

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Respondent,
Respondent on Review,

v.

KADE WILLIAM KIRSCHNER,

Defendant-Appellant,
Petitioner on Review.

Union County Circuit Court
Case No. F19697

CA A154602

SC S063069

BRIEF OF *AMICUS CURIAE*
THE NATIONAL CRIME VICTIM LAW INSTITUTE IN SUPPORT OF
STATE OF OREGON

Review of the decision of the Court of Appeals
on appeal from a judgment of the Circuit Court for Union County
Honorable Brian C. Dretke, Judge

Per Curiam Opinion Filed: January 28, 2015
Before Sercombe, Presiding Judge; Hadlock, Judge; and Tookey, Judge

ERNEST G. LANNET #013248
Chief Defender
Criminal Appellate Section
MORGEN E. DANIELS #075739
Deputy Public Defender
Office of Public Defense Services
1175 Court Street NE
Salem, OR 97301
Phone: (503) 378-3349
Email:
Morgen.E.Daniels@opds.state.or.us
Attorneys for Petitioner on Review

MARGARET GARVIN #044650
AMY C. LIU #101232
National Crime Victim Law
Institute at
Lewis & Clark Law School*
310 SW 4th Ave, Suite 540
Portland, OR 97204
Phone: (503) 768-6819
Emails: garvin@lclark.edu
aliu@lclark.edu
Attorneys for Amicus Curiae

*Law School is not *amicus* and is
listed for location purposes only

(Parties continued on next page)

ELLEN ROSENBLUM #753239

Attorney General

ANNA JOYCE #013112

Solicitor General

DOUGLAS PETRINA #963943

Assistant Attorney General

1162 Court Street NE

Salem, OR 97301-4069

Phone: (503) 378-4402

Email: doug.petrina@doj.state.or.us

Attorneys for Respondent on Review

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STATEMENT OF THE *AMICUS CURIAE*'S INTEREST

Amicus curiae the National Crime Victim Law Institute (NCVLI) is a nonprofit educational and advocacy organization located at Lewis and Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing.

NCVLI accomplishes its mission through education and training; promoting the National Alliance of Victims' Rights Attorneys and Advocates; researching and analyzing developments in crime victim law; and litigating as *amicus curiae* issues of national importance regarding crime victims' rights in cases nationwide. NCVLI also provides information to crime victims and crime victims' attorneys through its website, www.ncvli.org.

This case involves issues that are fundamental to the rights and interests of Oregon crime victims, including crime victims' rights to justice, fairness, and prompt restitution. NCVLI submits this brief in aid of the Court's task of analyzing and determining the correct rule of law in this matter.

INTRODUCTION

Since the voters amended the Oregon Constitution to guarantee explicit constitutional rights to crime victims, lawmakers have made great strides amending and enacting laws consistent with the constitutional mandate to "preserve and protect the right of crime victims to justice," "to receive prompt

restitution,” and to be treated with fairness. Or Const Art I, § 42(1), (1)(d); *see* ORS 137.106, 147.410-.438, 147.500-.550. Mindful of these objectives, in recent years, the Oregon Court of Appeals has recognized that the procedures for securing prompt restitution are designed primarily to benefit crime victims and has resolved disputes over the construction of ORS 137.106 in a manner consistent with the legislative policy that offenders should shoulder the burden of the financial consequences of their unlawful activities.¹ This Court should do no less.

Adopting defendant’s construction of ORS 137.106 would require this Court to reject over three decades of appellate case law that interprets the statute to demand no more than a “but for” causal relationship between the criminal conduct and the victim’s loss, frustrate reasonable expectations based on the long line of decisions, and impose an additional burden of proof on the State (and on victims)—all of which would be incompatible with notions of

¹ *See, e.g., State v. Thompson*, 257 Or App 336, 342, 306 P3d 731 (2013), *rev den*, 354 Or 390 (2013) (interpreting ORS 137.106’s 90-day limit and concluding that the trial court had the authority to order supplemental restitution outside the 90-day period); *State v. Wagoner*, 257 Or App 607, 610, 307 P3d 528 (2013) (interpreting the same 90-day limit and concluding that the trial court had authority to impose restitution in the first instance after the 90-day period to remedy a violation of the victim’s right to restitution); *cf. Dolan v. United States*, 560 US 605, 615, 130 S Ct 2533, 2541, 177 L Ed 2d 108 (2010) (concluding that the trial court retains jurisdiction to order restitution beyond the federal Mandatory Victims’ Restitution Act’s 90-day deadline and rejecting a construction of the statutory language in a way that would defeat the MVRA’s objectives and harm the victims).

justice, fairness, and prompt restitution. *Cf. Farmers Ins. Co. of Oregon v. Mowry*, 350 Or 686, 698, 261 P.3d 1 (2011) (“Stability and predictability are important values in the law; * * * to frustrate reasonable expectations based on prior decisions creates the potential for uncertainty and unfairness.”).

Since *State v. Dillon*, 292 Or 172, 637 P2d 602 (1981), Oregon appellate courts have consistently recognized the *sui generis* nature of criminal restitution and have applied a “but for” inquiry to the causation analysis without also requiring a showing of foreseeability. Despite the various amendments to ORS 137.106, the legal landscape underpinning these decisions has not changed in any significant way. Indeed, the critical language in the statute—“resulted in”—has remained *unchanged* in ORS 137.106 since it was first enacted in 1977. Applying well-established principles of statutory construction, this Court should conclude that the legislature was aware, and intended to incorporate, the meaning of “resulted in” as developed in case law when it left the phrase in place in each successive amendment.

Moreover, the facts of this case do not warrant a re-examination of the “but for” rule for restitution. To conclude that the crime victim’s lost wages suffered as a result of his participation in the court process—a process that flows directly from defendant’s criminal conduct—are not recoverable in restitution would run afoul of common sense, prevent future crime victims from exercising their participatory rights, and defeat the purposes underlying

Oregon’s constitutional and statutory guarantees to crime victims. Further, if the Court were to examine foreseeability despite the weight of history and expectation, it is clear that the crime victim’s economic loss falls squarely within the category of reasonably foreseeable losses.

Because the legal landscape has not changed significantly and defendant has not advanced a principled reason for the Court to discard the “but for” rule for causation under ORS 137.106, the Court must affirm the Court of Appeal’s decision.

ARGUMENT²

I. NO PRINCIPLED BASIS EXISTS FOR THE COURT TO ABANDON THE “BUT FOR” RULE FOR CRIMINAL RESTITUTION.

As the Court of Appeals correctly concluded, “but for” cause, without more, is the requisite standard for the causation determination under ORS 137.106. *See State v. Kirschner*, 268 Or App 716, 342 P3d 1026 (2015), *rev allowed*, (Or May 11, 2015) (adopting the ruling as stated in *State v. Ramos*, 267 Or App 164, 177-79, 340 P3d 703 (2014)). Oregon appellate courts have applied this rule for more than 30 years.

In *State v. Dillon*, this Court interpreted the then-newly enacted ORS 137.106³ and discussed the causal relationship required for an award of

² *Amicus curiae* joins the State’s briefing on the additional reasons why this Court should affirm the court of appeals’ decision.

restitution. *See Dillon*, 292 Or at 181. In that case, defendant was convicted of assault for hitting a police officer with his car, criminal mischief for hitting a police car with his own, and other charges arising from his refusal to follow an officer's order to get out of his car. The trial court ordered defendant to pay restitution to the police department for damage to a patrol car hit by gunfire—specifically, gunfire from *an officer who was aiming at defendant*. *See id.* The Court of Appeals reversed the order, finding that defendant's criminal activities did not establish his liability for the gunfire damage to the patrol car. *State v. Dillon*, 51 Or App 729, 736, 626 P2d 959 (1981), *aff'd in part, rev'd in part*, 292 Or 172 (1981). This Court disagreed, concluding that “the damage is a result in fact of defendant's criminal activities.” *Dillon*, 292 Or at 181.

In reaching its conclusion, it is clear that the Court employed a “but for” standard in its causation determination. As the Court explained:

[T]he damage is a result in fact of defendant's criminal activities. * * * As to the damage to the police car hit by gunfire[,] * * * the police officer who fired at defendant did so in reaction to defendant's assault. The . . . damage to the police car [is a] direct result[] of the offense of assault in the fourth degree.

Id.

³ Notably, the former ORS 137.106 at issue in *Dillon* contains the same “resulted in” causation terminology that exists in the current ORS 137.106. *See Dillon*, 292 Or at 181 (quoting the statute as follows: ““When a person is convicted of criminal activities which have *resulted in* pecuniary damages, in addition to any other sentence it may impose, the court may order that the defendant make restitution to the victim””) (emphasis added).

After *Dillon*, every published Court of Appeals decision applies a “but for” analysis to determine causation under ORS 137.106. See, e.g., *State v. Doty*, 60 Or App 297, 300, 653 P2d 276 (1982) (citing *Dillon* and stating that “if the loss ‘resulted,’ in a ‘but for’ sense, from defendant’s criminal activities,” then restitution is proper for that loss);⁴ *State v. Crooks*, 84 Or App 440, 446-47, 734 P2d 374 (1987) (applying a “but for” test and affirming a restitution order directing defendant—convicted of the sale of an unregistered security—to pay \$14,000 to the victim-buyers who lost that amount on a promissory note issued from defendant’s company and discharged in bankruptcy);⁵ *State v. Stephens*, 183 Or App 392, 397, 52 P3d 1086 (2002) (applying a “but for” test and affirming a restitution order directing defendant—convicted of unauthorized use and possession of a stolen car—to pay \$4,000 to the owner for

⁴ In *Doty*, defendant was convicted, after a guilty plea, of theft and taking property “of a value of less than \$200.” 60 Or App at 299. The trial court awarded the victim \$2000 in restitution, which included the value of all items stolen from the house. Defendant challenged the amount, admitting that he kicked the victim’s door open and stole some items but arguing that someone else must have subsequently entered and taken the other items missing from the residence. *Id.* at 299-300. The court of appeals affirmed. The court reasoned that “regardless of whether defendant actually stole the jewelry, the entire loss ‘resulted’ from his ‘criminal activities,’ including the admitted kicking in of the victim’s door, because it at least created free access to the home for the hypothetical subsequent theft.” *Id.* at 300.

⁵ In *Crooks*, the court recognized that “the bankruptcy of defendant’s company may have been the immediate cause of the [victims’] loss.” 84 Or App at 447. It nevertheless concluded that restitution was proper under a “but for” test because the note “flowed from the obligation [defendant] incurred in the underlying transaction” and “the loss would not have occurred but for the sale of the unregistered security.” *Id.* at 446-47.

tires and wheels stolen from car after defendant left the car unattended);⁶ *State v. Bullock*, 135 Or App 303, 307, 899 P2d 709 (1995) (applying a “but for” test and affirming a restitution order directing defendant—convicted of sexually abusing a child-victim—to pay over \$38,000 to third party agencies for medical care and treatment of the child-victim);⁷ *State v. Pumphrey*, 266 Or App 729, 734-36, 338 P3d 819 (2014) (applying a “but for” test and affirming a restitution order directing defendant—convicted of violating a court’s stalking protective order (SPO)—to reimburse the victim for various expenses incurred after the SPO violations, including the cost of a new phone number, rent payment for a temporary residence, and lost wages for missing work to facilitate changing the locks).

Thus, for more than three decades, Oregon appellate courts have interpreted ORS 137.106 to require a causal relationship between defendant’s

⁶ The *Stephens* court rejected defendant’s argument that the theft by another person after he parked the car cuts off the requisite causal connection between his criminal action and the loss. See 183 Or App at 396. The court reasoned that “defendant’s acts of possession and his exercise of control over the BMW, which included leaving it unprotected in his friend’s yard, facilitated the theft”; and restitution is proper where “the damages *resulted from* defendant’s criminal activities.” *Id.* at 399 (emphasis in original).

⁷ The *Bullock* court rejected defendant’s argument that “the victim’s own ‘free will and self-determination’ are intervening factors and that the victim is responsible for the behavior [post-defendant’s criminal acts] that necessitated treatment and care.” 135 Or App at 307. Because the court determined that the “problems that the victim experienced were a result of the sexual abuse,” and “causation is met by applying a ‘but for’ standard,” the court concluded that these expenses were properly included in the restitution order. *Id.*

actions and the victim's losses only in the "but for" sense. During this same period, the legislature amended the restitution statutes multiple times in an effort to increase offender accountability and strengthen the deterrence and rehabilitative qualities of criminal restitution.⁸ At no point did lawmakers

⁸ In the 1980s, lawmakers across the country began to recognize that the criminal justice system had become "appallingly out of balance" and had "lost track of the simple truth that it is supposed to be fair and to protect those who obey the law while punishing those who break it." President's Task Force on Victims of Crime Final Report, at vi (1982) (Statement of The Chairman), *available at* <http://www.ovc.gov/publications/presdntstskforcrprt/87299.pdf>. In response to this imbalance, Oregon voters adopted constitutional victims' rights amendments, *see* Or Const, Art I, §§ 42 and 43, and the Oregon legislature enacted a number of statutory protections for crime victims, *see, e.g.*, ORS 147.410-147-438. The lawmakers sought "to secure balanced justice by eliminating unbalanced rules." ORS 147.410.

In the 2000s, the legislature re-examined Oregon's statutory restitution scheme and amended the law to reduce the gap between the crime victims' rights on the books—*e.g.*, the constitutional guarantees of prompt restitution, justice, and fairness—and the reality of what was happening in criminal cases statewide—little to no award of restitution to crime victims. *See, e.g., State v. N.R.L.*, 354 Or 222, 234 n.16, 311 P3d 510 (2013) (discussing the legislative history of Senate Bill (SB) 617, "which was the genesis for the 2003 amendments to ORS 419C.450" and ORS 137.106; observing that "Attorney General Hardy Myers stated that '[t]his bill in effect seeks to fulfill the constitutional commitment that Oregon has made to crime victims'"; and noting that "Myers further explained that * * * the task force believed that '[mandatory full restitution] is also an important mechanism for offender rehabilitation and reintegration as a productive and law abiding member of our society'"). The legislature subsequently amended the restitution statutes to:

- (1) Require restitution in all cases where "a person is convicted of a crime * * * that has resulted in economic damages," ORS 137.106(1);
- (2) Require restitution in the "full amount of the victim's economic damages" unless the victim consents to partial restitution, ORS 137.106(1)(a), (c); and

change the operative “resulted in” language, presumably because it saw no reason to disturb the meaning that Oregon courts have applied since *Dillon*. See *Mastriano v. Bd. Of Parole & Post-Prison Supervision*, 342 Or 684, 693, 159 P3d 1151 (2007) (“[W]e generally presume that the legislature enacts statutes in light of existing judicial decisions that have a direct bearing on those statutes.”); *Joshi v. Providence Health Sys. of Oregon Corp.*, 342 Or 152, 158, 149 P3d 1164 (2006) (“We assume that, in using the term ‘caused,’ the legislature intended to incorporate the legal meaning of that term that this court has developed in its cases.”). Defendant has failed to identify any reasoned basis to overturn such a long line of appellate case law.

The overarching goals of achieving justice and fairness and ensuring prompt restitution for crime victims are best served by not changing the judicial interpretation of ORS 137.106 when the legislature has not changed the critical language—“resulted in—and the legislative history does not suggest any intention to change its well-established meaning.

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(3) Remove the “civil action” limitation for restitution awards, ORS 137.103(2).

See Or Laws 2003, ch 670, § 1 (amending ORS 137.106); Or Laws 2005, ch 564, § 1 (amending ORS 137.106).

II. EVEN IF THE COURT WERE TO REQUIRE FORESEEABILITY, RESTITUTION FOR THE VICTIM'S LOSS WAS PROPER.

The Court may affirm the Court of Appeals without deciding whether and what civil standard of causation must apply in this case.⁹ While there may be some set of circumstances that would cause the Court to conclude that the tort concepts of foreseeability and independent intervening acts should be incorporated into the restitution analysis to cut off defendant's liability for the crime victim's losses, this case does not present such a set of circumstances.

The trial court awarded restitution to reimburse the crime victim for income lost from time off work to attend court proceedings. Such an economic loss is a direct and foreseeable consequence of defendant's criminal conduct. *See, e.g., State v. Lindsley*, 191 Ariz 195, 199, 953 P2d 1248, 1252 (1997) (affirming an order awarding restitution to the theft victim for wages lost due to voluntary attendance at trial on the ground that the trial attendance "was a direct result of defendant's crime" and "it makes no difference whether the victim attended [the proceedings] pursuant to subpoena or not"); *State v. Palubicki*,

⁹ If the Court were to conclude that that criminal restitution should incorporate civil causation concepts to limit victim's recovery, the Court must determine which civil causation standard should apply to the facts of this case. Under Oregon law, "but for" causation is still sufficient in certain tort cases. *See, e.g., Joshi*, 342 Or at 157, 162 (rejecting plaintiff's argument that Oregon courts have "abandoned the 'but-for' standard of causation, and instead applied a 'substantial factor' test to determine causation" in wrongful death cases; and concluding that both legal standards of causation may apply depending on the particular circumstances of the case).

727 NW2d 662, 666-67 (Minn 2007) (affirming an order awarding restitution to reimburse the victim’s adult children for expenses arising from their voluntary attendance at trial on the ground that “[i]t is a direct result of the crime that the children of the murder victim attended the proceedings and suffered lost wages”); *State v. Reale*, 158 Idaho 20, 54-56, 343 P3d 49 (2014) (affirming an order awarding restitution to the child-victim’s mother to reimburse her for lost wages resulting from taking time off from a nightshift job to sleep before morning court appearances; and finding that her decision to miss work was “not an intervening, superseding cause” as it is “foreseeable that the mother of a child victim would want or need to attend the same court proceedings”).

Additionally, a crime victim’s attendance at court proceedings is also a foreseeable consequence of defendant’s criminal actions because the victim has constitutional and statutory rights to be present at and to participate in the proceedings. *See* Or Const Art I, § 42(1)(a) (affording crime victims “[t]he right to be present at and, upon specific request, to be informed in advance of any critical stage of the proceedings held in open court when the defendant will be present, and to be heard at the pretrial release hearing and the sentencing”); ORS 147.500(5) (defining “critical stage of the proceeding” referenced in article 42 of the Oregon Constitution to include, *inter alia*, hearings “related to

the rescheduling of trial,” “[t]rial; * * * [and] [r]estitution hearings”).¹⁰ As one court has cautioned:

To deny a victim the right to reimbursement for wages lost in attending court proceedings which he or she may attend by right would be tantamount in some instances to denying that individual the opportunity to exercise that right.

Lindsley, 191 Ariz at 199, 953 P2d at 1252. If the Court were to deny this victim restitution for his lost wages, future Oregon victims will face a Hobson’s choice: exercise their constitutional and statutory rights to participate in the court proceedings but suffer additional economic harm or forgo their rights in order to maintain financial status quo. Such an outcome would render meaningless the constitutional and statutory rights to justice, fair treatment, and prompt restitution.

CONCLUSION

The fact that a crime victim appears in court during a criminal proceeding is a direct result of his or her offender’s criminal activities. Crime victims do not choose to be victims, and once they are, they bear the burden of myriad physical, psychological, and financial consequences. Adopting defendant’s construction of ORS 137.106 and rejecting the long standing “but for” rule for

¹⁰ Simple errors such as the ones allegedly committed by the prosecutor should be considered part of the reasonably foreseeable chain of events that follow defendant’s commission of the crime and the victim’s participation in the criminal case.

criminal restitution would add to this burden—an outcome that simply does not comport with Oregon’s penological policies or its constitutional and statutory guarantees to crime victims. For the foregoing reasons, and for the reasons stated in the State’s brief, the Court must affirm the Court of Appeal’s decision.

Date: August 12, 2015

Respectfully submitted,

s/ Amy C. Liu

Margaret Garvin #044650

Amy C. Liu #101232

National Crime Victim Law Institute at Lewis
& Clark Law School*

310 SW 4th Ave, Suite 540

Portland, Oregon 97204

Phone: 503-768-6819

*Attorneys for Amicus Curiae, the National
Crime Victim Law Institute*

*Law School is not *amicus* and is listed for
location purposes only

**CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH
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Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 4448 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I hereby certify that on August 12, 2015, I directed the foregoing BRIEF OF *AMICUS CURIAE* THE NATIONAL CRIME VICTIM LAW INSTITUTE IN SUPPORT OF STATE OF OREGON to be electronically filed with the Appellate Court Administrator, Appellate Records Section.

I further certify that I electronically served the document, using the court's eFiling system pursuant to Rule 16.45, upon the following persons:

MORGEN E. DANIELS #075739
Attorney for Petitioner on Review

DOUGLAS PETRINA #963943
Attorney for Respondent on Review

s/ Amy C. Liu

Amy C Liu #101232
*Attorney for Amicus Curiae, the National
Crime Victim Law Institute*