
IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Respondent,
Petitioner on Review,

v.

SCOTT B. GERHARDT,

Defendant-Appellant,
Respondent on Review.

Polk County Circuit Court
Case No. 12P3329

CA A152760

S063612

BRIEF ON THE MERITS – RESPONDENT ON REVIEW

Review of the decision of the Court of Appeals on an appeal from a judgment
of the Circuit Court for Polk County
Honorable Monte S. Campbell, Judge

En Banc Opinion Filed: September 16, 2015
Author of Opinion: Armstrong, Judge

Concurring Judges:
Haselton, Chief Judge, and Sercombe, Duncan, Hadlock, DeVore, Tookey, and
Garrett, Judges

Dissenting Judges:
Egan, Judge;
Flynn, Judge (joined by Ortega, Nakamoto, and Egan, Judges)

Review Allowed: May 18, 2016

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RESPONDENT’S BRIEF ON THE MERITS

STATEMENT OF THE CASE

Introduction

This court recently held that civil law concepts apply when determining criminal restitution. In particular, the court concluded that the concept of reasonable foreseeability limits an award of economic damages as restitution, *i.e.*, “a court is precluded from awarding, as ‘economic damages’ under ORS 137.106, expenses that the court concludes were not the result of reasonably foreseeable risks of harm.” *State v. Ramos*, 358 Or 581, 604, 368 P3d 446 (2016). The court’s opinion left open the question of the nature or degree of the causal connection that must exist between a defendant’s crime and a victim’s damages to support a restitution award. *Id.* at 586 n 2 (noting that the parties had not put at issue “substantial factor” versus “but-for” causation).

Defendant’s case asks this court to identify the degree of causation required between criminal activities and damages before a restitution award is authorized. How large a part must the defendant’s criminal activities have played in producing the claimed damages?

This case also presents this court with the opportunity to explicate how—after identifying factual causation—trial courts should employ reasonable

foreseeability to ascertain the scope of a defendant's liability. Must the victim incur the damages in the manner in which they were foreseeable?

To answer those questions, this court must consider the text and context of the restitution statute, the purposes of restitution identified by the legislature, and the constitutional concerns that limit restitution. As this court noted in *Ramos*, civil law concepts aid the inquiry. *Id.* at 596.

More concretely, defendant's case concerns whether restitution is authorized when the victim's costs—here, attorney fees incurred in part to obtain a restraining order—resulted not from defendant's criminal conduct of strangulation, but from the last link in a chain of events that took place *after* defendant committed that crime, namely, defendant's refusal to adhere to a pretrial no-contact order. Defendant's crime was a first link in that causal chain. But it was not the main cause of the victim's damages, and it was attenuated from the damages to the extent that restitution for those damages is not appropriate.

Procedural History

A person who is convicted of a crime that results in economic damages must pay full restitution to the victim. ORS 137.106(1)(a). Defendant pleaded no contest to the crime of strangling his wife. The prosecution sought restitution for several expenses, including attorney fees that the victim paid during the pendency of the case. Defendant contested the restitution claim. At the

restitution hearing, the prosecutor offered Exhibit 1, a document in which the victim listed various expenses, including \$1,880 to hire a lawyer to assist her after defendant's "repeated violations of the no contact order while in jail" after his arrest but before his conviction; and Exhibit 2, the attorney's invoice. The sentencing court ordered defendant to pay restitution to the victim to cover the attorney fees. Tr 27.

Defendant appealed, arguing that the victim did not necessarily or reasonably incur the cost of a lawyer as a result of defendant's crime of conviction, but rather as a result of defendant's violations of the no-contact order. App Br 10-14. The state responded that the restitution award was proper because "[b]ut for defendant's crime in strangling victim, victim would not have incurred attorney fees, and those fees were a necessary result of defendant's crime." Resp Br 2.

While defendant's case was under advisement in the Court of Appeals, this court granted the defendants' petitions for review in *State v. Ramos*, 267 Or App 164, 340 P3d 703, *rev allowed*, 357 Or 143 (2015), and *State v. Kirschner*, 268 Or App 716, 342 P3d 1026, *rev allowed*, 357 Or 299 (2015). Those cases presented restitution issues similar to those in defendant's case. *Ramos* and *Kirschner* concerned whether civil damages concepts apply in determining restitution. This court heard argument in *Ramos* and *Kirschner* on September 15, 2015.

The Court of Appeals decided defendant's case on September 16, 2015. *State v. Gerhardt*, 273 Or App 592, 359 P3d 519 (2015). Sitting *en banc*, a divided Court of Appeals reversed the trial court's restitution order. *Id.* The court held that the attorney fees were not an expense that the victim incurred as a result of defendant's criminal conduct, but rather "an expense that the victim concluded that she needed to incur as a result of conduct in which defendant had engaged *after* he had committed the crime" of conviction. *Id.* at 597 (emphasis in the original).

Four judges dissented. Judge Flynn wrote the dissent in which she emphasized her understanding that the causation standard did not make restitution dependent on whether defendant's crime of strangulation was, in itself, sufficient to cause the victim's need for a restraining order. *Id.* at 600-04. Judge Egan joined that dissent but also wrote separately, concluding that (1) the majority opinion departed from established precedent as set forth in the Court of Appeals decisions in *Ramos* and *State v. Pumphrey*, 266 Or App 729, 338 P3d 819, *rev den*, 357 Or 112 (2015), in which the court deemed that "but-for" causation was the only causal predicate required for a restitution award; and (2) the majority opinion undermined an important government policy objective,

i.e., encouraging domestic-violence victims to seek the protection of FAPA¹ restraining orders. *Gerhardt*, 273 Or App at 599-600.

The state petitioned this court for review and asked it to hold the petition in abeyance pending the outcome in *Ramos*. State's PFR 1. The state urged this court to grant review and hold that restitution requires factual causation but not reasonable foreseeability. *Id.*

This court decided *Ramos* and *Kirschner* in February 2016, holding that under the criminal restitution statutes, it is appropriate to rely on civil law concepts, including foreseeability, to determine damages cognizable as restitution. *Ramos*, 358 Or 581, 368 P3d 446 (2016); *Kirschner*, 358 Or 605, 368 P3d 21 (2016). *Ramos* was about foreseeability, not causation. The court did not examine what factual causal relationship must exist between crime and damages to support a restitution award.

On May 18, 2016, this court allowed the state's petition for review in this case.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

Three predicates form the basis for a restitution award: (1) criminal activities, (2) damages to a victim, and (3) a causal relationship between the

¹ The Family Abuse Prevention Act (FAPA), ORS 107.700 to 107.735, sets forth the procedures by which a person who has been a victim of abuse may obtain, implement, and enforce a restraining order against the person who abused them.

two. The legislature intended courts to rely on civil law concepts in determining whether particular damages are cognizable as restitution and the scope of a defendant's liability for those damages.

First Question Presented. What is the nature of the causal relationship that must exist between a defendant's crime and a victim's damages for those damages to be recoverable as restitution?

First Proposed Rule of Law. The restitution statute provides that a defendant must pay restitution when the crime of conviction *results in* economic damages. The defendant's criminal conduct must be sufficient in itself to cause the victim's damages for those damages to be recoverable as restitution.

Second Question Presented. Alternatively, if restitution is permitted where the crime was not sufficient in itself to cause the victim's damages, what degree of causal connection must exist between the crime, other identified causes, and the damages claimed?

Second Proposed Rule of Law. If a defendant's criminal conduct is one of two or more causes of the victim's damages, then the crime must be a substantial factor in causing the victim's damages—rather than a mere “but-for” cause—to support a restitution award.

Third Question Presented. Assuming that the state has proved the requisite causation between a defendant's crime and a victim's damages, is a

determination that a victim's damages were reasonably foreseeable in a general sense sufficient without more to permit a restitution award?

Third Proposed Rule of Law. No. A predicate determination that the damages were reasonably foreseeable as a matter of law triggers a factual reasonable foreseeability assessment that examines the particular facts and evidence in the particular case—that is, not what *could* happen, but what *did* happen. Only if the damages were both legally *and* factually reasonably foreseeable is a restitution award proper.

STATEMENT OF FACTS

The Court of Appeals adequately set forth the historical facts:

“[On July 4, 2012, d]efendant was arrested for strangling the victim—his wife—and was jailed as a result. While in jail, defendant was subject to a court order that barred him from contacting the victim. Defendant repeatedly violated that order, which eventually prompted the victim to hire an attorney to seek enforcement of the no-contact order and to obtain a restraining order under the Family Abuse Prevention Act (FAPA). Defendant ultimately pleaded guilty to the strangulation charge, and the victim requested a restitution award * * * for, among other things, \$1,880 in attorney fees that she had paid her attorney for services related to the no-contact and FAPA orders.”

Gerhardt, 273 Or App at 593.

The no-contact order appears to have originated on July 19, 2012, when the trial court marked the space next to the line, “NO CONTACT WITH VICTIM” on the pre-printed order setting defendant's case for arraignment. Arraignment Scheduling Order 7/19/12, TCF. The no-contact order was also a

condition of defendant's release when he posted bail on July 23, 2012. Bail release agreement, TCF.

SUMMARY OF ARGUMENT

1. Civil concepts are pertinent in determining restitution. A restitution award must be supported both by sufficient factual causation and both legal and factual reasonable foreseeability.

Analysis of the restitution statute and the relevant context demonstrates that the legislature intended to authorize restitution for damages that result from a defendant's criminal conduct alone, and not from a defendant's other, subsequent, noncriminal behavior, whether it was wrongful or not. The terms of the statute spell that out, and the legislative history supports it.

Alternatively, if restitution is authorized for damages that resulted from a defendant's criminal conduct plus some other subsequent conduct, then the state must prove that, in addition to being a "but-for" cause of the damages, the criminal conduct was a substantial factor in bringing about the victim's harm. It is not sufficient for the state to prove that a bare "but-for" connection exists between defendant's conduct and the damages. Likewise, it is not sufficient if the victim's damages merely relate to the facts or events surrounding the defendant's criminal conduct. The crime must do more than "set the stage" for

later conduct that causes damages. The state must establish a significant causal connection between the crime and damages.

2. In addition to proving factual causation, the state must prove that the harm and consequent damages were a reasonably foreseeable result of the defendant's criminal activities. What is reasonably foreseeable in a given situation will depend on how generally or specifically the circumstances are described. When determining whether a result was reasonably foreseeable as a matter of law, it is likely appropriate to describe the circumstances more generally.

In the criminal restitution context, when determining at the sentencing phase of a trial whether a result was reasonably foreseeable for restitution purposes, the circumstances underlying foreseeability must be described specifically to ensure that the defendant is not held liable for harm that is outside the scope of the circumstances. Unlike at the summary judgment phase in a civil case, at sentencing in a criminal case, liability *qua* guilt has been adjudicated, and all the facts are before the court. The court is imposing a sentence, not determining whether a plaintiff's case may proceed to the evidentiary phase of the trial. It makes sense to use a detailed, fact-based description of the events at issue to determine foreseeability.

It might be generally foreseeable, as the state asserts, that someone who has been choked may seek a restraining order to protect against further abuse.

And that might be sufficient to permit the sentencing court to evaluate whether expenses associated with obtaining a restraining order are cognizable as restitution. It is not sufficient, however, to authorize the court to order restitution for those expenses when the evidence does not bear out that preliminary general determination.

What is actually compensable as restitution will depend on what actually happened and what the evidence actually establishes, not on what might have happened. The state asks this court to adopt a general description of events to arrive at the foreseeability determination. The problem with the state's proposed rule is that a preliminary, general description of events would allow broader recovery than what the evidence actually proves and would frustrate one of the purposes of restitution: punishing the defendant for his criminal conduct in a constitutionally sound way.

Here, it was not reasonably foreseeable for a reasonable person in defendant's position to think that as a result of his criminal conduct police would arrest him, he would be put in jail, he would be charged with a crime and indicted, that upon indictment the court would order him not to contact his wife, that he would do so anyway, that she would not try to enforce the no-contact order or obtain a restraining order on her own, but instead would elect to hire a lawyer to help her get a restraining order.

ARGUMENT

A person convicted of a crime must pay for a victim's economic damages that result from the crime. Defendant's case asks this court to decide (1) whether a defendant's crime must be sufficient in itself or, alternatively, at least a substantial factor in causing the victim's damages to necessitate restitution, and (2) how reasonable foreseeability should apply in assessing the scope of restitution.

The state argues that there is no factual-causation sufficiency requirement in restitution—*i.e.*, that once *any* factual link is established between crime and damages, restitution is appropriate so long as the state proves general reasonable foreseeability as a matter of law. Pet BOM 6-7. That argument fails—such a rule contains slight useful structure or limit. As defendant explains, the legislature did not intend the statutory restitution scheme to untether the determination of restitution from all but the most general requirements of proof, thereby allowing extremely broad recovery that could be constitutionally problematic. Rather, the legislature linked restitution to civil standards that do contain effective structure and limits. In essence, the restitution statutory scheme requires the functional equivalent of a jury finding—*not* just a summary-judgment trial court ruling—of civil liability before restitution is authorized.

I. The purposes of restitution: restitution is both a criminal sanction that serves a penological purpose and a sufficiently rigorous process by which the state may recover damages for crime victims without those victims having to go through the additional arduousness of a civil case.

Restitution is first and foremost a criminal sentencing sanction. *State v. Hart*, 299 Or 128, 138, 699 P2d 1113 (1985). Its primary purpose is “penological: it is intended to serve rehabilitative and deterrent purposes by causing a defendant to appreciate the relationship between his criminal activity and the damage suffered by the victim.” *Id.* (quoting *State v. Dillon*, 292 Or 172, 179, 637 P2d 602 (1981); *see also Ramos*, 358 Or at 599 n 11 (quoting *Hart* for that proposition).

However, restitution embodies a “peculiar blend of both civil and criminal law concepts * * *.” *Hart*, 299 Or at 138. In addition to its rehabilitative, punitive, or deterrent effects on a defendant, restitution is, like civil damages, meant to make a victim whole. *State v. Islam*, 359 Or 796, 802, ___ P3d ___ (2016). By the terms of the restitution statute, a victim must be fully compensated for all proven damages caused by a defendant’s crime. ORS 137.106(1)(a). As this court noted in *Ramos*, the legislators who developed and enacted that statutory scheme intended in large part for it to allow crime victims to recover the damages that they would be entitled to in a civil action so that they would not have to undergo the “additional arduousness” of civil litigation. *Ramos*, 358 Or at 590 (internal citation omitted).

But limits apply. In *State v. Stalheim*, this court identified a persistent concern in restitution law: when broadly conceived, criminal restitution implicates constitutional concerns regarding the civil jury trial right and the right to due process. 275 Or 683, 687-90, 552 P2d 829 (1976). If pleading, production, and proof requirements for restitution are formulated too loosely, a defendant may be deprived of property without adequate process, without appropriate proof of the damages, and in violation of the civil jury trial right. *Id.* Furthermore, a loose formulation may enable a victim to benefit unfairly from a windfall, receiving payment for costs that would not be recoverable in a civil proceeding or that the defendant might not have caused through her criminal conduct. To ensure that restitution is awarded fairly and fully, and to preclude the imposition of speculative sanctions, the legislature enacted a scheme that limits criminal restitution to those damages recoverable in a civil action and relies on tested civil law concepts to determine those damages. *See, e.g., Dillon*, 292 Or at 179-80 (describing how civil law concepts operate in shaping criminal restitution sentencing authority).

Since its enactment in 1977, Oregon's restitution scheme has evolved to ensure that restitution serves the dual purposes identified above without running afoul of constitutional requirements. *See Ramos*, 358 Or at 587-92 (discussing legislative history of the restitution statute); *id.* at 589 n 5 (quoting summary of legislative history in *State v. Algeo*, 354 Or 236, 247-48, 311 P3d 865 (2013)).

The victim's right to full recovery is given force by the statutory requirement that the trial court order restitution for all damages that result from the defendant's crime, while the defendant's rights are protected by the procedural guarantees of a post-verdict² hearing to contest restitution and the requirement that the state prove, with legally sufficient evidence, that the defendant's crime caused the damages underlying restitution. Both of these concerns are effectuated in part by the application of civil law concepts to shape the factual and legal requirements that determine the scope of restitution liability.

II. How Oregon's restitution scheme works: under Oregon law, crime victims are entitled to full restitution for damages that result from those crimes, and courts use civil law concepts to determine restitution.

Under Oregon law, people convicted of crimes must pay restitution to victims who have suffered damages that result from those crimes.

This court has identified three indispensable prerequisites to a restitution award: "(1) criminal activities, (2) [economic] damages, and (3) a causal relationship between the two." *Dillon*, 292 Or at 181. "Criminal activities" means "any offense with respect to which the defendant is convicted or any

² The defendant's civil jury trial right is thus not implicated, because any deprivation of property by a restitution order occurs only after (1) a jury or jury equivalent has decided the facts underlying the damages, or (2) the defendant has pleaded guilty or no contest, thereby admitting the facts underlying the damages. Thus, no deprivation takes place unless a jury trial or its functional equivalent has taken place.

other criminal conduct admitted by the defendant.” ORS 137.103(1).

“Economic damages” are

“objectively verifiable monetary losses including but not limited to reasonable charges necessarily incurred for medical, hospital, nursing and rehabilitative services and other health care services, burial and memorial expenses, loss of income and past and future impairment of earning capacity, reasonable and necessary expenses incurred for substitute domestic services, recurring loss to an estate, damage to reputation that is economically verifiable, reasonable and necessarily incurred costs due to loss of use of property and reasonable costs incurred for repair or for replacement of damaged property, whichever is less.”

ORS 31.710(2)(a).

Procedurally, the prosecution bears the burden of asserting and proving a restitution claim:

“When a person is convicted of a crime * * * that has resulted in economic damages, *the district attorney shall investigate and present to the court * * * evidence of the nature and amount of the damages.* * * * If the court finds from the evidence presented that a victim suffered economic damages, in addition to any other sanction it may impose, the court shall enter a judgment or supplemental judgment requiring 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) (emphasis added).

As the text of the restitution statute demonstrates, whether restitution is authorized in a given case depends on (1) whether the state proves a sufficient causal connection between the crime and “economic damages” and (2) whether the state adduces evidence sufficient to prove the damages. In addition, the

statute requires that damages must be reasonably foreseeable to be cognizable as restitution. *Ramos*, 358 Or at 596.

In *Ramos*, this court explained that civil law concepts are relevant in assessing whether restitution is authorized under ORS 137.106. *Ramos*, 358 Or at 594. In particular, the court concluded that “reasonable foreseeability is a limiting concept that applies to an award of economic damages under ORS 137.106.” *Id.* at 596. *Ramos* focused on reasonable foreseeability because the defendant in that case did so, not because the court meant “to foreclose consideration of other civil law concepts in future cases.” *Id.* at 598-99. Other civil law concepts are therefore also pertinent to help courts determine restitution. *See, e.g., id.* at 586 n 3; 599 (positing other civil law concepts that the defendant could have but did not rely on in that case); *Islam*, 359 Or at 800 (holding that a civil law rule concerning the measure of conversion damages was apposite in assessing restitution for the shoplift crime at issue in that case).

Civil law causation concepts provide a useful, fair, and, if appropriately employed, constitutionally sound framework to help courts determine whether the state has met its burden to prove that the defendant’s crime caused the victim’s damages. *See Lasley v. Combined Transport, Inc.*, 351 Or 1, 6-7, 261 P3d 1215 (2011) (noting that factual causation is a “separate concept” from liability as determined by foreseeability).

III. To determine appropriate factual causation in the criminal restitution context, courts rely on civil law concepts.

In this section, defendant discusses how civil factual causation concepts apply in the restitution context. As a preliminary matter, defendant notes that the restitution statute provides for restitution to be awarded only for damages that result from a defendant's *criminal* activities, that is, either from the crime of conviction or from other criminal conduct to which the defendant has admitted. ORS 137.103(1). The statute does not provide that restitution shall be ordered to compensate victims for damages that result from a defendant's bad (but not criminal) behavior, from the violation of a court order or other such misconduct, or even from other putatively criminal conduct that the defendant has not admitted or been convicted of.

In many instances the requisite causal connection will be patent given the statutory elements of the crime of conviction and the nature of the damages. *Ramos*, 358 Or at 595. In an assault case, for example, a determination of guilt establishes that the defendant's criminal activities caused the victim's physical injury, thus rendering the defendant liable for the victim's reasonable medical expenses as restitution. No further inquiry is necessary. Likewise, where a defendant is convicted of criminal mischief, all that remains in terms of proof to authorize restitution for damaged property is for the state to establish the monetary amount of the damages.

In this case, if the state had claimed and proved that the victim incurred medical expenses in attending to injuries resulting from defendant strangling her, or counseling costs in dealing with the shock and stress of defendant's crime, the court could have ordered those amounts as restitution without conducting further causal inquiry. Causation and blameworthiness are inherent in the criminal statute. *See Ramos*, 358 Or at 595 (foreseeability inquiry not necessary in determining whether property damages were appropriate as restitution in an arson case, because statute specifically identified property damage as the proscribed harm, but necessary in determining whether other more remote damages could be cognizable as restitution).

But in a case where the causal chain that connects the defendant's crime and the victim's damages is attenuated, or where several causal factors are in play, causation is indeed at issue and the state must prove it.

A. To support a restitution award in a criminal case, defendant's criminal conduct must be sufficient *in itself* to cause the victim's damages.

The clearest illustration of the bounds of restitution causation is the text of the restitution statute itself. As discussed above, ORS 137.106 conditions restitution to situations when a crime "has resulted in economic damages." ORS 137.106(1)(a). Thus, the damages must result from a defendant's criminal activities. No portion of that statute authorizes the sentencing court to award restitution for damages that result from a defendant's non-criminal behavior.

The text does not authorize restitution for damages that result from a combination of a defendant's criminal and non-criminal activities. This court should not interpret the statute to sweep more broadly than the text that the legislature enacted. A reviewing court must take care not to insert what the legislature has omitted or to omit what the legislature inserted, or to second-guess the legislature's policy choices. ORS 174.010 (setting forth "the office of the judge" in construing statutes); *see also State v. Eumana-Moranchel*, 352 Or 1, 19, 277 P3d 549 (2012) (describing this court's role in interpreting statutes). The text and legislative history of the statute support the point that damages cognizable as restitution must be caused by a defendant's criminal activities alone. While the legislature has stated time and again that it intends for victims to recover full damages as restitution, it has never indicated that it meant to expand restitution to compensate for harms brought about by conduct other than the defendant's criminal activities.³ *See* ER-1-19.

The statutory definition of the phrase "criminal activities" shows that the legislature did not mean to authorize restitution for damages resulting from non-criminal conduct or unproven criminal conduct.

Restitution is limited to damages resulting from a defendant's criminal activities. "Criminal activities means any offense with respect to which the

³ The defendant's brief on the merits in *State v. Ramos*, 358 Or 581, contains a section detailing the genesis and legislative history of the restitution statutory scheme. Defendant attaches that section here for reference as ER- 1-19 because it could be useful to the court in deciding defendant's case.

defendant is convicted or any other criminal conduct admitted by the defendant.” ORS 137.103(1). This court further examined that statutory phrase in *State v. Eastman/Kovach*, 292 Or 184, 188, 637 P2d 609 (1981):

“‘Criminal activities’ is a broader term than ‘crime’ or ‘elements of crime,’ and is intended to communicate a larger meaning. It includes, by definition, ‘other criminal conduct admitted by the defendant,’ which would seem to refer to the circumstances of the crime as well as other crimes the defendant might own up to as in a plea bargain situation. Thus, there need not be an exact equivalency between the terms of the criminal statute or the allegations of the charging document under which a defendant is convicted and the acts which cause the special damages. Conceivably, the damage may result from only some of the acts which constitute the crime, for they could be deemed ‘criminal activities’ as long as they were done in the commission of the crime. We do not mean by this opinion to fully construe the term. We mean to recognize its breadth and at the same time *to express a limitation that affects* [the cases at issue].”

(Emphasis added; footnote omitted).

In *Eastman/Kovach*, a case involving the crime of failure to perform the duties of a driver, the trial court ordered the defendants to pay restitution for medical expenses and property damage sustained by the victims as a result of the traffic accidents that gave rise to the criminal charges. 292 Or at 187. The Court of Appeals reversed the restitution award, and this court affirmed, reasoning that the victims’ losses were not caused by the defendants’ criminal activities: the defendants’ failure to perform statutory duties did not cause the

victims' injuries, the accidents did.⁴ *Id.* at 188-90. The court explained that the accidents were neither “criminal” nor “activities” as defined by the restitution statute and thus did not give rise to restitution liability, notwithstanding that the costs were economic damages that resulted from the accidents “upon which [the] charging documents” at issue were based. *Id.* at 188. Restitution was not available as an alternative to the accident victims bringing a civil action because the accidents that caused the damages were not acts that the defendants performed in the course of committing the crimes at issue.

Eastman/Kovach and its companion cases *Dillon*, 292 Or 172, and *State v. Tuma*, 292 Or 194, 637 P2d 614 (1981), explained how the restitution statute works, demonstrating, *inter alia*, that one of the purposes of the statute is to ensure that sentencing courts avoid potential constitutional problems of the kind identified by this court in *Stalheim*, 275 Or at 686-90. In *Dillon*, for instance, the court noted that the legislature had expanded the defendant's right to be heard in the restitution context and limited recovery to certain forms of

⁴ The court so held, notwithstanding the fact that both “failure to perform the duties” crimes at issue subsumed the accidents essentially as elements—put another way, the state had to prove that the defendants had been involved in the accidents in order to prove their guilt. Justice Peterson dissented on that basis, arguing that the occurrence of the accidents was “just as much an element of the offense as the failure to render assistance * * *” and should therefore have made the defendants liable for restitution for the victims' losses. *Eastman/Kovach*, 292 Or at 190-93 (Peterson, J., dissenting).

damages caused by the defendant's "criminal activities." 292 Or at 178-79. In *Tuma*, the court reversed a restitution award because the record did not contain evidence proving that the claimed damages resulted from the defendant's criminal activities. 292 Or at 196.

By limiting the restitution award to damages resulting from facts that the defendant had either admitted to, or that had been determined by a jury or judge, the statute limits awards to circumstances in which the functional equivalent of a jury verdict has established the facts underlying the damages. That limitation protects the defendant's civil jury trial right but still allows the victim to recover without new, duplicative litigation.

This court has heretofore hewed close to that principle: defendant found no case in which the court affirmed a criminal restitution award for damages that were incurred to redress harms other than the harms directly caused by a defendant's criminal activities. To the contrary, this court has distinguished between damages resulting directly from the defendant's criminal activities and damages that were not shown to result directly from the defendant's criminal activities. *See, e.g., State v. Lefthandbull*, 306 Or 330, 334, 758 P2d 343 (1988) (restitution not authorized because the record did not demonstrate that damage to the victim's property was a direct result of the crime to which the defendant pleaded guilty or the conduct that he admitted to); *Hart*, 299 Or at 130-31 (medical, foster care, and educational expenses all "directly related to the

victim's injuries caused by the defendant's assault[,]" therefore restitution was authorized); *Dillon*, 292 Or at 181 (medical bills and damage to police vehicle "direct results" of defendant's crime of fourth-degree assault, therefore restitution was authorized); *Eastman/Kovach*, 292 Or at 189-90 (restitution not authorized for damages that resulted from car accident and not from defendant's failure to perform the duties of a driver) *Tuma*, 292 Or at 196 (restitution not authorized where the record was insufficient to show that victim's travel expenses resulted from the defendant's burglary).

This court should decline the state's invitation to construe the restitution statute so broadly as to authorize, and so to require, restitution for damages arising from a defendant's noncriminal conduct or from criminal activities evidenced only by assertions that have not been tested by a jury or established by the defendant's own admission as required by ORS 137.103(1).

B. A defendant's crime that is one of multiple causes of damages, or one link in a lengthy causal chain between crime and damages, is insufficient to trigger restitution unless the crime is a substantial factor in bringing about the victim's damages.

Alternatively, defendant's case calls upon the court to consider whether ORS 137.106 authorizes restitution if a defendant's crime is but one among multiple causes, as here, where defendant's criminal conduct was a first link in a chain of causal events. Contrary to the state's assertion that no further factual causation must be proved once "but-for" causation is established, Pet BOM 6,

the state must prove not only that defendant's criminal conduct was *a* factual cause of the victim's damages, but that it was a *sufficient* factual cause.

As argued above, defendant's first position is that the criminal conduct must be *the* factual cause, sufficient in itself to have caused the victim's damages. In the alternative, if this court concludes that restitution is authorized for damages caused by a defendant's criminal activities combined with some other non-criminal or non-adjudicated conduct, defendant posits that the crime of conviction must be at least a *substantial factor* in causing the damages.

Defendant borrows the substantial factor rule from civil cases in which causation must be determined when two or more causes concur to bring about an event. *See* W. Page Keeton *et al.*, *Prosser and Keeton on Torts* 266-68 (5th ed 1984) (discussing substantial factor test). The term has resisted precise definition in this court's case law, but the concept is nonetheless useful in determining factual causation. Defendant conceives of the rule in criminal restitution as essentially a "but-for"-plus test. It requires that, to be a factual cause of the victim's damages sufficient to trigger restitution, the defendant's

criminal activities must have been “an important factor and not one that [was] insignificant” in bringing about the harm. UCJI 23.02.⁵

When the defendant’s crime is separated from the damages by a significant chain of intervening events, especially—as here—other events that the victim has identified as causing the harm at issue, it is not a substantial factor in causing that harm. When, as here, the defendant’s crime provides a factual predicate but is not the impetus for the harm, it is not a substantial factor in causing that harm. The aim of this rule is to ensure that restitution awards are fair—that defendants are not held liable for harms remote from their criminal conduct.

This court applied the substantial factor rule without amplifying it in *McEwen v. Ortho Pharmaceutical Corp*, 270 Or 375, 528 P2d 522 (1974), using it as a yardstick with which to evaluate whether the evidence was sufficient to support the jury’s verdict that the defendants’ negligence had in fact brought about the plaintiff’s injury. *See also Lasley* 351 Or at 6-12 (discussing whether certain evidence was relevant to the determination of whether defendant’s conduct was a substantial factor in causing the plaintiff’s

⁵ Defendant recognizes that uniform jury instructions are not a source of law. However, the instructions are useful in considering “how sometimes elusive legal principles are understood and applied in practice by the trial judges and lawyers who are charged with following them.” *Piazza v. Kellim*, 360 Or 58, 71 n 7, ___ P3d ___ (2016).

harm); *Joshi v. Providence Health System of Oregon Corp.*, 342 Or 152, 159-62, 149 P3d 1164 (2006) (discussing the application of the substantial factor rule in a medical wrongful death action); *Stewart v. Jefferson Plywood*, 255 Or 603, 606, 469 P2d 783 (1970) (assuming without discussion that for an actor to be held liable, that actor’s conduct must have been a “substantial factor” in causing the plaintiff’s injury). The substantial factor rule is appropriate for determining factual causation in the criminal restitution context when more than one cause is involved or when the defendant’s criminal conduct is at the other end of a long causal chain from the victim’s damages.

The text of the restitution statute supports defendant’s arguments. To interpret statutory terms, this court examines the plain and ordinary meaning of the text, the context, the legislative history of the restitution statutes, and, if necessary, resorts to general maxims of statutory construction. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993). *See also State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009) (identifying the “appropriate methodology” for interpreting a statute.).

The plain meaning of the phrase “to result in” shows that the causal connection between crime and damages must be substantial to support a restitution award.

Although the legislature did not further define the meaning of the phrase “to result in” in the ORS 137.106 (1)(a), “result” is a verb of common usage. It is therefore appropriate to rely on the everyday meaning of the word to interpret

it. *Gaines*, 346 Or at 175 (citing *PGE*, 317 Or at 611, for the proposition that the court “ordinarily presumes that the legislature intended terms to have plain, natural, and ordinary meaning”). “Result,” as “result in,” commonly means “to proceed, spring, or arise as a consequence, effect, or conclusion.” *Webster’s Third New Int’l Dictionary* 1937 (unabridged ed 2002). To plumb the meaning of “result” it is necessary to look at the meanings of “consequence,” “effect,” and “conclusion.”

“Consequence” commonly means “something that is produced by a cause or follows from a form of necessary connection or from a set of conditions : a natural or necessary result * * *.” *Id.* at 482. An alternate meaning, particular to the study of logic, is “the rational process by which effect follows cause : logical sequence * * *.” *Id.* “Effect” commonly means “something that is produced by an agent or cause : something that follows immediately from an antecedent : a resultant condition * * * [.]” *Id.* at 724. “EFFECT is the correlative of the word *cause* and in general use implies something necessarily and directly following upon or occurring by reason of the cause.” *Id.* (emphasis in the original). “Conclusion” commonly means “a reasoned judgment” or, more generally, “the last part of anything.” *Id.* at 471.

The ordinary meanings of the words “result,” “consequence,” “effect,” and “conclusion,” indicate that ORS 137.106 (1)(a) requires courts to order restitution when a person’s crime has necessarily given rise to a victim’s

economic damages. Taken together, those definitions demonstrate that the verb “result” requires an unattenuated causal relationship between crime and damages rather than a mere but-for connection. The word “result” connotes the “rational,” “necessary” relationship that exists between cause and effect, *e.g.*, studying has resulted in a passing grade (because the student learned the material) versus studying has resulted in a broken nose (because the student tripped and fell because she had her nose in a book on the way to class).

Those common meanings demonstrate that the legislature did not mean for restitution to be triggered by the establishment of just any factual relationship, no matter how slight, between the defendant’s criminal conduct and the victim’s damages, or when the record shows that a subsequent, related event caused the victim’s damages. The text shows that the legislature intended to authorize restitution when that factual relationship is a logical, cause and effect relationship that is neither muddled nor ruptured by intervening events.

If the prosecution can establish factual causation, the reasonable foreseeability inquiry comes into play.

IV. If the state proves sufficient factual causation, courts then rely on reasonable foreseeability as a limiting principle to determine the scope of a defendant’s liability for criminal restitution.

In the civil realm, reasonable foreseeability means, generally, that liability is limited to those circumstances in which “a reasonable person in the position of the defendant reasonably would have foreseen” that her conduct

posed a risk of the kind of harm at issue to persons such as the victim.

Piazza, 360 Or at 81; *see also Stewart*, 255 Or at 609 (“[T]he community deems a person to be [liable] only when the injury caused * * * is one which could have been anticipated because there was a reasonable likelihood that it could happen.”). Reasonable foreseeability “serves as a limit on the scope of liability.” *Chapman v. Mayfield*, 358 Or 196, 206, 361 P3d 566 (2015) (citing *Fazzolari v. Portland School Dist. No 1J*, 303 Or 1, 734 P2d 1236 (1987)). It provides the framework for stating “[b]ounds of liability” so that the law does not “make one insure the world at large against all harm from one’s negligent conduct.” *Fazzolari*, 303 Or at 6.

The foreseeability inquiry poses different questions depending on whether an evidentiary record has developed: “When tested before trial, do the allegations of a complaint state facts that, under the law, will allow plaintiff to recover from the named defendant? When tested after a trial, does the evidence introduced reasonably permit findings of fact on which the law will allow the plaintiff to recover from the defendant?” *Buchler v. Oregon Corrections Div.*, 316 Or 499, 509, 853 P2d 798 (1993).

In *Ramos*, this court held that reasonable foreseeability is a limiting concept that applies in determining criminal restitution. 358 Or at 596.

Defendant’s case gives this court the opportunity to explain how this civil law

concept that operates differently at each of several distinct phases in negligence cases can be put to good use in the sentencing phase of a criminal proceeding.

In the civil context, foreseeability is a way to answer some basic questions: given what happened, should this defendant have to pay for this plaintiff's harm? What are the limits of the defendant's liability? *See Piazza*, 360 Or at 70 n 6 (the foreseeability inquiry is a "normative value-laden inquiry" by which community conceptions of fault are expressed).

Reasonable foreseeability applies at several stages in civil proceedings. Before trial, courts use the concept of foreseeability to test whether the allegations in a complaint or the evidence adduced as part of a summary judgment motion state facts that, under the law, *could allow* the plaintiff to recover from the defendant; juries employ a foreseeability analysis in evaluating the trial evidence to determine if and to what degree the facts and theory of liability taken together *will allow* recovery from the defendant.

How reasonable foreseeability is formulated, and thus the scope of a defendant's liability in a given situation, will vary depending on how the circumstances at issue are described. *Chapman*, 358 Or at 208; *Piazza*, 306 Or at 87. A broad characterization of events (*e.g.*, the sidewalk shooting took place in a high-crime neighborhood) will more likely result in a conclusion that the risk of harm was foreseeable; a more specific description (*e.g.*, the random

sidewalk shooting committed by a mentally ill person took place in a neighborhood where gang-, drug-, and alcohol-related violence was common) will often result in the conclusion that the risk was not foreseeable. *Chapman*, 358 Or at 208.

The question here is which application is germane and useful to a sentencing court in a criminal sentencing proceeding.

At the first phase in civil cases, courts often characterize the operative circumstances very generally in the interest of allowing cases to proceed in order to give voice to community judgment through jury determinations. *Piazza*, 360 Or at 79-80. The preference is to allow cases to go to trial, and thus to a factual determination of foreseeability, rather than for courts to determine as a matter of law that a particular harm was not reasonably foreseeable under particular circumstances. Only if the circumstances present some “concatenation of highly unusual circumstances” does the court step in and rule as a matter of law that the case may not proceed. *Stewart*, 255 Or at 609.

At the second phase, the factfinder examines the evidence—that is, what *actually occurred*—in light of the plaintiff’s theory of liability to assess whether the harm that the victim suffered was reasonably foreseeable. This characterization of the circumstances is necessarily narrower than that formulated by the court at the preliminary phases. Its purpose is to determine actual liability.

In the criminal restitution context, the sentencing court takes on all of those roles in the restitution proceeding. The sentencing court acts first as gatekeeper to determine what kinds of damages may be cognizable as restitution based on the general situation that a case presents. Then, the court acts as factfinder to determine what is and is not actually compensable as restitution based on the particular events that took place. At a minimum, that factual inquiry requires determining whether the damages were reasonably foreseeable, and whether the state's evidence is sufficient to prove them.

In that context, reasonable foreseeability is a factual determination rather than a question of law: in most instances, the elements of the criminal charge will effectively limn the boundaries of reasonable foreseeability as a matter of law. Restitution is meant to compensate for damages incurred by the victim to redress the kinds of injuries that the legislature meant to protect against when it enacted the criminal statute at issue. When it enacted the strangulation statute, for example, the legislature likely wanted to protect people from the physical and emotional injury that could result from that particular type of violent conduct. At that level, it might make sense for a court to conclude that it is reasonably foreseeable as a matter of law that a person who has been the victim of strangulation might want a restraining order—one of the harms that

strangulation produces could be lingering fear in the victim’s mind, which could be redressed with a restraining order.⁶

But at the more granular factfinding level—the point at which the sentencing court determines whether a particular defendant must make restitution to a particular victim based on a particular set of facts—the sentencing court must make the foreseeability determination based on a specific description of the facts at issue rather than the general characterization of the situation that is appropriate at the outset. At that point, the sentencing court is equivalent to the jury in a civil trial: the foreseeability determination should not be a common-knowledge based conclusion that people who are victims of domestic violence foreseeably seek restraining orders, but rather an individualized examination of the defendant’s criminal activities and the actual details of what followed to determine what is reasonably foreseeable in that more detailed scenario. It is possible that something that is reasonably foreseeable in that general, preliminary sense, will *not* be so when it comes down to the actual facts in the record.

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⁶ It does not necessarily follow that hiring an attorney to secure the restraining order is foreseeable. Oregon courts have made the restraining order process relatively accessible and completely free of charge—many people obtain such orders without the assistance of a lawyer.

V. The record here does not show that the victim suffered the damages as a result of defendant's criminal conduct.

This is the direct evidence in the record concerning the victim's motivations for hiring a lawyer:

"Hired after [defendant's] repeated violations of the no contact order while in jail.

"Attorney assisted in contacting the jail to get a copy of the no contact order release provision, to contact the district attorney and Victim's Assistance on the plea offer, restitution and no contact provision, obtaining a FAPA restraining order after his previous violations of no contact order with no repercussions, gathering evidence of violation of no contact provisions[.]"

Ex 1.

The victim did not reasonably or necessarily incur the cost of hiring a lawyer to help her get a restraining order against defendant because of defendant's crime. The victim stated that she sought a restraining order because defendant had violated a no-contact order while he was in jail. Ex 1. Her decision to obtain a restraining order was caused by defendant's conduct after the crime, not by the crime itself. What is more, the record contains no information about why the victim decided to hire a lawyer to help her get a

restraining order.⁷ Certainly she had every right to hire an attorney, but it was her choice to do so, not an expense that she became liable or subject to pay because defendant committed the crime of strangulation.

Presumably, if defendant had not violated the no-contact order, the victim probably would not have felt the need to obtain a FAPA restraining order. But the paucity of information in the record concerning the victim's motives or perspective supports only speculative conclusions, save for the one conclusion established by the direct evidence that the victim supplied: that she hired a lawyer as a result of defendant's repeated no-contact order violations.⁸ As the Court of Appeals noted, defendant's crime was a factual predicate in that defendant would not have been arraigned on charges and thus subject to the order that he violated had he not committed strangulation against his wife. But based on the evidence in the record, the strangulation alone was "not sufficient to cause the victim to incur the attorney fees." *Gerhardt*, 273 Or App at 595. It

⁷ ORS 107.718(8)(c) provides that "no filing fee, service fee or hearing fee shall be charged" for FAPA restraining order proceedings. The process by which a person can get a FAPA order is relatively simple. A petitioner can file a petition in the traditional way, or even fill out an online form in the "TurboCourt" system which will prepare the exact documents necessary and help the petitioner file. *See* <https://turbocourt.com/go.jsp?act=actShowAppInfo&appcode=elf-oregon-dv&courtcode=Marion> (website last visited August 7, 2016) ("It's as easy as that—a do-it-yourself service that's fast and stress-free!").

⁸ The attorney's invoice supports this conclusion: the bulk of the lawyer's work for the victim dealt with the no-contact order and restraining order issues. Ex 2.

was defendant's conduct *after* the crime that prompted the victim to hire the lawyer, thus incurring costs. *Id.* Restitution was therefore not proper under ORS 137.106(1)(a).

The "but-for" relationship between defendant's crime and the victim's decision to hire an attorney is also insufficient to satisfy the causation requirement that must underlie a restitution award. The mere fact that a defendant's criminal conduct is a factual predicate of a victim's damages does not demonstrate that those criminal activities caused the damages for purposes of authorizing restitution. Where a defendant's conduct is one of multiple causes of a victim's harm or one link in an attenuated causal chain, the state must assert and prove that the defendant's conduct was, at the least, a substantial factor in causing the harm. Here, the state failed to carry that burden. Again, the evidence is scant and shows only that defendant's in-jail conduct prompted the victim to choose to hire a lawyer. Defendant's criminal conduct was a link in a causal chain, but the chain was attenuated enough that restitution was not proper.

A factual reasonable foreseeability analysis comes to the same conclusion. The foreseeability question here is whether it was reasonably foreseeable to someone in defendant's position when he committed the crime of strangulation that his criminal conduct would result in a no-contact order which he would violate, and that rather than attempting to get the state to enforce an

existing no-contact order⁹ the victim would hire a lawyer to help her get a FAPA restraining order in a separate proceeding.

Even assuming that a reasonable person is presumed to know and comprehend all aspects of the law—so that defendant would be aware of the upcoming no-contact order at the time of his crime—it casts the net too broadly to say that the whole chain of circumstances is reasonably foreseeable. The state argues that the court should make the foreseeability determination based only on a general description of the crime of conviction: the victim was entitled to restitution because “it is reasonably foreseeable that a domestic-violence victim will hire an attorney to enforce or seek an order protecting the victim from further abuse.” Pet BOM 11. But, as explained above, at the sentencing phase in a criminal case, a general description of the civil-proceeding summary-judgment ilk is not helpful in evaluating reasonable foreseeability—it will allow recovery under too many circumstances, and likely implicate constitutional concerns. The sentencing court should look to the facts in the record, not to a general description that relies on common-knowledge. This court should do the same.

⁹ Ex 1 states that the victim obtained a FAPA order “after [defendant’s] previous violations of no contact order with no repercussions[.]” A factfinder could infer from that statement that she tried to get the state to enforce the order, but to no avail. In that case, it would be the state’s failure to enforce the court order that caused the victim to get the FAPA order, not defendant’s criminal activities.

VI. The Court of Appeals correctly concluded that the defendant's criminal conduct did not cause the victim's damages, and this court should affirm.

Although the Court of Appeals' opinion in this case predated this court's decisions in *Ramos* and *Kirschner*, that court's analysis took into account both causation and foreseeability and came to the correct conclusion. Based on the trial court record, the Court of Appeals determined that the damages resulted not from defendant's crime of conviction, but from his later bad conduct. *Gerhardt*, 273 Or App at 594-95. Thus, the state did not establish the requisite causation.

Additionally, the court recognized the principle that "restitution can be awarded for damages that are a foreseeable consequence of a defendant's criminal conduct[.]" but concluded that that principle did not extend "to allow an award of restitution for expenses incurred by a victim as a result of unlawful acts committed by a defendant after the criminal acts on which the award is based." *Id.* at 598. While it is "foreseeable that a person who commits an act of domestic violence may commit subsequent acts of domestic violence against the same victim[.]" * * * a restitution award for a conviction for an initial act * * * could not permissibly include damages for injuries sustained as a result of subsequent violent acts by the defendant." *Id.* That is analogous to the circumstances here, the court said, and restitution was therefore improper. *Id.*

That conclusion comports with this court's recent decisions in *Ramos* and *Kirschner*, and this court should affirm the Court of Appeals' decision.

CONCLUSION

For the above reasons, defendant respectfully asks this court to affirm the Court of Appeals' decision in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief length

I certify that (1) this brief on the merits complies with the word-count limitation in ORAP 9.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 9,137 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 certify that I directed the original Respondent's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on August 11, 2016.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Respondent's Brief on the Merits will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Benjamin Gutman, #160599, Solicitor General, attorney for Petitioner on Review, State of Oregon; and on Rosemary W. Brewer, Margaret Garvin, and Erin K. Olson, attorneys for amici curiae.

Respectfully submitted,

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