, applicant did not engage in contributory misconduct. *In re Hornsby*, Ct. of Cl. No. V93-36299tc (October 25, 1994) aff'd jud (March 2, 1995).

Applicant who earlier was engaged in an altercation in a bar which he initiated, was subsequently shot by another individual in retaliation for the applicant's prior conduct. Applicant's claim for an award was denied. *In re Moody*, Ct. of Cl. No. 2013-00437-VItc (December 20, 2013).

Drug abuse is not contributory misconduct per se. The unlawful action must foreseeably be related to the injury sustained. *In re Anderson*, Ct. of Cl. No. V90-60261tc (March 24, 1994).

3. Substantial

For an award of reparations to be denied, rather than reduced, as a result of contributory misconduct on behalf of the victim or applicant pursuant to R.C. 2743.60(F), there must be a showing of substantial contributory misconduct. If the court does not find a substantial amount of contributory misconduct by the victim or applicant to deny an award of reparations, an award shall be granted but reduced by a percentage to be determined by the court. *In re Spaulding*, 63 Ohio Misc.2d 39, 619 N.E.2d 1109 (Ct. of

Cl. 1991).

Contributory misconduct warranted a reduction of an award rather than a total denial of the claim. *In re Damiano*, 91 Ohio Misc.2d 162, 698 N.E.2d 141 (Ct. of Cl. 1997) and *In re Svoboda*, 91 Ohio Misc.2d 166, 698 N.E.2d 144 (Ct. of Cl. 1997). *In re Sebens*, Ct. of Cl. No. V2002-50919jud (June 10, 2003), 2003-Ohio-3852.

Any misconduct that approaches fifty percent is substantial and is a complete bar to an award of reparations. *In re Terry*, Ct. of Cl. No. V91-96073tc (September 30, 1994). But, see also *In re McKendry*, Ct. of Cl. No. V91-26415jud (January 26, 1994) and *In re Simpson*, Ct. of Cl. No. V93-36752jud (February 14, 1996) where a judge of the court of claims stated:

> "While impossible to specifically define 'substantial' this court evaluates all applications for reparations on the basis of a case-by-case analysis and has consistently held that R.C. 2315.19 (Effect of contributory negligence or implied assumption of risk) is not the applicable standard to apply to victim of crime cases. The single commissioner or panel of commissioners has the authority to deny or reduce an award due to contributory misconduct on behalf of the victim or claimant and their decision will be supported by the court unless unreasonable in a manner that approaches arbitrariness."

In *In re Simpson*, Ct. of Cl. No. V93-36752jud (February 14, 1996), the judge upheld a reduction of 60% based on the contributory misconduct of the victim.

The holding in *In re Bieri*, Ct. of Cl. No. V80-36295jud (May 10, 1983), where a victim challenges another or the victim accepts the challenge of another, to engage in a physical encounter or voluntarily participates in a multi person fracas, wherein either one or both or any of the parties receive physical injuries, whether by fair or foul means, constitutes contributory misconduct as a matter of law is overruled. *In re Spaulding*, 63 Ohio Misc.2d 39, 619 N.E.2d 1199 (Ct. of Cl. 1991).

Jaywalking is contributory misconduct, although not substantial contributory misconduct. Accordingly, applicant's award was reduced by 20 percent as the result of being struck by a drunk driver. *In re Leach*, 63 Ohio Misc.2d 181, 620 N.E.2d 300 (Ct. of Cl. 1993).

4. Kempton considerations:

   a) Age and corresponding mental capacity of the victim/applicant;

   b) The victim/applicant's familiarity/relationship with the offender;

   c) The victim/applicant's mens rea;

   d) Whether the victim/applicant suffered from diminished capacity due to intoxication or other mitigating factors;

e) Whether the victim/applicant suffered a disproportionate level of harm compared to the victim/applicant's level of misconduct. See *In re Sow*, 2015-00229-VI (August 5, 2016) adopted jud (March 10, 2017).

f) Whether the victim/applicant's degree of misconduct was a de minimus or substantial violation of the law; and

g) Whether granting of reparations award violate public policy of Victim of Crime Act. *In re Kempton*, Ct. of Cl. No. V2006-20640tc (April 2, 2007), 2007-Ohio-2929. See also, *In re Troutwine*, Ct. of Cl. No. V2006-20879tc (July 13, 2007), 2007-Ohio-4513 (balance misdemeanor conduct versus felonious conduct, 40% reduction). *In re VanHorn*, Ct. of Cl. Nos. V2006-20241, V2006-20321tc (June 29, 2007), 2007-Ohio-3493 (diminished capacity due to alcohol consumption, lack of means rea, disproportionate level of harm, no criminal activity completed, 40% reduction).

6. Burden of proof shifts to claimant.

(R.C. 2743.60(F)): **When attorney general decides whether a claim should be denied because of an allegation of contributory misconduct, the burden of proof on the issue of that alleged contributory misconduct shall be upon the claimant, if either of the following apply:**

(1) The victim was convicted of a felony more than ten years prior to the criminally injurious conduct that is the subject of the claim or has a record of felony arrests under the laws of this state, another state, or the United States;

The burden of proof may be shifted based upon three felony arrests, one misdemeanor conviction and a diagnosis of marijuana abuse. *In re Harris*, Ct. of Cl. No. V94-36934tc (September 29, 1995).

(2) There is good cause to believe that the victim engaged in an ongoing course of criminal conduct within five years or less of the criminally injurious conduct that is the subject of the claim.

The amount of evidence required to shift the burden to applicant is less than a preponderance of the evidence. *In re Walker*, Ct. of Cl. No. V92-66437sc (May 24, 1994).

Prior conviction for breaking and entering, eighteen years before the criminally injurious conduct was sufficient to shift the burden of proof to the applicant with respect to the issue of contributory misconduct. *In re Martin*, 61 Ohio Misc.2d 280, 578 N.E.2d 562 (Ct. of Cl. 1988).

Police reports and coroner's report which indicate decedent was a recreational cocaine user is sufficient to establish an ongoing course of criminal conduct. *In re Cox*, Ct. of Cl. No. V92-59775tc (January 20, 1995).

I. Exclusion for Inmates

(R.C. 2743.60(G)): **The attorney general or the court of claims shall not make an award of reparations to a claimant if the criminally injurious conduct that caused the injury or death that is the subject of the claim occurred to a victim who was an adult and while the victim, after being convicted of or pleading guilty to an offense, was serving a sentence of imprisonment in any detention facility, as defined in section 2921.01 of the Revised Code.**

In re Cooper, 62 Ohio Misc.2d 1, 587 N.E.2d 979 (Ct. of Cl. 1990)

The inmate exclusion contained in R.C. 2743.60(G) applies when the applicant was assaulted in the Gallia County Jail while serving a sentence for civil contempt. The language of R.C. 2743.60(B) does not require the reason for incarceration be a criminal violation. *In re Smith*, Ct. of Cl. No. V2009-40731tc (February 24, 2010), 2010-Ohio-6713.

J. Unreasonable failure to submit expense to a collateral source

(R.C. 2743.60(H)): **If a claimant unreasonably fails to present a claim timely to a source of benefits or advantages that would have been a collateral source and that would have reimbursed the claimant for all or a portion of a particular expense, the attorney general or court of claims may reduce an award of reparations or deny a claim for an award of reparations to the extent that it is reasonable to do so.**

Factors such as age, educational background and familiarity with the collateral source involved, are taken into consideration when determining whether or not a claimant acted unreasonably.

The failure to submit expenses to a readily available collateral source creates a presumption that all expenses have been recouped. *In re Schroepfer*, 4 Ohio Misc.2d 15, 448 N.E.2d 528 (Ct. of Cl. 1983).

If it was the responsibility of the medical provider to submit necessary information for payment to applicant's insurance company and due to the provider failure to do so, it would be both unreasonable and unlawful to deny a claim for an award of reparations when the applicant did everything within his ability to have the claim paid by his insurance carrier. *In re Arnold*, Ct. of Cl. No. V2002-51508tc (January 16, 2003).

Where a person from the Department of Human Services receives the signed forms and subsequently does not inform the providers of Medicaid coverage, the applicant's claim cannot be denied pursuant to R.C. 2743.60(H). *In re Reilly*, Ct. of Cl. No. V92-53700tc (July 30, 1993).

If the provider failed to submit a claim for Medicaid payment for more than a year even though the provider was made aware of coverage on the date of service, the claim shall be reduced pursuant to R.C. 2743.60(H). *In re Singletary*, Ct. of Cl. No. V91-77770tc

(September 30, 1994). See also, *In re Brill*, Ct. of Cl. No. V2005-80207tc (December 30, 2005), 2005-Ohio-7137.

If applicant believes medical insurance will cover a hospitalization and later it is learned coverage is not available. Applicant did not act unreasonably in not submitting a claim to welfare when informed by medical personnel that applicant's family income was too high to qualify for coverage. *In re Mangan*, Ct. of Cl. No. V93-39212tc (April 28, 1995).

If the applicant becomes eligible for Medicaid after the receipt of treatment and the coverage is backdated, it is the applicant's responsibility to notify the provider of his Medicaid coverage. Failure to do so will result in a denial of the applicant's claim for this particular medical expense pursuant to R.C. 2743.60(H). *In re Griffith*, 66 Ohio Misc.2d 139, 643 N.E.2d 618 (Ct. of Cl. 1994).

The applicant's medical, psychological, and nature of the criminally injurious conduct must be taken into consideration when evaluating whether the applicant unreasonably failed to avail herself to a readily available collateral source. *In re Dunn*, Ct. of Cl. No. V2008-30961tc (December 11, 2009), 2009-Ohio-7220 aff'd jud (April 15, 2010), 2010-Ohio-6707.

Applicant acted reasonably by obtaining treatment outside her HMO for her sexually abused child after the HMO's assigned social worker stated that she was untrained and lacked experience in treatment for child sexual abuse victims. *In re Cardinal*, Ct. of Cl. No. V94-45526tc (September 29, 1995) aff'd jud (January 25, 1996).

An applicant did not unreasonably fail to utilize a collateral source when there were no available Christian counselors within the insurance company's network of providers and the applicant established it was necessary for both her and the victim's spiritual and psychological well-being to be treated by a Christian counselor. *In re Curcio*, Ct. of Cl. Nos. V2002-51486, V2002-51478tc (January 16, 2003).

Applicants acted reasonably when their grandson was a victim of sexual abuse and they sought a counselor outside their insurance carrier's list of providers, because he needed immediate attention and counselors within the carrier's network were either unavailable or could not see the victim for over six months. *In re N.H.*, 2016-00029-VI (June 3, 2016), 2016-Ohio-8607 adopted jud (June 22, 2016), 2016-Ohio-8611).

R.C. 2743.60(J) Human Trafficking Victims

(J) Nothing in this section shall be construed to prohibit an award to a claimant whose claim is based on the claimant's being a victim of a violation of section 2905.32 of the Revised Code if the claimant was less than eighteen years of age when the criminally injurious conduct occurred.

K. **R.C. 2743.601 Applicability of certain provisions pertaining to reparations.**

Except as otherwise provided in this section, the amendments to sections 2743.51, 2743.56, 2743.59, and 2743.60 of the Revised Code made by the act in which this section was enacted apply to all applications for an award of reparations filed on or after the effective date of this section and to all applications for an award of reparations filed before the effective date of this section for which an award or denial of the claim by the attorney general or the court of claims has not yet become final. The amendments to section 2743.60 of the Revised Code made by the act in which this section was enacted, to the extent that they eliminate the statute of limitations and to the extent that they remove the seventy-two hour reporting requirement, and the amendments to section 2743.51 of the Revised Code concerning guardian bonds shall apply to all claims for an award of reparations pending on the effective date of this section and to all claims for an award of reparations filed on or after the effective date of this section that are based on criminally injurious conduct not previously addressed by the attorney general or by the court of claims. (Effective date July 10, 2014).

III. SUBROGATION, REPAYMENT AND RECOVERY OF AWARD

A. State's Subrogation to Claimant's Rights. (R.C. 2743.66(D)(3) and (4), 2743.712 and 2743.72))

The reparations fund has a right of reimbursement, repayment and subrogation from:

a. The offender who was convicted of an offense which resulted in an award of reparations being granted. Multiple offenders are jointly and severally liable.

b. A third party who has an expressed or implied contractual or legal relationship which obligates them to pay any expenses.

c. Ineligible or overpaid claimants.

1. Procedure

(a) The attorney general may investigate a claim to determine the need for any action. The attorney general has the authority to issue subpoenas and subpoenas duces tecum to conduct discovery of matters related to the filing of an action. Subpoenas or subpoenas duces tecum filed can be enforced by the court of common pleas in Franklin County. Failure to comply with a subpoena or subpoena duces tecum may result in filing an action for contempt with the common pleas court.

(b) The attorney general, as the legal representative of the fund, may pursue a legal action to receive reimbursement, repayment, or subrogation. Subrogation actions must be filed in the Franklin county court of common pleas within six years from the date the last reparation award payment is made. Imprisonment tolls the six-year statute of limitations.

(c) Claimants must provide written notice to the attorney general concerning any legal actions taken which are related to the criminally injurious conduct which is the basis of the reparations claim. Failure to do so will make any settlement or resolution void. Once notified the attorney general has the option to:

i. Be joined as a party plaintiff,

ii. Require claimant to bring action as a trustee on behalf of the reparations fund or,

iii. Reserve these options until a later date.

(d) If claimant is required to bring the action as a trustee and is successful in recovering money for the reparations fund, reasonable attorney fees incurred may be deducted.

(e) The attorney general may assert reimbursement, repayment, or subrogation rights through correspondence or legal proceedings. The costs and attorney's fees of the attorney general are fully recoverable from a liable offender, third party or overpaid claimant.

Where the applicant executed a full release in a civil lawsuit settlement as the result of injuries to her minor child, the panel held the release concerned only the claims of the minor victim and not the applicant. Furthermore, since the settlement was solely for the benefit of the minor, the applicant could still receive an award based on the medical expenses incurred on behalf of the victim. Accordingly, the attorney general's rights of subrogation were not affected as the result of the settlement agreement. *In re Head*, Ct. of Cl. No. V91-83702tc (February 17, 1995).

When an applicant executes a complete release in the settlement agreement, the attorney general is precluded from exercising the right of subrogation on behalf of the reparations fund against the offender. By such action, the court found and concluded that applicant had waived any rights to participate in the Victims of Crime Program. *In re Hudnall*, 91 Ohio Misc.2d 115, 698 N.E.2d 113 (Ct. of Cl. 1995).

Applicant executed a complete release with her own insurance company for uninsured motorist benefits. Although the *Hudnall* case involved a general release for "bodily injury" that did not state how much, if any, was designated for pain and suffering, the court finds the *Hudnall* determination extends to any release and settlement agreement, however worded, where the effect of the document is to preclude the state's right to subrogation. *In re Feckner*, Ct. of Cl. No. V93-39000jud (May 30, 1996).

Applicant was injured in a motor vehicle accident involving a drunk driver. Applicant signed a full and final release with the offender's insurance carrier and received the policy limits ($12,500). The panel held the effect of the release must be examined on a case-by-case basis and an applicant should be excluded from participation in the program only to the extent that the state's right of subrogation is destroyed. Since applicant received the policy limits, releasing the insurer's liability had no effect on the state's subrogation rights. Coupled with the fact that the offender was insolvent and judgment-proof, the release of the offender did not prejudice the state's subrogation rights with regard to the offender. Accordingly, the settlement was treated as a collateral source not a bar to further participation in the program. *In re Cupp*, 91 Ohio Misc.2d 151, 698 N.E.2d 134 (Ct. of Cl. 1997).

If an applicant reaches a settlement agreement with the offender's insurance carrier, applicant has the burden to prove what portion of the settlement, if any, constitutes reimbursement for non-economic loss. Also, pursuant to *In re Cupp* it is the effect of the settlement release which determines the extent of an applicant's eligibility to participate in the reparations program. In the case at bar, although the recovery amount was less than the policy limit, the circumstances indicate the settlement amount did not negatively impact the state's subrogation

since the amount of the recovery was reasonable. *In re Fout-Craig*, Ct. of Cl. No. V93-27851tc (February 5, 1999).

An applicant should not be penalized by the Crime Victims Program for having to pay a portion of an automobile insurance settlement to his health insurer in settlement of a subrogation claim, and when the applicant no longer receives the benefit of his automobile insurance settlement to the extent of the amount paid in subrogation, the subrogated amount does not constitute a collateral source. The subrogated amount should be subtracted from the insurance proceeds, along with the attorney fees to arrive at the net settlement figure. *In re Dungey*, Ct. of Cl. No. V92-49877jud (February 23, 1999). See also, *In re Kissinger*, Ct. of Cl. No. V93-72805tc (July 21, 2000).

In determining the apportionment of an insurance settlement between economic and noneconomic loss, the sufficiency of the settlement with respect to the applicant's injuries must be taken into consideration. Any money paid for medical bills or in subrogation to third party insurers shall be treated as a medical expense in calculating the applicant's net collateral source availability. *In re Kennard*, Ct. of Cl. No. V97-63444tc (November 13, 2000).

B. Repayment (R.C. 2743.66(D)(3) and 2743.72(C))

If it is discovered that a claimant was not actually eligible to receive an award of reparations the attorney general may recover the award for the reparations fund.

The applicant was initially found eligible to receive an award of reparations, granted an award and subsequently, filed a supplemental reparations application seeking additional reparations, whereupon the attorney general's investigation discovered applicant had engaged in felonious conduct, use of cocaine, within ten years prior to the occurrence of the criminally injurious conduct. Accordingly, since applicant's felonious conduct was proved, by a preponderance of the evidence, the applicant actually was not eligible for the original award. Therefore, pursuant to R.C. 2743.72(C), applicant was ordered to repay the award and the attorney general was directed to proceed with the collection. *In re Snow*, 86 Ohio Misc.2d 14, 684 N.E.2d 757 (Ct. of Cl. 1996).

A final order is issued only by the judge of the court of claims. Accordingly, if the attorney general discovers the applicant engaged in felonious conduct which would make repayment necessary pursuant to the statute and no final order has been rendered, the doctrine of *res judicata* does not apply. The single commissioner pursuant to R.C. 2743.72(C) has ample authority to order repayment. *In re Beverly, Jr.*, Ct. of Cl. No. V88-57011jud (November 4, 1998).

However, where an award had been granted to an applicant prior to the enactment of Sub. H.B. 363, based on the decedent's death and it was known at that time that decedent engaged in felonious conduct, but controlling case law allowed the award, Sub. H. B. 363 could not be applied retroactively since the prior decision was *res judicata*. *In re Rowser*, Ct. of Cl. No. V94-69484tc (June 12, 1997). See also, *In re Ford*, 91 Ohio Misc.2d 187, 698 N.E.2d 157 (Ct. of Cl. 1997) and *In re Howard*, Ct. of Cl. No. V2008-

30812tc (December 11, 2009), 2009-Ohio-7219.

C. Recovery From Claimant (R.C. 2743.60(D), 2743.66(D)(4), and 2743.72(D))

If the claimant received money from another person or entity, including a collateral source, for an expense included in an award of reparations, the attorney general has the right to recover this money for the fund.

> Applicant was found eligible to receive compensation from the program and received original and supplemental awards. Applicant's attorney was notified of the state's right of subrogation. Subsequently, applicant's attorney notified this court that applicant had received a settlement from the offender's insurance company, for which he signed a complete release. Accordingly, pursuant to *In re Hudnall*, an applicant who executes a complete release in the settlement agreement waives any rights to participate in the Victims of Crime Program. Therefore, applicant was ordered to repay the previous awards and the attorney general was directed to proceed with collection. *In re Rau*, 86 Ohio Misc.2d 58, 684 N.E.2d 1322 (Ct. of Cl. 1997).
>
> Applicant received an award of reparations. Later applicant executed a settlement agreement with a third-party tortfeasor. Accordingly, pursuant to *In re Hudnall* an applicant who executes a complete release in the settlement agreement waives any rights to participate in the Victims of Crime Program. Therefore, applicant was ordered to repay the previous award and the attorney general was directed to proceed with collection. *In re Scott*, 86 Ohio Misc.2d 37, 684 N.E.2d 1308 (Ct. of Cl. 1997).

D. Restitution and Subrogation (R.C. 2743.72)

The attorney general has the authority to seek restitution from the offender for any money paid from the reparations fund. The attorney general is also subrogated to a collateral source that is available to the victim.

A trial court can order an offender to pay restitution to the fund as long as a financial background check of the offender has been made prior to the issuance of the order. The amount of restitution to the fund is based on the award granted to the victim. *State v. Riegsecker*, 6th Dist. No. F-03-22, 2004-Ohio-3808.

If a trial court determines restitution is appropriate to a third-party payer, i.e. insurance company, for costs incurred by a victim, the Ohio Victims of Crime Compensation Program shall be included in the restitution order. *State v. Kreischer*, 5th Dist. No. 03 CA20, 2004-Ohio-6854.

IV. DECISION PROCESS

A. Initial Determination--Attorney General

R.C. 2743.59(A)(C)(D) and (E)

1. The attorney general shall investigate each claim.

2. Collect information to make a decision from victim, claimant, or other sources through the use of subpoenas.

3. The finding of fact and decision by the attorney general shall contain all of the following:

a. The date and nature of the criminally injurious conduct and whether such conduct occurred;

b. Whether the criminally injurious conduct was reported to a law enforcement officer or agency, the date on which the conduct was reported, the name of the person who reported the conduct, and the reasons why the conduct was not reported to a law enforcement officer or agency;

c. The exact nature of the injuries sustained by the victim;

d. A specific list of economic loss sustained by the victim, claimant, or dependent;

e. Information concerning reimbursement from collateral sources;

f. A specific list of any benefits or advantages that the victim, the claimant, or a dependent has received or is entitled to receive from any collateral sources for economic loss that resulted from the conduct and whether a collateral source would have reimbursed the claimant for a particular expense if a timely claim had been made, and the extent to which the expenses likely would have been reimbursed by the collateral sources.

g. A description of any contributory misconduct in the claim, the felony record or arrest record of the victim and any other information that may result in a denial of a claim pursuant to R.C. 2743.60;

h. Whether the victim was a minor;

i. If the victim is a minor the date a complaint, indictment, or information was filed against the alleged offender; and

j. Any other information that is relevant to the claim.

4. The decision rendered by the Attorney General shall contain:

   a. Whether the claimant is eligible for an award of reparations. Whether payments of the award of reparations are to be made to the claimant, provider, or jointly and the amounts of the payments;

   b. Whether the payments should be made in a lump sum or by installments; and

   c. If no award is granted the reasons for this decision.

   The attorney general's decision should be rendered within one hundred twenty days after receiving the application. The attorney general may extend the decision time limit by notifying the claimant in writing and providing reasons.

B. Reconsideration (R.C. 2743.61(A))

A request for reconsideration may be filed no later than 30 days after a decision is rendered by the attorney general.

A reconsideration may concern the propriety of making or denying an award of reparations or the amount of the award.

A final decision shall be rendered within sixty days of receiving the request for reconsideration. The time may be extended by the attorney general notifying the claimant in writing and providing specific reasons for the extension.

If claimant does not file a request for reconsideration within 30 days the decision is final unless the attorney general determines the interests of justice allow for reconsideration.

Only the court of claims can render final judgments. The attorney general merely renders final appealable decisions. The attorney general's function is purely administrative in nature with respect to making an initial determination. The attorney general's scope of authority is limited since the attorney general is unable to afford applicants any hearing rights as due process requires. Consequently, the doctrine of res judicata cannot be applied by the attorney general to its prior decision since this would violate due process. *In re Parkins*, Ct. of Cl. No. V2002-51168tc (January 16, 2003); *In re Bolton*, Ct. of Cl. No. 2014-00092-VI (May 1, 2015).

The interest of justice required an untimely appeal to be heard where the applicant provided evidence of a series of intervening actions caused by the offender caused her to untimely file her appeal. *In re Nihot*, Ct. of Cl. No. V2011-60069tc (August 30, 2011).

If applicant files an appeal to the Attorney General's initial finding of fact and decision, the appeal shall be considered a request for reconsideration and remanded to the Attorney General for further proceedings. *In re Davis*, 2016-00012-VI jud (January 28, 2016).

C. Appeal-Magistrate (R.C. 2743.52(B), 2743.53(A) and 2743.61(B) and (D))

A notice of appeal may be filed no later than 30 days after the final decision of the attorney general is rendered, unless the interests of justice allow the appeal to be heard. See *In re Wesney*, 2015-00115-VI jud (March 9, 2015).

A claimant may appeal the amount of the award or the denial of the claim.

Within 14 days of the filing of the appeal the attorney general shall supply the court with the decision and all material the attorney general used to make the initial determination.

Within 90 days of receiving the appeal a hearing shall be scheduled and heard before the court.

Within 60 days of the hearing a written decision shall be rendered. If the initial determination of the attorney general is reasonable and lawful it shall be affirmed if, however, the initial determination is not supported by a preponderance of the evidence, or is unreasonable or unlawful the panel may reverse, and the decision shall be vacated or modified.

The court has the authority to order law enforcement officers to provide copies of information or data gathered during the investigation of the criminally injurious conduct. (R.C. 2743.55(A))

The attorney general may petition the court for an order finding contempt if necessary to carry out the powers and duties of the attorney general. (R.C. 2743.63)

If the mental, physical, or emotional condition of the victim or claimant is material for an award the court may order a victim or claimant to submit to a mental or physical examination and may order an autopsy of a deceased victim. The specifics surrounding the nature, type and time/date of the examination shall be provided to the victim or claimant. A detailed report of the findings of the autopsy or examination shall be filed with the attorney general. (R.C. 2743.62(B))

The court may require the claimant to supplement the application with reasonably available medical or psychological reports relating to the injury sustained. (R.C. 2743.62(D))

The court hearing is a trial de novo and affords applicants with due process rights. *In re Martin*, 61 Ohio Misc.2d 280, 578 N.E.2d 562 (Ct. of Cl. 1988); *In re Porter*, 85 Ohio Misc.2d 29, 684 N.E.2d 107 (Ct. of Cl. 1994); *In re Bolton*, 2014-00092-VI jud (June 15, 2015), *In re Nickum II*, 2015-00911-VI jud (May 25, 2017).

The rules of evidence do not apply. Any type of evidence may be submitted including hearsay. The evidence will be weighed with regard to its probative value. *In re Matin*, Ct. of Cl. No. V78-3410jud (March 14, 1980).

New evidence may be submitted and new issues raised. *In re Martin*, 61 Ohio Misc.2d 280, 578 N.E.2d 562 (Ct. of Cl. 1988); *In re Porter*, 85 Ohio Misc.2d 29, 684 N.E.2d 107 (Ct. of Cl. 1994) *In re Nickum II*, .2015-00911-VI jud (May 25, 2017).

However, the court may reverse a decision of the attorney general if it finds the decision is unreasonable or unlawful. "'Unlawful' means that which is not in accordance with law," and "[un]reasonable' means that which is not in accordance with reason, or that which has no factual foundation." *Johnson v. Kell*, 89 Ohio App.3d 623, 625-626 N.E.2d 1002 (10th Dist. 1993), citing *Citizens Commt. V. Williams*, 56 Ohio App.2d 61, 70, 381 N.E.2d 661 (10th Dist. 1977).

A court can independently analyze the evidence to determine whether it is in agreement with a position taken by the Attorney General which is not disputed by the applicant. *In re Schultz*, Ct. of Cl. No. V2008-30260tc (July 18, 2008), 2008-Ohio-4269 aff'd jud (October 30, 2008).

A certified copy of the journal entry of a criminal case is the requisite evidence necessary to establish a felony conviction. *In re Walker*, Ct. of Cl. No. V2008-30235tc (July 18, 2008), 2008-Ohio-4270.

Witnesses may be subpoenaed by either the applicant or the attorney general.

Physical evidence may be presented.

The applicant presented testimonial evidence that his back had been injured at the time of the criminally injurious conduct, however, medical evidence at the time of the crime makes no mention of a back injury. It was found the back injury was related to the crime based on the applicant's testimony, a victim's impact statement, the reparations application, and a later examination by a doctor. *In re Young*, Ct. of Cl. No. V2005-80215jud (November 18, 2005), 2005-Ohio-6648.

A written determination is made by the court.

If the final decision of the attorney general is not appealed within 30 days it is final unless the court determines the interests of justice allow hearing the untimely filed appeal. *In re Nelson*, Ct. of Cl. No. V2001-32429tc (February 14, 2002). Late appeal denied. *In re Wesney*, 2015-00115-VI jud (March 9, 2015).

Claimant signed a payment information form that contained a waiver of appeal but her attorney submitted a letter questioning the decision rendered by the attorney general however he failed to utilize the standardized appeal form, and the letter was filed after the 30-day appeal period expired. The panel found the claimant did not effectively waive her right to appeal since the purported waiver was not supported by sufficient consideration to be enforced, the failure to submit an appeal on the court's form did not terminate applicant's appeal rights, and the panel had the discretion, pursuant to statute, to hear untimely appeals. *In re Ruffin*, Ct. of Cl. No. V2002-51524tc (January 16, 2003), 2003-Ohio-6127.

Where the attorney general failed to raise the issue of applicant's conviction for domestic violence which would preclude an award pursuant to R.C. 2743.60(E)(1)(d), in the final decision, the court was not precluded from hearing the issue at the court hearing and denying the applicant's claim. Pursuant to R.C. 2743.55(A), the court is obligated to determine all matters relating to claims for awards of reparations. *In re Lang*, Ct. of Cl. No. V2006-20674jud (April 4, 2007), 2007-Ohio-2934.

Applicant should be afforded a reasonable amount of time to respond to the attorney general's motion to dismiss applicant's objection and notice of appeal. Guidance should be obtained from the court's rules and the Rules of Civil Procedure in determining what is a reasonable response period. *In re Huff*, 91 Ohio Misc.2d 131, 698 N.E.2d 122 (Ct. of Cl. 1996).

D. **Objections to the decision of a Magistrate**

Civ.R. 53 (D)(2)(b) states:

(b) *Motion to set aside magistrate's order.* Any party may file a motion with the court to set aside a magistrate's order. The motion shall state the moving party's reasons with particularity and shall be filed not later than ten days after the magistrate's order is filed. The pendency of a motion to set aside does not stay the effectiveness of the magistrate's order, though the magistrate or the court may by order stay the effectiveness of a magistrate's order.

(i) *Time for filing*. A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed.

(ii) *Specificity of objection*. An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection.

Civ.R. 53(D)(3)(b), the filing of a transcript, is not required in appeals from a magistrate's decision to a judge of the court of claims. *In re S.L.*, 2016-00677-VI jud (August 8, 2011).

Civ.R. 53 (D)(4) in pertinent part states:

(4) *Action of court on magistrate's decision and on any objections to magistrate's decision; entry of judgment or interim order by court.*

(a) *Action of court required.* A magistrate's decision is not effective unless adopted by the court.

(b) *Action on magistrate's decision*. Whether or not objections are timely filed, a court may adopt or reject a magistrate's decision in whole or in part, with or without modification. A court may hear a previously-referred matter, take additional evidence, or return a matter to a magistrate.

(c) *If no objections are filed.* If no timely objections are filed, the court may adopt a magistrate's decision, unless it determines that there is an error of law or other defect evident on the face of the magistrate's decision.

(d) *Action on objections*. If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. Before ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate.

(e) *Entry of judgment or interim order by court*. A court that adopts, rejects, or modifies a magistrate's decision shall also enter a judgment or interim order.

(i) *Judgment*. The court may enter a judgment either during the fourteen days permitted by Civ.R. 53(D)(3)(b)(i) for the filing of objections to a magistrate's decision or after the fourteen days have expired. If the court enters a judgment during the fourteen days permitted by Civ.R. 53(D)(3)(b)(i) for the filing of objections, the timely filing of objections to the magistrate's decision shall operate as an automatic stay of execution of the judgment until the court disposes of those objections and vacates, modifies, or adheres to the judgment previously entered.

(5) *Extension of time*. For good cause shown, the court shall allow a reasonable extension of time for a party to file a motion to set aside a magistrate's order or file objections to a magistrate's decision. "Good cause" includes, but is not limited to, a failure by the clerk to timely serve the party seeking the extension with the magistrate's order or decision.

(6) *Disqualification of a magistrate*. Disqualification of a magistrate for bias or other cause is within the discretion of the court and may be sought by motion filed with the court.

(7) *Recording of proceedings before a magistrate.* Except as otherwise provided by law, all proceedings before a magistrate shall be recorded in accordance with procedures established by the court.

V. POWERS, DUTIES AND RESPONSIBILITY OF THE ATTORNEY GENERAL

A. Powers and Duties:

1. Create an application form for an award of reparations. (2743.56(A))

2. Fully investigate a claim for an award of reparations. (2743.59(A))

   a. Depose witnesses. (2743.59(B)(1))

   b. Issue subpoenas and subpoenas duces tecum. (2743.59(B)(2)(a)(b))

   c. Petition the judge of the court of claims for a contempt order for persons who do not lawfully comply with subpoena or subpoena duces tecum. (R.C. 2743.59)(B)(d)

   d. Order law enforcement agencies to provide copies of information or data concerning the criminally injurious conduct. (R.C. 2743.55(A)). However, provide immunity for the disclosure of information. (R.C. 2743.58)

   e. Order victim or claimant to undergo mental or physical examination. (R.C. 2743.62(B))

   f. Order an autopsy of a deceased victim. (R.C. 2743.62(B))

   g. Petition of the court of claims for order of contempt to carry out powers and duties. (R.C. 2743.63))

3. Make awards of reparations or deny claims for awards of reparations. (R.C. 2743.52(A))

   a. Issue a finding of fact and decision. (R.C. 2743.59(C) and (D))

   b. Audit fee bill payments for claims for medical, psychological, dental, chiropractic, hospital, physical therapy and nursing services and adjust fee bill reimbursements in accordance with guidelines adopted by the administrator of workers compensation. (R.C. 2743.521(A))

   c. Grant emergency awards. (R.C. 2743.67))

   d. Designate an adult family member of a minor to receive an award of one thousand dollars or less for the minor. (R.C. 2743.66(E))

4. Reconsider awards of reparations. (R.C. 2743.61(A))

5. Process and pay attorney fees to attorneys representing claimants pursuant to R.C. 2743.51 to 2743.72. (R.C. 2743.65))

6. Act as legal representatives of the reparations fund. (R.C. 2743.711))

a. Enforces rights of reimbursement, repayment and subrogation against:

1. Offender, (R.C. 2743.72(G))

2. Claimant, (R.C. 2743.72(C) and (B)) and

3. Third party. (R.C. 2743.72(B))

b. Receive restitution. (R.C. 2743.72(E))

c. Join civil action of claimant to recover monies for reparations fund or require claimant to bring such civil action. (R.C. 2743.72(H)(1) and (2))

d. Written authorization for a settlement agreement between claimant and third-party offender. (R.C. 2743.72(I))

e. Defend the fund in hearing appeals before the court of claims. (R.C. 2743.711)

B. Responsibilities

1. Decision Making

a. Make a written finding of fact and decision within one hundred twenty days after receiving the reparations application. (R.C. 2743.59(E))

b. Notify claimant in writing if one hundred twenty-day period is extended and state specific reasons for extension. (R.C. 2743.59(E))

c. Suspend proceedings in a claim at the request of the prosecuting attorney due to the commencement of a criminal prosecution. (R.C. 2743.64))

d. Insure confidentiality of confidential materials obtained conducting the investigation. (R.C. 2743.62(2)(a))

e. Provide a person who takes a mental or physical exam at the direction of the attorney general to be provided with a copy of the report. (R.C. 2743.62(C))

f. Respect the victim's or claimant's privacy if violations of R.C. 2907.02 to 2907.07 are the basis of the claim. (R.C. 2743.62(E))

g. Issue a final decision within sixty days after a request for reconsideration has been filed. (R.C. 2743.61(A))

h. Notify claimant in writing if the sixty days period is extended and state specific reasons for the extension. (R.C. 2743.61(A))

2. Appeals

   a. The attorney general shall provide a notice of appeal form to a claimant at the time the final decision is rendered. Local court of claims Rule 24(A)(1).

   b. If appeals are filed with the attorney general's office rather than the court of claims, the attorney general shall forward the notice of appeal to the court within three days. Local court of claims Rule 24(A)(3)

   c. The attorney general shall file the claim record with the court of claims within 14 days after the notice of appeal is filed. Local court of claims Rule 24(A)(5)

   d. Any correspondence filed by the applicant with the Attorney General within 90 days after a final decision is rendered shall be forwarded to the co for review and determination as to whether the correspondence constitutes an appeal. Local court of claims Rule 24(A)(4).

   e. A notice of appeal filed prior to the final decision shall be treated as being filed immediately after such decision is made. Local court of claims Rule 24(A)(6).

3. Miscellaneous

   a. The cost of printing and distributing the pamphlet prepared by the attorney general pursuant to R.C. 109.42 and information cards or other printed material to law enforcement agencies and prosecuting authorities and publicizing the availability of awards of reparations pursuant to R.C. 2743.71.

   b. Prepare and transmit an annual report to the governor, president of the senate, speaker of the house and minority leaders of both parties a report concerning the activities of the Ohio Crime Victim's Compensation Program. (2743.69(A))

   c. Administer and pay the costs associated with medical examinations and antibiotic costs incurred as the result of sexual offenses committed against a person pursuant to 2907.28. (R.C. 2743.191(A)(1)(e), (h) and 2907.28)

   d. Pay the costs of administering R.C. 2969.01 to 2969.06, recovery of offender's profit fund. (R.C. 2743.191(A)(1)(e))

   e. Administer the office of crime victim's assistance pursuant to R.C. 109.91 and 109.92. (R.C. 2743.191(A)(1)(g))

   f. Pay the costs of administering a DNA specimen collection procedure pursuant to R.C. 2152.74 and, R.C. 2901.07 of performing DNA analysis of these DNA specimens, and entering the resulting DNA records regarding those analyze into the DNA data base pursuant to section 109.573 of the Revised Code. (R.C. 2743.191(A)(1)(k))

g. Payment of actual costs associated with the initiatives by the attorney general for the apprehension, prosecution, and accountability of offenders and the enhancing of services to crime victims. These costs should not exceed five percent of the balance of the reparations fund at the close of the immediate previous fiscal year. (R.C. 2743.191(A)(1)(l))

h. The costs of administering the adult parole authority's supervision pursuant to division (E) of section 2971.05 of the Revised Code of sexually violent predators who are sentenced to a prison term pursuant to division (A)(3) of section 2971.03 of the Revised Code and of offenders who are sentenced to a prison term pursuant to division (B)(1)(a), (b), or (c), (B)(2)(a), or (c), or (B)(3)(a), (b), (c), or (d) of that section. (R.C. 2743.191(A)(1)(m)).

i. Subject to the limit set forth in those sections, the costs of the installation and monitoring of an electronic monitoring device used in the monitoring of a respondent pursuant to an electronic monitoring order issued by a court under division (E)(1)(b) of section 2151.34 or division (E)(1)(b) of section 2903.214 of the Revised Code if the court determines that the respondent is indigent or used in the monitoring of an offender pursuant to an electronic monitoring order issued under division (B)(5) of section 2919.27 of the Revised Code if the court determines that the offender is indigent. (R.C. 2743.191(A)(1)(n)).

VI. BURDEN OF PROOF, PRESUMPTIONS AND EVIDENCE

A. Burden of proof

1. The applicant has the burden of proof for the following:

a. Present a prima facia case for reparations award;

b. A victim of criminally injurious conduct;

c. Meets the necessary residency requirement;

d. Qualify as a claimant;

e. Suffered economic loss related to the criminally injurious conduct;

f. The economic loss is reasonable;

g. The economic loss was incurred;

h. Was gainfully employed at the time of the criminally injurious conduct;

i. Lost a job opportunity as a result of criminally injurious conduct;

j. Was a dependent, in fact, of the decedent;

k. Was receiving unemployment benefits at the time he was injured;

l. That the requirements for an award have been satisfied by a preponderance of the evidence;

m. Rebut an inference raised by the attorney general which would disqualify the claimant from receiving an award;

n. Qualifies to receive an emergency award;

o. Has to rebut the presence of contributory misconduct if:

p. Pursuant to the holding in *In re Fout-Craig*, Ct. of Cl. No. V93-27851tc (February 5, 1999), determine what portion of a settlement received as a result of the criminally injurious conduct constitutes pain and suffering or reimbursement for economic loss.

q. Has the burden that the victim did not engage in contributory misconduct if any of the following apply:

(1) The victim was convicted of a felony more than ten years prior to the criminally injurious conduct or has a record of felony arrests or,

(2) There is good cause to believe the victim engaged in an ongoing course of criminal conduct within five years or less of the criminally injurious conduct.

2. The attorney general has the burden of proof for the following:

a. The criminal conduct was not reported to law enforcement;

b. The offender or his accomplice would benefit from an award granted to a claimant;

c. The victim failed to cooperate with law enforcement;

d. The victim engaged in contributory misconduct;

e. The claimant unreasonably failed to submit economic loss to a readily available collateral source;

f. The victim or the applicant was convicted of a felony within ten years of the criminally injurious conduct or during the pendency of the claim;

g. Establish by a preponderance of the evidence that the victim or claimant engaged in an offense of violence or a violation of 2925.03 of the Revised Code within ten years prior to the criminally injurious conduct or during the pendency of the claim;

h. The claimant was convicted of a violation of 2912.22 or 2919.25 of the Revised Code within ten years of the occurrence of the criminally injurious conduct or during the pendency of the claim;

i. Establish by a preponderance of the evidence that the victim engaged in conduct which was a felony violation of 2925.11 of the Revised Code at the time of the criminally injurious conduct;

j. The victim was engaged in an ongoing course of criminal activity within five years of less of the criminally injurious conduct or was convicted of a felony more than ten years prior to the criminally injurious conduct;

k. The victim was serving time in a detention facility when he was a victim of criminally injurious conduct;

l. Rebut any evidence presented by the applicant which creates a prima facia case for eligibility.

B. Presumptions

1. Proof of conviction of a person whose conduct gave rise to a claim is conclusive evidence that the crime was committed, unless an application for rehearing, an appeal of the

conviction, or certiorari is pending, or a rehearing or new trial has been ordered. (R.C. 2743.64)

2. If a decedent was not financially supporting the spouse and children at the time of decedent's death there is a presumption that the failure to support would have continued with regard to an after-born child. *In re Garrett*, Ct. of Cl. No. V80-41612jud (June 22, 1983). However, if the decedent acknowledges prior to his death that the child was his and paid for the examination and treatment in connection with the pregnancy, then the after born child is considered a dependent. *In re Kristanc*, Ct. of Cl. No. V79-3585tc (May 17, 1983).

3. A positive toxicology report for a victim indicates the knowing and voluntary ingestion of drugs, absence evidence to the contrary. *In re Trice*, Ct. of Cl. No. V92-83781tc (April 26, 1995).

4. A person who qualifies for free services under the Ohio Hospital Care Assurance Program does not incur an expense for treatment and accordingly does not incur any economic loss. *In re Wilson*, Ct. of Cl. No. V92-83935jud (November 30, 1994).

C. Evidence

R.C. 2743.53(A)

The court of claims shall hear and determine all matters relating to appeals from decisions of the attorney general pursuant to sections 2743.51 to 2743.72 of the Revised Code.

1. The rules of evidence do not apply to proceedings before the court of claims. *In re Grow*, 7 Ohio Misc.2d 26, 454 N.E.2d 618 (Ct. of Cl. 1983).

3. The use of affidavit evidence. Affidavits are admitted and evaluated in the same way and their substantive value tested by the same standards, as all other evidence. *In re Rea*, 61 Ohio Misc.2d 732, 584 N.E.2d 1350 (Ct. of Cl. 1989).

3. The applicant must present evidence to prove by a reasonable degree of medical certainty that the medical treatment incurred was caused by the criminally injurious conduct. *In re Bailly*, Ct. of Cl. No. V78-3484 jud (August 23, 1982).

VII. MISCELLANEOUS

A. Emergency Award (R.C. 2743.67))

An emergency award may be made if:

a. It appears likely a final award will be made in favor of the claimant;

b. The victim or claimant will suffer undue hardship if an award is not granted; and

c. An emergency award will not exceed $2,000.00.

The amount of the emergency award will be deducted from the final award of reparations and if ultimately the award is denied the entire emergency award must be repaid.

Although the attorney general ordinarily makes emergency awards the panel of commissioners in *In re Lemieux*, Ct. of Cl. No. V2004-60920tc (December 3, 2004), 2004-Ohio-7341, found there was sufficient evidence to prove applicant had sustained work loss and due to his dire situation an emergency award in the amount of $2,000.00 should be made to him.

B. Supplemental Reparations Application (R.C. 2743.68)

A supplemental reparations application may be filed within six years after the last decision either by the attorney general or the court is rendered if any of the following apply:

a. The claimant was initially granted an award of reparations and the claimant incurred additional unreimbursed out-of-pocket expenses;

b. The claimant was initially denied an award due to collateral source reimbursement, however, the collateral source actually reimbursed less than was initially determined;

c. The claimant was initially denied an award because collateral sources totally reimbursed the claimant's out-of-pocket expenses and now the claimant has incurred additional unreimbursed out-of-pocket expenses; or

d. The claimant was initially denied an award because no unreimbursed out-of-pocket expenses had been incurred, but now unreimbursed out-of-pocket expenses have been incurred.

After the six-year time period has lapsed, the claim is dormant.

The statute allows additional filings to supplement an original reparations application. As additional out-of-pocket expenses are incurred a supplemental reparations application can be filed as long as it is filed no more than six years after the last decision of the

attorney general or the court of claims. There is no limit as to the number of supplemental reparations applications that can be filed. However, once the statutory maximum of $50,000 is reached, the claim is closed.

Lack of knowledge of the existence of the Victims of Crime Compensation Program or its provisions does not toll the statute of limitations. *In re Clark*, 8 Ohio Misc.2d 34, 457 N.E.2d 965 (Ct. of Cl. 1983). See also, *In re Packard*, Ct. of Cl. No. V2010-50388jud (February 15, 2011); *In re Torres*, Ct. of Cl. No. V2010-50761tc (January 27, 2011), 2011-Ohio-5289; *In re Robinson*, Ct. of Cl. No. V2009-40773tc (March 12, 2010) and *In re Proviano*, Ct. of Cl. No. V2007-90722jud (February 19, 2009), 2009-Ohio-7226.

Claimant filed a supplemental reparations application 14 days after the five-year filing period expired. Claimant was seeking reimbursement for additional medical expenses incurred as a result of the criminally injurious conduct. The panel found the supplement application was mailed prior to the expiration of the filing period, but received after the period expired, and the expenses were related to the criminally injurious conduct. Accordingly, the time period for filing the supplemental reparations application was extended. *In re Ross*, Ct. of Cl. No. V2002-50561tc (January 16, 2003).

However, the panel found the applicant failed to prove, within a reasonable degree of medical certainty, that her diagnosis of post-traumatic stress disorder and recurrent major depression prevented her from timely filing a supplemental compensation application. Evidence had shown she contacted an attorney prior to the filing date and had filed for S.S.I. benefits from 2000-2003. *In re Gardner,* Ct. of Cl. No. V2003-40909tc (August 11, 2004), 2004-Ohio-5080.

The court exercised its equitable power to grant an award when the supplemental compensation application was filed after the five years ran, when the applicant established by a preponderance of the evidence based upon medical evidence that her physical and psychiatric condition did not allow her to file the application in a timely manner. *In re Preston*, Ct. of Cl. No. V2006-21140tc (August 3, 2007), 2007-Ohio-4703 aff'd jud (December 4, 2007), 2007-Ohio-7275; *In re Elton III*, Ct. of Cl. No. 2014-00671-VI (December 12, 2014) aff'd jud (February 11, 2015).

An applicant who files a supplemental compensation application after the judge of the court of claims has rendered a final decision in the same matter is barred by the doctrine of res judicata. *In re Robinson*, Ct. of Cl. No. V2010-50566tc (August 25, 2011).

C. Guardianship (R.C. 2743.51(4)(a) and 2743.66(E))

R.C. 2743.51(F)(4)(a) states:

1. **"Allowable expense" includes reasonable expenses and fees necessary to obtain a guardian's bond pursuant to section 2109.04 of the Revised Code when the bond is required to pay an award to a fiduciary on behalf of a minor or other incompetent.**

2. If a person entitled to an award of reparations is under eighteen years of age and if the

amount of the award exceeds one thousand dollars, the order providing for the payment of the award shall specify that the award be paid either to the guardian of the estate of the minor appointed pursuant to Chapter 2111 of the Revised Code or to the person or depository designated by the probate court under section 20111.05 of the Revised code. If the person entitled to an award of reparations is under eighteen years of age and if the amount of the award is one thousand dollars or less, the order providing for the payment of the award may specify that the award be paid to an adult member of the family of the minor who is legally responsible for the minor's care or to any other person designated by the attorney general or the court of claims.

VIII. ATTORNEY FEES (R.C. 2743.65)

A. The court of claims has no jurisdiction to rule on attorney fees pursuant to R.C. 2743.65. *State ex rel. DeWine v. Court of Claims of Ohio*, 130 Ohio St.3d 244, 2011-Ohio-5283, 957 N.E.2d 280.

B. The attorney general shall forward a copy of this section to the attorney with the application form for attorney's fees. The attorney shall file the application form with the attorney general. The attorney general's decision with respect to an award of attorney's fees is final ten days after the attorney general renders and mails a copy of the decision to the attorney at the address provided by the attorney. The attorney may request reconsideration of the decision on grounds that it is insufficient or calculated incorrectly. The attorney general's decision on the request for reconsideration is final.

Revised Code 2743.65(A) requires that an attorney fee be determined by the attorney general. The attorney fee process is commenced by the filing of an itemized fee petition with the attorney general's office. All fees must be commensurate with services rendered under R.C. 2743.51 to 2743.72.

1. The maximum rate which an attorney can charge is $60 per hour.

    a. A maximum of $750 for claims resolved without the necessity of filing an appeal.

    b. A maximum of $1020.00 for claims in which an appeal is filed with the court of claims plus $30.00 per hour for travel time to attend the hearing if the attorney's office is not located in Franklin, Delaware, Licking, Fairfield, Pickaway, Madison or Union Counties.

    c. A maximum of $1320.00 for claims in which an appeal is filed with the court of claims.

    d. A maximum of $750.00 for filing a supplemental reparations application.

    e. A maximum of $200 if the claim is denied on the basis of a claimant's or victim's conviction for a felony prior to the filing of the claim.

        (i) If the claimant or victim committed a felony during the pendency of the claim the $200 fee limitation does not apply.

        (ii) If the attorney had knowledge of the claimant's or victim's felony conviction prior to the filing of the claim, the filing of the claim may be determined frivolous and attorney fees denied.

An attorney may receive a travel fee at the rate of $30 per hour for travel to a hearing before the court of claims. However, no travel fee is allowed if the attorney's main office is located in Franklin, Delaware, Licking, Fairfield, Pickaway, Madison or Union counties.

f. A maximum of $60 per hour may be charged for the creation of a guardianship if the guardianship is required in order for an individual to receive an award of reparations.

g. The attorney general is required to forward an application form for attorney fees to the attorney of the claim. The form must:

(i) Inform the attorney of the requirements under this section;

(ii) Contain a verification statement comporting with the law prohibiting falsification;

(iii) Require an itemized fee statement;

(iv) Require that the completed fee statement be served upon the claimant;

(v) Include a notice that the claimant may oppose the fee statement by notifying the attorney general's office in writing within 10 days and;

Attorney fees are paid regardless of the outcome of the applicant's claim. Attorney fees will be denied only if the claim or appeal was frivolous.

2. No attorney fees will be allowed for:

a. Estate work or representation of a claimant against a collateral source;

b. Duplication of investigative work required to be performed by the attorney general pursuant to R.C. 2743.59;

c. Performance of unnecessary criminal investigation of the offense;

d. Presenting (or appealing) an issue which has been repeatedly ruled upon by the highest appellate authority, without a unique issue of fact or law to distinguish it;

e. The fee request is unreasonable, not commensurate with services rendered or violates the Ohio Code of professional responsibility; or

f. Services which are determined to be frivolous, may result in attorney fees being reduced or denied.

The attorney should consider that R.C. 2743.59 requires the attorney general to investigate the claim fully. The attorney general's duties require him to obtain police reports, medical information and verification, of all other items of information which relate to the applicant's claimed economic losses. During the attorney general's investigation, little or no substantial legal work is required by an applicant's attorney unless the attorney general specifically requests information from the applicant or the attorney. The attorney should be compensated for any efforts reasonably expended in

obtaining and submitting information requested by the attorney general.

More or less hours than contained under the attorney fee maximums provided in R.C. 2743.65(A)(1), (2), (3), (4), or (5) may be awarded depending on the nature of the case.

An attorney cannot receive payment pursuant to R.C. 2743.65 if the attorney was granted an allowable expense under R.C. 2743.51(F)(4) in the same case.

A contract or agreement between the attorney and claimant for the payment of attorney fees or attorney fees in excess what has been granted pursuant to the decision by the attorney general is void and unenforceable.

3. Witness Fees

R.C. 2743.65(J)

(J) Each witness who appears in a hearing on a claim for an award of reparations shall receive compensation in an amount equal to that received by witnesses under section 119.094 of the Revised Code.

R.C. 119.094 states:

(A) Unless otherwise provided by the Revised Code, each witness subpoenaed to an adjudication hearing shall receive twelve dollars for each full day's attendance and six dollars for each half day's attendance. Each witness also shall receive fifty and one-half cents for each mile necessarily traveled to and from the witness's place of residence to the adjudication hearing.

(B) As used in this section:

(1) "Full day's attendance" means a day on which a witness is required or requested to be present at an adjudication hearing before and after twelve noon, regardless of whether the witness actually testifies.

(2) "Half day's attendance" means a day on which a witness is required or requested to be present at an adjudication hearing either before or after twelve noon, but not both, regardless of whether the witness actually testifies.