

IN THE SUPREME COURT FOR THE STATE OF OREGON

STATE OF OREGON,

Plaintiff,

v.

DANIEL ALGEO,

Defendant.

Yamhill County Circuit
Court CR-100607

SC S060830

J.W.P.,

Petitioner on Review

v.

STATE OF OREGON and DANIEL
ALGEO,

Respondents on
Review.

PETITIONER'S BRIEF ON THE MERITS

Continued . . .

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INTRODUCTION

This case presents an issue with far-reaching implications for crime victims in Oregon: may a convicted criminal sentenced to pay restitution to his victims lessen his obligation by pointing a finger at the alleged negligence of the victims? For the first 22 years of her life, that question was academic for Petitioner J.W.P. But in October 2010, J.W.P. was struck while attempting to cross the street by a pickup truck driven by Respondent Daniel Algeo. Mr. Algeo was driving drunk; J.W.P. was jaywalking. Following Mr. Algeo's criminal conviction, the trial court determined that J.W.P.'s jaywalking left her 90% responsible for her injuries, and reduced Mr. Algeo's restitution obligation accordingly.

There are tens of thousands of crimes in Oregon each year that result in economic damage to victims. The citizens of this state have responded by adding to the Oregon Bill of Rights a victim's right to restitution. And their legislators have, over several decades, fine-tuned a method for awarding it. The current criminal restitution statute expressly instructs courts to order restitution equal to the "full amount" of the victim's economic damages. The statutory context and recent legislative changes confirm that those words mean what they say. And the sound policy grounds of deterrence and rehabilitation explain why.

The trial court attempted to write into the statute a comparative fault rule that is not included, not incorporated by reference, not even suggested, by the

text of the statute, yet would have profound effects on crime victims and criminal restitution practice in Oregon. The court's decision should be reversed, and the law confirmed that in restitution a convicted criminal may not shift blame to victims, but instead will be held accountable for the full amount of the economic damages that result from his crime.

BACKGROUND

I. THE COLLISION

October 16, 2010, was homecoming weekend at Linfield College. (P-ER 35.¹) Petitioner J.W.P. and three friends, all recent graduates of Linfield, returned to campus for the homecoming festivities. (P-ER 35.) Late that Saturday night, after watching the football game and walking briefly through a fraternity house, they headed back to their car. (P-ER 35-36.) It was parked on SE College Ave., a quiet residential street on campus. The group crossed the street diagonally, walking in pairs—a young man, the owner of the car and the group's designated driver, and a woman in front, J.W.P. and another woman following approximately 20 feet behind. (P-ER 35.)

As the two women in back attempted to cross the street, Respondent Daniel Algeo struck them with his Ford Ranger pickup truck. (P-ER 28.)

¹ The references to "P-ER __," "R-ER __," and "P-SER __," throughout this brief refer to Petitioner's Excerpt of Record (filed 11/05/2012), Respondent's Excerpt of Record (filed 11/21/2012), and Petitioner's Supplemental Excerpt of Record (filed 2/8/2013), respectively.

Mr. Algeo was traveling approximately 25-30 mph. (R-ER 12-13.) He had just left a nearby restaurant called Thistle, where he had been drinking. (P-ER 28.)

Both women were given emergency medical treatment at the scene. (P-ER 28.) J.W.P. was identified as having serious physical injuries, including a fractured skull. (R-ER 12.) She was transported by Life Flight helicopter to a Portland hospital for emergency treatment. (P-ER 28.) The other victim was taken by ambulance to the Willamette Valley Medical Center for non-life threatening injuries. (R-ER 12.)

Shortly after the collision, Mr. Algeo was interviewed by the McMinnville Police. (P-ER 28-30.) He volunteered that he was the driver of the Ford pickup and that he had been drinking. (P-ER 28.) Consistent with those admissions, the officer that interviewed Mr. Algeo reported that Mr. Algeo “was swaying from side to side and back and forth,” had “bloodshot and watery eyes” with “drooping eyelids,” “had difficulty balancing,” could not walk in a straight line, had difficulty touching his heel to his toe, could not stand on one leg, and produced an “overwhelming” odor of alcohol. (P-ER 29-30.) The officer concluded, based on his “training and experience” and “observations while talking with Mr. Algeo,” that Mr. Algeo “was too impaired to be driving.” (P-ER 28.) Approximately an hour after the collision, Mr. Algeo’s blood alcohol content registered 0.19%.² (P-ER 30.)

² The legal limit for driving a non-commercial vehicle is 0.08%. ORS 813.130.
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II. PROSECUTION AND RESTITUTION HEARING

During the State's prosecution the following spring, Mr. Algeo plead guilty to three counts: one count of driving under the influence and two counts of assault in the fourth degree for "intentionally, knowingly or recklessly caus[ing] physical injury" to J.W.P. and the other victim. (P-SER 1-8.) On March 14, 2011, Mr. Algeo was sentenced to a combination of supervised probation, jail time, fines payable to the State, and a suspension of his driver's license. (P-ER 49; P-SER 9-15.) The Judgment provided the State with 90 days to submit a "reasonable final restitution amount." (P-SER 9-15.)

On June 13, 2011, the State of Oregon submitted a proposed supplemental judgment requesting that Mr. Algeo be ordered to pay \$98,284.89 in restitution to the two victims, primarily to cover their medical expenses. (P-ER 49.) On September 2, 2011, Mr. Algeo filed a motion for a restitution hearing. (P-ER 49.) On September 6, 2011, the State amended its proposed judgment, reducing the restitution amount to \$77,621.52. (P-ER 49.) For J.W.P., the State sought \$61,367.68, including \$49,484.78 for medical expenses, \$11,467.41 for lost wages, and \$415.49 for damaged property. (P-ER 26.) Mr. Algeo stipulated that this amount accurately reflected J.W.P.'s economic damages.³ (P-ER 45.)

³ As discussed more fully below, other damages, including future impairment of earnings and pain and suffering, are not eligible in criminal restitution.

On December 19, 2011, the trial court requested that the State and Mr. Algeo submit written briefs regarding restitution. (P-ER 14.) On February 13, 2012, the trial court held a hearing related to restitution and found that Mr. Algeo committed criminal conduct, the victims suffered economic damages, and but for Mr. Algeo's admitted conduct (*i.e.*, causing physical injury to J.W.P. and the other victim), the victims would not have incurred the economic damages. (P-ER 15.) The trial court then requested additional briefing on two questions: (1) "whether the restitution to the victims for damages must be recoverable in a civil action," and (2) "whether contributory negligence analysis is appropriate." (P-ER 14.) The trial court conducted an evidentiary hearing on July 6, 2012. (P-ER 15.)

III. TRIAL COURT DECISION

On July 17, 2012, the trial court issued a "Letter of Opinion." It found: (1) "what the economic damages are that are recoverable by criminal restitution, are those that are recoverable in a civil action;" (2) the rule of comparative fault should be applied in restitution proceedings, although the rule that if a plaintiff is more than 50% responsible for his injuries should not; and (3) "[i]t is clear from the evidence that almost all of the economic damages suffered by the victims" were caused by their jaywalking. Based on these findings, the trial court ordered Mr. Algeo to pay only 10% of J.W.P.'s economic damages—\$6,136.75. (P-ER 26-27, 48-49.)

IV. VICTIM'S RIGHTS CLAIM

On August 13, 2012, J.W.P., for the first time represented by private counsel, filed with the trial court a Claim of Violation of Crime Victim's Right(s) pursuant to ORS 147.515. (P-ER 1-6.) J.W.P. requested that the trial court: (1) issue an order requiring Mr. Algeo to show cause why J.W.P.'s constitutional right to prompt restitution had not been violated; (2) schedule a hearing, if necessary; and, ultimately, (3) order Mr. Algeo to pay the full amount of her economic damages. (P-ER 1-6.)

Three days later, August 16, 2012, the trial court entered a supplementary judgment memorializing its earlier decision that Mr. Algeo should pay only 10% of the victims' economic damages. (P-ER 48.) On September 13, 2012, J.W.P. amended her Claim of Violation of Crime Victim's Rights to include the trial court's supplementary judgment. (P-ER 1-6.) In anticipation of an upcoming hearing on the victim's rights claim, the parties submitted additional briefing regarding the trial court's conclusion that a comparative fault rule applies to restitution. (P-ER 51-69.)

On October 29, 2012, the trial court conducted a hearing on the merits of J.W.P.'s Claim of Violation of Crime Victim's Rights. Later that day, the trial court entered an order denying the claim. (P-ER 70.)

V. APPEAL TO THE OREGON SUPREME COURT

On November 5, 2012, J.W.P. petitioned this Court pursuant to ORS 147.537 to review the trial court's decision that the civil law comparative fault rule applies to criminal restitution. On December 28, 2012, this Court granted *certiorari* and requested additional briefing on the merits.

DISCUSSION

Tempting as it might be, this appeal does not challenge the trial court's finding that two women jaywalking across a residential street were 90% responsible for the injuries they sustained when they were hit by a pickup truck driven by a person with a blood alcohol content more than twice the legal limit, drooping eyes, slurred speech, and who could not balance on his own two feet. Instead, this appeal focuses on a more fundamental and consequential error—that it was appropriate for the trial court to assess the blameworthiness of the victims in the first place.

As explained below, not only did the legislature never intend for comparative fault to be written into the restitution statute, it intended exactly the opposite—if a person commits a crime that results in economic damages, that person is responsible for the full amount of those damages, irrespective of the fault of any victim or third party. The statutory language requires it, the legislative history confirms it, the case law supports it, and sound public policy underlies it.

I. CRIME VICTIMS ARE ENTITLED TO RESTITUTION UNDER BOTH THE OREGON CONSTITUTION AND STATUTE

The correct result in this case follows from Oregon statute. But it begins with the Oregon Bill of Rights, which provides victims of crimes “[t]he right to receive prompt restitution from the convicted criminal who caused the victim’s loss or injury.” Art. I, § 42(1)(d). The right to restitution, as well as the mechanics for enforcing and safeguarding it, has also been codified by the legislature. *See generally* ORS 137.106. Below is a brief overview of the concept of criminal restitution and the way it has been incorporated by statute into Oregon’s criminal sentencing procedure.⁴

A. Restitution is penological.

In the criminal context, restitution means “[c]ompensation for loss; esp., full or partial compensation paid by a criminal to a victim, not awarded in a civil trial for tort, but ordered as part of a criminal sentence or as a condition of probation.” *Black’s Law Dictionary* (9th ed. 2009). It is penological, intended to “accomplish[] the traditional goals of sentencing such as rehabilitation of the defendant and deterrence to impress upon the defendant the seriousness and cost of his offense.” *State v. Hart*, 299 Or 128, 138, 699 P2d 1113 (1985). *See*

⁴ The trial court’s order violated J.W.P.’s right to restitution under both the Oregon Constitution and statute. But this Court has advised that “if statutory sources of law provide a complete answer to the legal question that a case presents, [it] ordinarily decide[s] the case on that basis, rather than turning to constitutional provisions.” *State v. Barrett*, 350 Or 390, 398, 255 P3d 472 (2011). Consequently, this brief focuses on the relevant statutes, which are dispositive.

also *State v. Dillon*, 292 Or 172, 179, 637 P2d 602 (1981) (explaining that restitution “is intended to serve rehabilitative and deterrent purposes”).

B. The statutory process for ordering criminal restitution.

Oregon prescribes a four-step process for ordering restitution in a criminal case, each step becoming necessary if the prior step is satisfied.

First, the trial court must determine whether a person has been “convicted of a crime, or a violation described in ORS 153.008, that has resulted in economic damages.” ORS 137.106(1). Second, the district attorney must “investigate and present to the court... evidence of the nature and amount of the damages.” *Id.*⁵ Third, the trial court must determine, for any particular victim, whether the damages presented are *economic* damages—“objectively verifiable monetary losses,” other than future impairment of earning capacity. *Id.*; ORS 137.103(2); ORS 31.710. Damages such as pain and suffering, loss of consortium, and emotional distress, which are available in civil suits, are not available in criminal restitution. *Id.*

Before continuing to the fourth step, we pause to note there is no dispute in this case regarding the first three steps. Mr. Algeo plead guilty to driving under the influence and causing physical injury to J.W.P. *See* ORS 813.010

⁵ Crime victims also have a right under the Oregon Constitution to present evidence to the trial court, either directly, through personal counsel or through a request to the prosecutor. *See* Art. I, §§ 42(1)(a) (giving crime victims a right to be heard at sentencing) and 42(4) (giving prosecutors the right to, upon the victim’s request, “assert and enforce a right established in this section”).

(criminalizing driving under the influence); ORS 163.160 (criminalizing assault in the fourth degree). The district attorney's office collected and presented evidence of the nature and amount of the victims' damages. And the trial court determined, based on the parties' stipulation, that those damages were economic damages, and therefore eligible for a restitution order.

That brings us to the fourth step, where this dispute resides. If the first three steps are satisfied, the trial court must determine the amount of restitution the defendant must pay. ORS 137.106(1). By statute, the trial court must order the defendant to pay "the full amount of the victim's economic damages as determined by the court." ORS 137.106(1)(a) and (b). Or, it may order an amount less than the full amount of the victim's economic damages on one condition: victim consent. ORS 137.106(1)(c). If the crime is a "person felony," the victim's consent must be in writing. ORS 137.106(1)(c)(B).

In short, if a court determines that a particular victim suffered economic damages as a result of a crime, it must calculate those economic damages and order the defendant to pay their full amount, unless the victim consents to a lesser amount.

II. CIVIL LAW COMPARATIVE FAULT SHOULD NOT BE INCORPORATED INTO CRIMINAL RESTITUTION

The "cardinal rule" of statutory interpretation is to determine the intent of the legislature. *State v. Gaines*, 346 Or 160, 165, 206 P3d 1042 (2009); *see also* ORS 174.020. This is done through three steps. First, the court must

examine the text and context of the statute. *See Gaines*, 346 Or at 171-72.

Second, the court consults pertinent legislative history, to the extent it deems appropriate. *Id.* Third, “[i]f the legislature's intent remains unclear after examining text, context, and legislative history, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty.” *Id.*

As explained below, it is clear from the text and context of the restitution statute that the legislature did not intend to incorporate civil comparative fault. To the contrary, both the statutory text and the legislative history show a deliberate choice to fix the amount of restitution based solely on the victim’s economic damages. The trial court came to the opposite conclusion based principally on case law and policy grounds. But those, too, point in the other direction.

- A. The text and context of the statute demonstrate that the legislature did not intend to incorporate civil law comparative fault into criminal restitution.**
 - 1. The plain language of the restitution statute specifies the amount, and the comparative fault statute has no application to restitution.**

There are sections of the Oregon code in which the meaning of the statute is not clear from the language. This is not one of them. Absent consent by the victim “the court *shall* include... in the judgment... [a] requirement that the defendant pay the victim *restitution in a specific amount that equals the full amount of the victim’s economic damages* as determined by the court.”

ORS 137.106(1)(a) and (b) (emphasis added). The *only* circumstance in which a court may order “less than the full amount of the victim’s economic damages” is if the victim consents to that amount. ORS 137.106(1)(c). “[T]here is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes,” *Gaines*, 346 Or at 171 (internal quotations and citations omitted), and the words of the restitution statute are clear.

But there is another statute in play—the civil law comparative fault statute, ORS 31.600. The statute sets forth the rule and mechanics for apportioning fault, including which categories of persons should be included in the analysis. Not only does it never reference criminal restitution, but the words and concepts it uses are tailored specifically to tort law: “The trier of fact shall compare the fault of the *claimant* with the fault of any party *against whom recovery is sought*, the fault of *third party defendants* who are *liable in tort* to the *claimant*, and the fault of any person *with whom the claimant has settled*.” ORS 31.600(2) (emphasis added).

In short, the text of both of the restitution statute and the comparative fault statute demonstrate that comparative fault was not intended to be incorporated into criminal restitution.

2. The statutory context confirms that comparative fault was not intended to be incorporated.

If the legislature had intended to incorporate the rule of comparative fault into criminal restitution, it knew how to do so. As just discussed, the legislature wrote a rule of comparative fault for tort actions. *See* ORS 31.600. It has also expressly incorporated that rule in other non-tort statutes. *See, e.g.,* ORS 654.336 (providing that ORS 31.600 applies to certain claims against employers). Yet there is neither comparative fault language nor any reference to ORS 31.600 in the criminal restitution statute.

These omissions are especially significant because the legislature *did* incorporate into criminal restitution another section from the same tort chapter—the definition of “economic damages.” *See* ORS 137.103(2) (adopting for criminal restitution the definition of “economic damages” provided in ORS 31.710). The legislature’s incorporation of the tort law definition of economic damages, with a modification for future impairment of earnings, demonstrates that the legislature considered what elements, if any, of tort law it wanted to incorporate into criminal restitution, and drew the lines expressly. Comparative fault was not included.

The mechanics for restitution hearings further confirm that comparative fault was not contemplated. For instance, the restitution statute directs the district attorney to investigate and present only “evidence of the nature and amount of the damages.” ORS 137.106(1). This instruction makes sense if the

nature and amount damages is the only question that the court must answer. If, on the other hand, the legislature had intended for the trial court to analyze the relative fault of the persons involved, it would have also instructed the district attorney to investigate and present—or at least the court to consider—evidence of any contributing conduct by victims or other third parties. *Compare with* ORS 147.125 (providing that when a crime victim seeks compensation *from the State*, the Department of Justice must take into account “the degree or extent to which the victim's acts or conduct contributed to the injuries or death of the victim”).

Similarly, the legislature’s guidelines for the interplay between civil actions and criminal restitution proceedings show that comparative fault was not intended to be a bridge between them. First, a finding of liability against the defendant for economic damages in criminal restitution is “conclusively determined” for a subsequent civil action. ORS 137.109(2). Yet there is no mention of the effect of a finding of comparative fault by the victim, because the legislature did not intend for there to be any such analysis. Second, the statute directs that “the court shall credit any restitution by the defendant to a victim against any judgment in favor of the victim in such civil action.”

ORS 137.109(1). Yet here, even where the legislature specifies an accounting between the victim and defendant, there is no mention of a reduction in restitution for victim negligence.

3. Respondent's reading of the statute misconstrues its plain meaning.

In his brief opposing certiorari, Mr. Algeo identified two components of the statute that he believes indicate the legislature's intent to incorporate comparative fault. Neither supports his position.

First, Mr. Algeo argued that the phrase “as determined by the court,” which follows the statute's directive to order restitution, places the amount of restitution squarely within the court's discretion. *See, e.g.,* ORS 137.106(1)(a) (“A requirement that the defendant pay the victim restitution in a specific amount that equals the full amount of the victim's economic damages *as determined by the court.*”) (emphasis added). The phrase “as determined by the court” follows the phrase “economic damages,” however, not the term “restitution.” In context, its plain meaning is that the amount of the victim's *economic damages* must be determined by the court, not the amount of restitution.

If the legislature had intended the phrase “as determined by the court” to make the amount of restitution discretionary, it would have written the statute differently. For instance, the legislature might have said: “[T]he court shall include... [a] requirement that the defendant pay the victim restitution in an amount determined by the court.” It did not, and Mr. Algeo's interpretation of the statute's language would make superfluous the statute's express directive

that the amount of restitution be “a specific amount that equals the full amount of the victim’s economic damages.” ORS 137.106(1).

Second, Mr. Algeo argued that the statutory requirement that a “victim” have “suffered economic damages *as a result of the offense*” demonstrates that the legislature intended to incorporate comparative fault. *See, e.g.*, ORS 137.103(4)(a) and (b) (emphasis added). To the extent Mr. Algeo argues that there must be a causal link between the defendant’s criminal conduct and the victim’s injuries, he’s correct. But there’s no dispute that a causal link exists here—Mr. Algeo plead guilty to “intentionally, knowingly or recklessly caus[ing] physical injury” to J.W.P. and the other victim. (P-SER 1-8.) Alternatively, to the extent Mr. Algeo argues that this language incorporates the civil law doctrine of comparative fault, he’s incorrect. This requirement is an on/off switch, not a dimmer. The only question it poses is whether a causal link exists, not how it compares to other potential causes of the injury.⁶

The trial court expressed concern over the consequences of this straightforward reading of the statute, observing that although there are no cases applying comparative fault to criminal restitution, “if it [were] *not* [applied], the result would be making a defendant pay for damages he did not cause.” (P-ER 46 (emphasis in original).) As we will see shortly, the restitution statute

⁶ For the same reasons, *State v. Jones*, 113 Or App 425, 427, 833 P2d 320 (1992), which was relied on by the trial court but held only that a causal link between the criminal conduct and injury must *exist*, is consistent with the position that criminal restitution does not incorporate comparative fault.

rests on sound policy. But even if it did not, the trial court's discomfort with its policy implications does not empower the trial court to alter the statute:

If the language is plain and unambiguous, if it can be given but one meaning, and that meaning does not lead to an impossibility or an absurdity such as the legislature could not be supposed to have intended, the court must give effect to that meaning if constitutional, even though the result may be, in the court's opinion, harsh, unjust or mistaken in policy."

Fox v. Galloway, 174 Or 339, 347, 148 P2d 922 (1944) (citing *Pub. Serv.*

Comm'n v. Pac Stages, Inc., 130 Or 572, 281 P 125 (1929); *State v. Tollefson*, 142 Or 192, 16 P2d 625 (1933); *Anderson v. Thomas*, 144 Or 572, 26 P2d 60 (1933)).

In sum, the text and context of the statutes make clear that when the legislature said that restitution orders in criminal cases must be "in a specific amount that equals the full amount of the victim's economic damages," it meant it. "[T]he office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted." ORS 174.010. There is no mention, reference to, or even suggestion of comparative fault in the criminal restitution statute, and the trial court erred in attempting to insert it.

B. The legislative history further establishes that the legislature did not intend to incorporate civil law comparative fault into criminal restitution.

The criminal restitution statutes have decades of history, but the trends are hard to miss: strengthen crime victims' rights, provide more specific

directives to courts, and lessen trial court discretion. This analysis will focus on three recent legislative sessions, which confirm that the legislature did not intend for comparative fault to be incorporated into criminal restitution.

1. In 2003, the legislature made criminal restitution mandatory and specified that it should be equal to the full amount of victims' damages.

2003 was a pivotal year for Oregon's restitution statute. The Oregon Constitution had not yet been amended to include a victim's right to restitution, and that year the legislature effectively rewrote significant portions of the statute, foreshadowing the growing public support for crime victims that would culminate in a constitutional amendment a few years later. For purposes of this case, there were two key changes.

First, whereas before 2003, trial courts could decide for themselves whether or not to order restitution in criminal cases, in 2003 the legislature made restitution mandatory:

Prior Language	Revised Language
In addition to any other sentence it may impose, the court <i>may</i> order that the defendant make restitution to the victim.	If the court finds from the evidence presented that a victim suffered pecuniary damages, in addition to any other sanction it may impose, the court <i>shall</i> ...

Compare Former ORS 137.106 (2001) *with* ORS 137.106.

Second, the legislature removed the amount of criminal restitution from the court’s discretion, and mandated that it must equal the “full amount” of the victim’s damages:

Prior Language	Revised Language
In determining <i>whether to order restitution which is complete, partial or nominal</i> , the court shall take into account...	<p>(a) Include in the judgment a <i>requirement that the defendant pay the victim restitution in a specific amount that equals the full amount of the victim’s pecuniary damages</i> as determined by the court; or</p> <p>(b) ...In the supplemental judgment, <i>the court shall establish a specific amount of restitution that equals the full amount of the victim’s pecuniary damages</i> as determined by the court....</p>

Compare Former ORS 137.106 (2001) *with* ORS 137.106.

The effect of this second change was well-documented during the 2003 legislative session. For instance, the conference committee summary of the bill that implemented these changes began: “WHAT THE MEASURE DOES: Makes it mandatory for the court to order full restitution in criminal or juvenile cases in which there is pecuniary damage.” Staff Measure Summary for SB 617B, Conference Committee of the 72nd Oregon Legislative Assembly,

published Aug. 4, 2003, available at

www.leg.state.or.us/comm/sms/sms03/sb0617bconfx08-04-2003.pdf.⁷

It has also been observed by Oregon courts. The Oregon Court of Appeals recently commented in the related context of restitution in juvenile proceedings, which received the same amended language, “[i]n 2003, the legislature made it mandatory for the court to order the youth offender to pay the victim restitution for the full amount of the victim’s loss or injury.” *State v. N.R.L.*, 249 Or App 321, 327, 277 P3d 564, *cert. granted*, 352 Or 377, 290 P3d 813 (2012). The court also commented that these statutory changes “arguably reemphasized the role of restitution in correcting behavior and impressing upon the offender the seriousness and cost of his offense.” *Id.* at 332 (internal quotations and punctuation omitted).

Notwithstanding the legislature’s nearly wholesale revision of the structure and operation of the restitution statute in 2003, there does not appear to be any mention, much less discussion, of incorporating civil law comparative fault into restitution proceedings. To the contrary, the two changes highlighted above—making restitution mandatory and specifying that it must equal the full amount of the victims’ economic damages—demonstrate that the legislature intended to remove restitution from the discretion of the court, and did not intend for it to incorporate the civil law rule of comparative fault.

⁷ A disclaimer at the bottom of the summary provides: “This summary has not been adopted or officially endorsed by action of the committee.”

2. In 2005, the legislature removed a reference to recovery in a civil action.

Two years later, the legislature returned to the restitution statute. It made only one change, but it was important.

Before 2005 (and before 2003), the statute described the pool of damages available in criminal restitution as “pecuniary damages,” which were defined to include “all special damages, but not general damages, which a person could recover against the defendant in a civil action...” Former ORS 137.103(2) (2003). Thus, even though the statute mandated restitution in an amount equal to the full amount of damages, there was at least a hook for Mr. Algeo’s argument that a trial court should look to civil law principles, like comparative fault.

That hook was eviscerated in 2005. In the 2005 legislative session, the legislature removed the term “pecuniary damages” from the restitution statutes, and inserted in its place the term “economic damages.” As described above, the definition of “economic damages” borrows a definition from tort law without any open-ended references to recovery in civil actions, as was used for “pecuniary damages.” *See* ORS 137.103(2). Indeed, the new definition includes a point of departure between economic damages in criminal restitution and economic damages in tort law, providing that impairment of future earnings are *not* available in restitution. *Id.*

3. In 2007, the legislature clarified that an order of less than the full amount of economic damages is permitted, but only with victim consent.

In 2007, the legislature addressed directly courts' authority to order less than the full amount of restitution. It added new subsections authorizing restitution orders in an amount "less than the full amount of the victim's economic damages"—*but only with the consent of the victim*. See ORS 137.106(1)(c)(A)-(B). For victims of a "person felony," the legislature was even more explicit, requiring that the consent be in writing. See ORS 137.106(1)(c)(B).

Thus, even when the legislature expressly considered reductions in restitution orders, it did not incorporate comparative fault. Instead, it clarified that the restitution amount may fall below a victim's economic damages on only one condition: victim consent.

C. Case law both within and outside of Oregon supports a straightforward reading of the statute.

There is no need to go any further. For the reasons discussed above, this case can and should be resolved based on the text and context of the restitution statute, informed by its legislative history.

The trial court relied principally on case law, however, and this brief will address two relevant opinions. These opinions grapple with the overarching question: to what extent, if any, does criminal restitution borrow from civil law? The answer, as explained in the case law discussed below, is "not much."

Restitution is governed by different rules, implicates different constitutional rights, serves a different purpose and, other than defining (in part) the relevant types of damages and directing them the victim rather than the State, is distinct.

1. Oregon courts have repeatedly acknowledged the distinction between criminal restitution and civil matters.

Oregon courts have long distinguished criminal restitution from civil proceedings. In *State v. Dillon*, this Court held that “restitution was clearly not intended to be the equivalent of a civil award.... [R]estitution must be understood as an aspect of criminal law, not as a quasi-civil recovery device.” 292 Or 172, 179-80, 637 P2d 602 (1981). Its function is “to serve rehabilitative and deterrent purposes.” *Id.* at 179. Importantly, the Court drew this conclusion even though it recognized that, under the restitution statute in effect at the time, criminal restitution borrowed two concepts from civil law: (1) a limitation on damages equal to the special damages available in a civil suit; and (2) a requirement that the payments be made to the person damaged rather than to the State. 292 Or at 178-79.

The statutory changes that have been made since *Dillon*, such as removing any reference to civil actions in the definition of the available damages, only reinforce the line *Dillon* drew between civil actions and criminal restitution. Accordingly, the Oregon Court of Appeals recently described *Dillon* as holding “that civil law concepts were inapplicable to criminal restitution awards.” *State v. N.R.L.*, 249 Or App at 325.

The distinction between civil law and criminal restitution is also important in terms of the nature and role of the factfinder. Five years before *Dillon* was decided, this Court was asked to construe a version of the restitution statute that did not define the types of damages available in criminal restitution. *See generally State v. Stalheim*, 275 Or 683, 552 P2d 829 (1976). This Court construed the statute as authorizing restitution only for damages “which are readily measurable.” *Id.* at 689-90. This limitation was later codified by statute (and has been refined several times since), but the Court’s underlying concern is as relevant today as it was then:

If the statute is interpreted broadly so as to permit the imposition of unliquidated damages... *the trial judge will be forced to make evaluations of losses usually reserved to civil juries....* While we customarily rely upon the collective intuition of the civil jury to calculate the amount which should be awarded for pain and suffering and other uncertain losses, and although in some civil cases this function is left to the trial judge sitting without a jury, *we find it highly inappropriate to assign this task to a judge presiding over a criminal trial.*

Id. at 686-87 (emphasis added). The same is true of apportionment of fault, which “[g]enerally... is for the jury and will not be upset except where it is manifest as a matter of law that the allocation is unreasonably disproportionate.” *See Jordan v. Coos-Curry Elec. Co-op., Inc.*, 267 Or 164, 165, 515 P2d 913 (1973).⁸

⁸ Incorporating comparative fault into criminal restitution may also raise constitutional questions about restitution proceedings. The Oregon Constitution provides that “[i]n all civil cases the right of Trial by Jury shall remain

2. The cases relied on by the trial court do not support its conclusion.

To support its conclusion that the restitution statute incorporates comparative fault, the trial court relied principally on *State v. Carson*, 238 Or App 188, 243 P3d 73 (2010). It is true that *Carson* states, “[w]hen a person is convicted of a crime, the trial court may impose restitution for damages recoverable in a civil action arising out of the facts or events constituting that crime or any other criminal conduct admitted by the defendant.” *Id.* at 192. But this interpretation of the restitution statute is inconsistent with the current text. First, it suggests that trial courts have discretion over whether to award restitution, which was removed in 2003. Second, its reference to “damages recoverable in a civil action” reflects the definition of “pecuniary damages,” which was removed in 2005.

Indeed, the *Carson* statement traces to *State v. Howett*, 184 Or App 352, 56 P3d 459 (2002), which, in turn, relied on versions of the restitution statute in effect prior to the 2003 and 2005 legislative changes. As discussed above, the current version of ORS 137.106 has been amended three times since *Howett*,

inviolate.” Art. I, § 17. Whether a matter is a “civil case” depends on “the particular issue in the proceeding rather than the controversy.” *Salem Decorating v. Natl. Council Comp. Ins.*, 116 Or App 166, 170, 840 P2d 739 (1992), *rev. den.*, 315 Or 643, 849 P2d 524 (1993). Although restitution proceedings have traditionally been characterized as primarily penal, *see, e.g., State v. N.R.L.*, 249 Or App at 332, inserting the traditionally civil law issue of comparative fault may tip the balance.

and replaces the term “pecuniary damages” (relied on by *Howett* for its civil recovery theme) with the term “economic damages.”

More fundamentally, the trial court misunderstood the overlap between criminal restitution and civil actions. The restitution statute’s incorporation of tort law’s definition of “economic damages,” with the modification for future earnings, does provide a link between restitution and civil law. But the link is simply intended to provide a useful boundary for *defining the pool of available damages* (i.e., objectively verifiable damages), not to open up the doors to civil law’s methods for *allocating those damages*.

The trial court’s attempt to expand this link fails under its own weight. Recall that the trial court held, citing *Carson*, that “the economic damages... that are recoverable by criminal restitution[] are those that are recoverable in a civil action.” (P-ER 46.) This conclusion is incorrect on its face, even putting aside comparative fault: the legislature expressly excluded from the economic damages recoverable in criminal restitution future impairment of earning capacity, ORS 137.103(2), which is recoverable in civil actions.

More importantly, adopting comparative fault does not make the damages recoverable in criminal restitution the same as the damages recoverable in a civil action. There are numerous other differences between these proceedings. The trial court addressed one—the civil law rule that a plaintiff who is more than 50% responsible for his own injuries cannot recover,

ORS 31.600(1)—and found that it does not apply to criminal restitution because of the significant policy differences between criminal restitution and civil actions.⁹ But there are many others. For instance, the Oregon Evidence Code, which would apply in any civil suit, does not apply in restitution hearings as to nearly every section other than privilege. *See State v. Dillon*, 292 Or 172, 180-81, 637 P2d 602 (1981) (observing that at a restitution hearing a judge “may consider anything he ordinarily would at any sentencing hearing”); ORS 40.015(4)(d) (excluding from sentencing proceedings ORS 40.010-40.210 and 40.310-40.585).

If the rule is, as the trial court interpreted the case law to hold, that the damages available in restitution are those recoverable in civil actions, where among the many rules of civil litigation, including comparative fault, the 51% rule, hearsay, and the right to a jury, are courts to draw the line in restitution hearings? The statute and the case law don’t say, because they did not intend for the question to be asked. Oregon courts, like the legislature, recognize the distinction between civil litigation and criminal restitution and have never drawn an exception for comparative fault.

⁹ The trial court acknowledged the inconsistency between its holding that these policy differences foreclose the 51% rule but not the comparative fault rule, but resolved the inconsistency on the ground that the State had not cited any authority prohibiting the use of comparative fault in criminal restitution. The authority to order restitution is statutorily granted, however, and there is no basis for the trial court’s position that it may interpret that authority as it sees fit unless it is specifically barred from doing so.

3. Courts outside Oregon have held that comparative fault should not be incorporated into similar restitution statutes.

Oregon courts are not the first to be confronted with this issue. In August 1993, Renee Ortiz was a passenger in a van driven by Jeremy Clinton. *State v. Clinton*, 890 P2d 74, 75 (Ariz App 1995). Mr. Clinton was driving drunk and lost control of the vehicle, causing it to roll and rendering Ms. Ortiz a paraplegic. *Id.*

After Mr. Clinton was convicted for driving under the influence, the State of Arizona sought restitution for Ms. Ortiz (and other victims). Like Oregon, Arizona's constitution included a right to prompt restitution, *id.*, and its statutes required trial courts "to make restitution to the person who is the victim of the crime.... in the full amount of the economic loss as determined by the court." *Id.* Also like this case, the trial court denied the request. It found that Ms. Ortiz had been the one to serve Mr. Clinton the drinks before he got behind the wheel, and held that "justice simply does not allow restitution" to a victim who is substantially responsible for her own injuries. *Id.*

The Arizona Court of Appeals reversed. It framed the issue—and answer—this way: "The question is whether a trial court can deny restitution because the victim was partially at fault for her own injuries. The answer is no." *Id.* The court reasoned: "*Because the above-referenced statutes make no mention of it, victim fault is not an issue in the restitution phase of a criminal*

case. The legislature has recognized that ‘many innocent persons suffer economic loss and personal injury or death as a result of criminal acts.’ But the restitution laws do not benefit only *innocent* victims, they benefit *all* victims—except those who are in custody or are ‘the accused.’” *Id.* (emphasis added).

Courts in other states agree. The language of restitution statutes vary, as do the courts’ rulings, but it is the prevailing view that comparative fault is not applied to criminal restitution unless expressly incorporated by the legislature. *See, e.g., State v. Wagner*, 484 NW2d 212, 216 (Iowa App 1992) (“We determine comparative fault principles do not apply to restitution for criminal acts[.]”); *State v. Knoll*, 614 NW2d 20 (Wis App 2000) (“To allow a defendant who has already been convicted of a crime to focus on the action of a victim to avoid restitution defeats [the purpose of criminal rehabilitation] because it permits him to evade responsibility for his own actions.”); *see also People v. Millard*, 175 Cal App 4th 7, 41, 95 Cal Rptr 3d 751, 780 (2009) (permitting trial court to apply comparative fault to an award of restitution, where statute instructed sentencing court to order “a dollar amount that is sufficient to fully reimburse the victim... for every determined economic loss incurred as the result of the defendant’s criminal conduct” but authorized courts not to order restitution where “compelling and extraordinary reasons exist”).

There is one state of particular relevance: Colorado. During the critical 2003 legislative session, discussed above, the Oregon legislature received

testimony from multiple witnesses who referred to Colorado's victim's rights framework as a model for Oregon. *See, e.g.*, Minutes, Senate Judiciary Committee, SB 617 testimony of Connie Gallagher, Administrator of the Crime Victims' Assistance Section, Oregon Department of Justice, Mar. 25, 2003 (“[T]he state of Colorado stands out as a model of what can be done when a state wants to get serious about doing the right thing and doing it well.”), and testimony of Michael D. Schrunk, District Attorney for Multnomah County, Mar. 13, 2003 (“Other states, most notably, Colorado, have taken this route [of full restitution] on behalf of victims of crime.”).

The issue of comparative fault was not mentioned in this testimony, but Colorado courts long ago established that comparative fault is *not* applied to criminal restitution. *See People v. Johnson*, 780 P2d 504, 507 (Colo 1989) (“We do not suggest that the sentencing court must conduct a mini-trial on the issue of damages and resolve such questions as comparative negligence or other affirmative defenses that arguably might be applicable in a civil suit brought by the victim against the defendant.”); *People v. Duran*, 991 P2d 313, 314 (Colo App 1999) (“On appeal, [the assault] defendant contends that the trial court erred in refusing to consider the victim's role in the incident when determining how much, if any, restitution to impose. We disagree.”).

D. The statute's mandate that a restitution order equal the full amount of the victim's economic damages is sound policy.

The criminal restitution statutes are based on a policy judgment: once a person is convicted of a crime, he is responsible for economic damages that result from that crime and is stripped of the ability to blame victims (or any other third party) to reduce those damages. Presumably, the legislature believed this rule would further either the rehabilitative or deterrent purposes of restitution by, for instance, “impress[ing] upon the defendant the seriousness and cost of his offense.” *State v. Hart*, 299 Or 128, 138, 699 P2d 1113 (1985). Applied here, a person will be less likely to drive after drinking if he knows he will be held accountable for any economic damages that result from his drunk driving, whether the victims were jaywalking, traveling a mile-per-hour over the speed limit, not wearing their seatbelts, or any other allegedly negligent activity.

The trial court questioned this policy judgment, expressing concern that if comparative fault was not incorporated in restitution, the defendant would “pay for damages he did not cause.” (P-ER 46.) Putting to the side the fact that because restitution limits damages to only “economic damages,” there are damages that a defendant *does cause* that he *does not* pay for, the trial court’s concern was not a basis for deviating from the plain language of the statute. The standard for doing so is that the statute would “lead to an impossibility or an absurdity.” *Fox*, 174 Or at 347. As discussed above, requiring a defendant

to pay for all damages that result from his criminal conduct is far from absurd. Nor is it unprecedented. There are many examples—even in civil law—in which the law discourages certain behavior by holding a person accountable for damage beyond that which he alone caused. *See, e.g.*, ORS 59.115(3) (extending joint and several liability to persons who directly or indirectly control or materially aid another person who commits securities violations); ORS 30.920(1) (extending product liability to sellers and lessors).

E. The practical effect of incorporating comparative fault into criminal restitution would be profound.

Under the plain language of the statute, restitution hearings focus on two simple questions relating to the defendant’s criminal conduct: (1) did damages result, and (2) how much are they. Further, those questions are answered within the limited universe of damages that can be easily and readily measured, such as medical expenses. Thus, restitution hearings are designed to be relatively narrow, short follow-on proceedings.

Incorporating comparative fault would alter the restitution practice dramatically. Crime victims, whether of drunk driving, assault, or a myriad of other crimes, would face a choice—consent to an order of no or reduced restitution, or go into court and defend their conduct, whether the allegations are of provocation, complicity or simple negligence. And many would have to make that choice, and potentially hire a personal lawyer, at a time when they are still recovering, both physically and emotionally, from a crime. The

legislature's intent to provide crime victims with a path to some basic relief without having to be thrust into litigation would be largely gone.

Inserting comparative fault into restitution would also risk turning restitution hearings into costly, prolonged mini civil trials. Apportioning fault between a defendant and victims (or even third parties) would likely require additional testimony and evidence, as well as experts. The costs of this additional litigation would fall to victims (potentially compounding their losses) and district attorneys, not to mention courts and defendants. Those costs would be especially significant in cases in which the defendant plead guilty and the trial court had not received evidence relating to the underlying event.

The magnitude of the additional costs is daunting. Data on restitution proceedings is limited, but during a one year period the Secretary of State counted 28,570 convictions for crimes likely to involve economic damages, and 10,215 convictions with restitution orders. *See* Secretary of State Audit Report: Ordering Restitution for Victims at p. 4, published January 2010, available at www.sos.state.or.us/audits/pages/state_audits/full/2010/2010-08B.pdf. The discrepancy between these two numbers is also important. The Secretary of State explained that although district attorneys “acknowledge the importance of restitution,” they reported that they did not have sufficient resources to in every case “meet the legislative requirement imposed in 2003.” *Id.* at 9. In a letter attached to the report, the District Attorney for Multnomah County said bluntly,

“I need additional resources to give me adequate victims’ advocates to allow this office to comply with the law.” *Id.* at 16. And that is without the additional procedure that comparative fault would require.

In short, the effects of incorporating a comparative fault rule, with its focus on victim conduct and accompanying process and costs, would be profound. This case is not the proper vehicle for debating the merits of those effects. It is enough to observe that had the legislature wanted to make such a sweeping change, it would have said so.

CONCLUSION

For J.W.P. and the other tens of thousands of crime victims each year, this case presents a critical issue. The people of Oregon have embedded a right to restitution within the Oregon Constitution, and their legislators have done the same by statute. If either had wanted to insert a rule of comparative fault, with all its attendant complexity and costs, there are many places they could have done so, and many ways they could have done it. Instead, the statute expressly requires that a convicted criminal be ordered to pay restitution equal “the full amount of the victim’s economic damages.” The legislative history shows this was a deliberate choice, and both case law and policy show it was made for good reason.

For the foregoing reasons, Petitioner J.W.P. respectfully requests that the opinion below be reversed and the matter remanded for an order directing Mr. Algeo to pay restitution for the full amount of J.W.P.'s economic damages.

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