

Contributory Conduct Requires Causal Connection, Kansas Court Rules

A 15-year-old driver whose blood alcohol level exceeded the legal limit when he was killed by a drunk driver cannot be denied compensation on contributory misconduct grounds unless there is some showing that his behavior caused or contributed to his victimization, according to a new ruling from the Kansas Supreme Court.

While the victim's conduct was illegal, the court said that there was no evidence that his violation of legal drinking limits had caused or contributed to his injury, and "the simple fact that [the victim] violated the driving under the influence statute for a person under the age of 21, without any further explanation of how it contributed to the accident," was insufficient to make a finding of contributory misconduct.

The decision is binding only in Kansas, but it relies heavily on similar rulings in other states. Courts in Ohio, North Carolina and Michigan also have declared that a compensation program must find some causal or contributory connection between the victim's behavior and the victimization, rather than rely solely on the victim's illegal behavior for denial.

It's important to note that some states do have statutory provisions that authorize denial or reduction if the victim is committing a criminal act at the time of the victimization, regardless of whether his conduct caused that victimization. (The Kansas board is considering seeking such a legislative change.) But many compensation laws are similar to the current Kansas statute. It appears that at least in those states, compensation programs must find causal connection before making decisions that victims are ineligible — the victim's criminal conduct alone likely is insufficient.

The victim in the Kansas case died after his car was hit head on by a drunk driver who had crossed the center line on the highway. Blood samples taken at the scene showed that the victim had a blood alcohol concentration (BAC) of .05, exceeding the legal limit of .02. The offending driver, who also was killed, had a BAC of .15. There were no eyewitnesses, and police were able to determine only that the offending driver was at fault for going into the oncoming lane when the crash occurred.

The Kansas Crime Victim Compensation Board originally denied the claim from the victim's parents for \$5,000 in funeral expenses, basing its ruling on its contributory misconduct statute and on an administrative rule allowing the board to consider "abuse of alcohol or an illegal substance" as an act that "may signify contributory misconduct." The board noted that the victim "was unlawfully operating a motor vehicle upon the highway." After an appeal hearing, the board partially approved the claim but reduced it by 25% "due to the underage alcohol level of the victim."

The victim's parents appealed to the District Court, which upheld the Kansas board's decision. The court found that the decision was supported by substantial evidence, and that deference had to be given to the board's decision unless it was "unreasonable, arbitrary, or capricious." "It cannot be said that there is no rational basis for the [board's] interpretation of the statute," the court wrote. ". . . Mr. Fisher was driving in violation of the law. Furthermore, abuse of alcohol or drugs is specifically listed [in Kansas administrative rules] as being a factor that may signify contributory misconduct."

The Kansas Supreme Court disagreed, emphasizing that the Kansas rule requires the Board to find in any contributory misconduct denial or reduction that "the claimant or the victim through which the claimant makes the claim has contributed to the injury for which the claim is made."

Excerpts from the decision follow. The full decision can be found at **Fisher v. Kansas Crime Victims Compensation Board**, 280 Kan. 601, 124 P.3d 74 (2005)

National Association of Crime Victim Compensation Boards
NACVCB Analysis of Contributory Conduct Decision in *Fisher v. Ks. Crime Victims Comp. Bd.*

The Kansas Supreme Court ruling:

Greg and Linda Fisher filed a claim for the death of their son Jeremy before the Kansas Crime Victims Compensation Board. Twenty-five percent of the allowed compensation was withheld by the Board based upon “the contributory misconduct” of Jeremy. . . . The district court affirmed the Board’s determination. The question . . . is whether Jeremy’s conduct on the morning of the accident contributed to his death under [Kansas law and rules]. We hold that his conduct did not contribute to his death, reverse the district court, and remand with directions.

. . . .
The Board awards compensation to claimants for economic loss arising from criminal conduct if satisfied by a preponderance of the evidence that the requirements for compensation have been met.

However, [Kansas law] provides: “Compensation otherwise payable to a claimant shall be diminished: . . . To the extent, if any, that the board deems reasonable because of the contributory misconduct of the claimant or of a victim through whom the claimant claims.” [Kansas law] grants the Board power to adopt rules and regulations to carry out the provisions of the Act. Kansas Administrative Rule 20-2-8, which addresses contributory misconduct, provides in relevant part:

“(a) An award of compensation may be reduced if the board finds that the claimant or the victim through whom the claimant makes the claim has contributed to the injury for which the claim is made. The following acts or behavior may signify contributory misconduct:

Consent, provocation or incitement, including the use of fighting words or obscene gestures;
Willing presence in a vehicle operated by a person who is known to be under the influence of alcohol or an illegal controlled substance;

Abuse of alcohol or an illegal substance;

Failure to retreat or withdraw from a threatening situation when an option to do so is readily available; or

Failure to act as a prudent person.”

. . . .
The Board argues it had a rational basis for its interpretation of “contributory misconduct,” *i.e.*, “to prevent unlawful conduct or to recognize the same and promote lawful conduct” by reducing “awards, or not make awards at all if there is evidence of unlawful conduct.”

. . . .
No question exists that Jeremy engaged in misconduct by driving with a BAC of .05 in this case; rather, the critical issue is whether the misconduct was “contributory.” Not only must the misconduct be “contributory,” but it also must have “contributed to the infliction of the injury for which the claim is made.” K.A.R. 20-2-8 [the rule cited above].

The vast majority of cases discussing “contributory misconduct” arising in a crime victims reparations context are from North Carolina and Ohio. Both states have interpreted “contributory misconduct” as including a proximate cause or causal relationship element. . . .

In *McCrimmon v. Crime Victims Compensation Comm.*, 121 N.C. App. 144, 147, 465 S.E.2d 28 (1995), the court found that the claimant’s theft of money from a convenience store was the proximate cause of a store owner shooting the claimant in the back as he attempted to flee and, therefore, was “contributory misconduct” within the meaning of the statute permitting denial of the claim. In contrast, in *Evans v. N.C. Dept of Crime Control*, 101 N.C. App. 108, 118, 398 S.E.2d 880 (1990), the North Carolina Court of Appeals found substantial evidence did not support the commission’s finding that the victim engaged in “contributory misconduct” because the victim’s injuries were not reasonably foreseeable when he left a bar with two women to go dancing at another bar and was stabbed by one of the women.

. . . .
In *In re McNeil*, 6 Ohio Misc. 2d 12, 453 N.E.2d 1309 (1983), the Ohio Court of Claims upheld the denial of crime victim reparations where the victim solicited a prostitute to his home and was subsequently stabbed and killed by the prostitute because the victim was involved in “contributory misconduct.” Of note in this case, one explanation of contributory misconduct was as follows:

“A victim does not have to be innocent of all misconduct, but only that misconduct which can reasonably be said to have caused or contributed to the injury. Contributory misconduct connotes a finding that the misconduct is ‘a’ or ‘the’ proximate cause, but for which the injury would not have occurred.”

In *In re Sotak*, 61 Ohio Misc. 2d 808, 585 N.E.2d 580 (1990), the claimant was injured in an automobile accident where he was a passenger in a car in which the driver was driving under the influence. The attorney general recommended denying reparations because the claimant’s failure to wear a seat belt in

National Association of Crime Victim Compensation Boards
NACVCB Analysis of Contributory Conduct Decision in *Fisher v. Ks. Crime Victims Comp. Bd.*

violation of Ohio law constituted contributory misconduct. The Ohio Court of Appeals disagreed on appeal, reasoning:

“Although Sotak’s failure to wear a seat belt may have been unlawful and bear some causal relationship to the fact that she sustained personal injury, her conduct did not bear any causal relationship to the offender’s decision to drive while under the influence of alcohol. 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. Put simply, the offender’s decision to drive drunk was not motivated or instigated by the applicant’s decision not to wear a seat belt. Therefore, the applicant’s claim will be granted.”

See also *In re Damiano*, 91 Ohio Misc. 2d 162, 698 N.E.2d 141 (Ct. Cl. 1997) (tavern patron who voluntarily engaged in physical altercation engaged in contributory misconduct warranting a reduction in reparations; *In re Svoboda*, 91 Ohio Misc. 2d 166, 698 N.E.2d 141, (applicant for reparations who did not initiate confrontation engaged in “contributory misconduct” by throwing offender to ground and repeatedly striking offender’s head against sidewalk justifying reduction of award).

Although the Michigan Crime Victims Reparations Act does not use the term “contributory misconduct,” its interpretation of “contributed to the infliction of his injury” provides further guidance in this case . . . In *McMillan v. Crime Victims Compensation Bd.*, 155 Mich. App. 358, 399 N.W.2d 515 (1986), the claimant was shot in the leg, while in an unlicensed bar (a misdemeanor), after he asked a woman to dance and commented on the obscene language her husband used in response to his request. The Michigan Court of Appeals considered whether the claimant’s actions provided a basis for the board’s denial of his claim because he “contributed to the infliction of his injury.”

Of note to this case, the court specifically rejected the Board’s interpretation of this language as holding “that anytime a claimant violates any criminal statute and the violation of the criminal statute is in any way a cause in fact of the claimant’s injury, the claimant has ‘contributed to the infliction of his injury.’ Such an interpretation would lead, in some situations, to results which would appear contrary to the Legislature’s intent to aid certain crime victims who are not blameworthy in causing their injuries.”

. . . The court found that if the risk that the victim’s injury would result from a particular criminal statute violation is foreseeable and not too remote, then the board should be allowed to deny or reduce his or her award under the statute. However, if the risk of injury due to the violation is very remote and unforeseeable, the board cannot deny or reduce his or her award under the statute.

Under the facts of *McMillan*, the court concluded that the claimant’s criminal violation merely involved his knowing presence in an unlicensed bar and the risk of being shot while merely present in an unlicensed bar was too remote and unforeseeable to hold him blameworthy for his injuries. The court found that the obvious, proximate cause of the claimant’s injury was being shot by the husband, reasoning:

“While it is true that claimant would not have been injured ‘but for’ having gone to the [unlicensed bar, referred to as a ‘blind pig’], it can be said his presence there was no more the cause of his injury than would his presence on a public street have been the cause if he had been shot by [the husband] on a public street. There is no apparent basis for saying that presence in a blind pig makes one more likely to be shot than presence on a public street at 2:30 a.m. in the morning. Thus, these analogies would seem to indicate that claimant’s mere presence in the blind pig did not contribute to his injury.”

. . . In this case, the [Kansas] Board did not specifically define “contributory misconduct” but found that Jeremy engaged in contributory misconduct by “unlawfully operating a motor vehicle upon the highway” with a BAC over the legal limit for a person under the age of 21. The Board’s conclusion can be interpreted in two ways. First, this conclusion suggests that the simple fact that Jeremy violated the driving under the influence statute for a person under the age of 21, without any further explanation of how it contributed to the accident, was per se contributory misconduct warranting a reduction of compensation. However, this interpretation focuses only on the term “misconduct” and completely ignores the term “contributory.” This interpretation runs contrary to the presumption that the legislature does not intend to enact useless or meaningless legislation and the obligation to interpret a statute in such a way that part of it does not become surplusage.

Second, as no evidence was presented that Jeremy was speeding or driving erratically, the Board seems to have held that “but for” Jeremy’s unlawful presence on the road he would not have been killed. This is precisely the argument rejected by the Michigan Court of Appeals in *McMillan* in its discussion of the effect of the claimant’s stabbing while he was unlawfully present in the bar as opposed to simply being

National Association of Crime Victim Compensation Boards
NACVCB Analysis of Contributory Conduct Decision in *Fisher v. Ks. Crime Victims Comp. Bd.*

stabbed in a lawful place. As the Board has abandoned that portion of its brief citing reports and studies concerning the effect of BAC on driving ability, no evidence was presented in this case that Jeremy's blood alcohol level made it more likely that he would have been hit by a drunk driver.

...

In its brief, the Board explains that its interpretation of "contributory misconduct" was to reduce or deny awards if there is evidence of unlawful conduct. Although this rationale makes sense in theory, its broad application without reference to whether the unlawful misconduct is "contributory" runs contrary to the regulation adopted by the Board itself: "An award of compensation may be reduced if the board finds that the claimant or the victim through whom the claimant makes the claim *has contributed to the injury for which the claim is made.*" (Emphasis added by the court). The regulation clearly provides that the misconduct, even if unlawful, must contribute to the injury.

Further, "abuse of alcohol or an illegal substance" is specifically listed as an act which *may*, not shall, signify contributory misconduct. This act, along with the others listed, *i.e.*, consent, provocation, or incitement, including the use of fighting words or obscene gestures; willing presence in a vehicle operated by someone known to be under the influence; failure to retreat or withdraw from a situation when an option to do is readily available; and failure to act as a prudent person, are broad in nature and may encompass many different factual situations, which may or may not contribute to the injury. While the Board certainly has the discretion to determine that minor's abuse of alcohol contributed to his or her injury if the evidence would support such a conclusion, the problem in this case is that no evidence was presented to support the conclusion that Jeremy's misconduct "contributed to the injury for which the claim [was] made."

Black's Law Dictionary 353 (8th ed. 2004) defines "contributory" as "[t]ending to bring about a result" or "[a] contributing factor." Webster's defines "contributory" as "of, relating to, or forming a contribution," and "contribute" is defined as "to give or supply in common with others" or "to play a significant part in bringing about an end or result."

Application of the dictionary definitions, the above case law, and the legislative history, and an examination of the statute and regulation, all support our conclusion that the Board erroneously interpreted and applied the term "contributory misconduct" in this case. In all of the cases discussed above, "contributory misconduct" or "contributed to the infliction of his injury" was only found in cases where the claimant's misconduct caused, contributed, or was the proximate cause of the injury. Although the Board is granted great deference in the interpretation of its statutes and regulations, we conclude that the Board's application of the term "contributory misconduct" to the facts of this case disregards the meaning of "contributory" and the regulation's requirement that the misconduct "contributed to the injury for which the claim is made."