
IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Respondent,
Respondent on Review,

v.

KADE WILLIAM KIRSCHNER,

Defendant-Appellant
Petitioner on Review.

Union County Circuit Court
Case No. F19697

CA A154602

S063069

BRIEF ON THE MERITS OF PETITIONER ON REVIEW

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

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

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PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

This case presents a statutory interpretation issue concerning the meaning of the clause “crime that has resulted in economic damages” in the restitution statutes and the phrase “economic damages” in the tort statute which is incorporated into the restitution statute. Specifically, defendant’s case asks this court to decide whether wages that the victim lost because he complied with state subpoenas to attend court hearings were “economic damages” and therefore compensable as restitution.

On appeal, defendant argued that the lost wages were not economic damages but rather costs, and as such were not compensable as economic damages. The Court of Appeals affirmed in a *per curiam* opinion citing *State v. Ramos*, 267 Or App 164, 340 P3d 703 (2014). In *Ramos*, the court held that restitution was proper where the defendant’s criminal conduct was a “but for” cause of the victim’s expenses.

The issue in this case is whether lost wages were “economic damages” and thus compensable as restitution. If the lost wages were “economic damages,” the question is whether they were a reasonably foreseeable result of defendant’s criminal conduct.

This court has consolidated for oral argument this case and *State v. Ramos*, S062942. The defendant in *Ramos* was convicted of attempted theft for making a false insurance claim and ordered to pay restitution to her insurance company for various expenses that the company paid out in the course of investigating and processing her false claim. The issue in *Ramos* is essentially the same as the issue in this case: whether the expenses at issue were “economic damages” and thus compensable as restitution. The briefs in this case and *Ramos* contain two of the same Questions Presented and Proposed Rules of Law, and the same Argument sections I-IV, with minor adjustments to account for factual differences. This case contains an additional Question Presented and Proposed Rule of Law. The Argument sections that are different in this case, V and VI, begin on page 40.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented. Must the state establish more than “but for” causation between a defendant’s criminal conduct and a victim’s expenses before a sentencing court may impose restitution for those expenses as “economic damages”?

First Proposed Rule of Law. Yes. A “but for” causal connection is a necessary predicate to a restitution award, but is not sufficient without more to form the basis of restitution. Once the “but for” connection is established, the trial court must determine whether the claimed expenses were a reasonably foreseeable

result of the defendant's criminal conduct and thus "economic damages" subject to restitution.

Second Question Presented. Did the legislature intend for trial courts to use tort damages concepts of liability to determine whether a victim's expenses are the proper subject of a restitution award?

Second Proposed Rule of Law. Yes. By incorporating the tort definition of economic damages into the restitution statute, the legislature analogized the determination of restitution arising from criminal conduct to the determination of damages arising from a civil tort. The legislature thus demonstrated its intent that trial courts continue to rely on civil damages concepts to determine whether claimed expenses are "economic damages" and therefore the proper subject of a restitution award.

Third Question Presented. Does an independent intervening cause that enters the chain of causation after a defendant's criminal conduct and produces victim expenses cut off the defendant's liability for those expenses as "economic damages" compensable as restitution?

Third Rule of Law. Yes. Even if a defendant's criminal conduct is the general, but-for cause of victim expenses, those expenses are not compensable as restitution if an intervening causal factor specifically caused the victim to incur those expenses.

STATEMENT OF FACTS

A person who is convicted of a crime that results in economic damages must pay full restitution for those damages to the victim. ORS 137.106(1)(a). Defendant pleaded guilty to possession of methamphetamine, carrying a concealed weapon, and possession of a Schedule II controlled substance. After a long night of alcohol and drugs, he and some other people “went to the wrong house where we were supposed to stay because we were messed up. Got pulled over and arrested.” Plea Tr 10. The house belonged to Nicholas During their attempt to get into the house, defendant and his companions damaged the front door and the floor surrounding the door. Rest Tr 5. Defendant had drugs and brass knuckles in his possession when he was arrested. Plea Tr 11.

At the beginning of defendant’s case, the trial court set trial dates within 60 days of defendant’s arraignment. OJIN entries 32-34. Defendant pleaded guilty on April 3, 2013. OJIN entries 44-49. was not present at the plea hearing. Tr 14-15. The state had subpoenaed to appear at the April 22 and 23 trial dates, but neglected to lift the subpoena even though defendant had pleaded guilty on April 3 and the trial dates were no longer in effect. Tr 8, Restitution Request, TCF. missed work to comply with that subpoena. Tr 6, 8; Restitution Request, TCF.

At the state’s request, the trial court stated at sentencing that it would

hold a restitution hearing within 90 days of the sentencing date. Plea Tr 22-23. On May 15, 2013, the court scheduled the restitution hearing for June 13, 2013. OJIN entry 60.

In the intervening weeks, the state did not provide defendant with documentation of the details of its restitution request. Rest Tr 10-11. Defendant indicated that he would contest restitution that was not documented. The state subpoenaed to appear at the June 13, 2013, restitution hearing. Rest Tr 8, 13. had to miss work to comply with the subpoena. Rest Tr 8. Had the state provided the requisite documentation to defendant, the parties would most likely have been able to come to an agreement with respect to the proper amount of restitution, and would not have had to miss work to comply with state subpoenas for additional hearings. Rest Tr 10-11

At the restitution hearing, defendant argued that the wages that lost as a result of court hearings were not the proper subject of a restitution award because it was the state's fault that had to miss work to come to court. Tr 10-11.

SUMMARY OF ARGUMENT

An analysis of the plain and ordinary meanings of the relevant statutory terms, the context of the statutes, and a review of the legislative history of the restitution statutes demonstrate that more than a but-for connection must exist between criminal conduct and victim expenses to support a restitution award. A

mere but-for connection between a defendant's crime and a victim's expenses is not sufficient to establish that those expenses are economic damages. Instead, civil law principles of the scope of liability apply: the expenses must be the reasonably foreseeable result of the defendant's wrongful conduct to be economic damages. Consequently, costs and expenses that are not damages in the civil context are likewise not damages in the criminal restitution context.

In particular, the legislative history shows that when the legislature amended the restitution statute in 2005 by replacing the term "pecuniary damages" and the requirement a victim's expenses must be recoverable in a civil claim to be recoverable as restitution in a criminal case, it did not intend to broaden the scope of damages compensable as restitution. Rather, the legislature substituted the phrase "economic damages" and incorporated the definition from the tort statute in an effort to make the restitution statute easier to use and more consistent in application.

Application of the above principles to defendant's case demonstrates that the wages that the victim lost by complying with subpoenas and attending court hearings were not properly the subject of a restitution award.

ARGUMENT

I. The text, context, and legislative history of the restitution statute show that the legislature intended for courts to rely on civil damages concepts to identify “economic damages” subject to restitution.

Defendant was convicted of a number of crimes after damaging the front door of house while trying to gain entry. The trial court ordered him to pay restitution for wages that lost as a result of attending court hearings (some of which had been cancelled well in advance) that were part of defendant’s prosecution and that were arguably caused by the prosecutor’s disorganization and failure to track the case effectively.

This case asks this court construe the phrase “has resulted in economic damages” in the ORS 137.106 using the methodology set forth in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), and modified in *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). The core questions are (1) whether the verb phrase “has resulted in” in the restitution statute refers to a mere but-for connection between crime and expenses, or to a more direct, logically sequential relationship between cause and effect akin to the concept of foreseeability used in tort law, and (2) whether “economic damages” for criminal restitution purposes are the same as

“economic damages” in the civil tort context, subject to the statutory exception for loss of future earning capacity.

To settle those questions, this court must discern what the legislature intended with respect to causation and “economic damages” as they apply to restitution. 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*, 317 Or at 610-612. As the *Gaines* court explained:

“The first step remains an examination of text and context. * *
 * But, contrary to this court’s pronouncement in *PGE*, we no longer will require an ambiguity in the text of a statute as a necessary predicate to the second step—consideration of pertinent legislative history that a party may proffer. Instead, a party is free to proffer legislative history to the court, and the court will consult it after examining text and context, even if the court does not perceive an ambiguity in the statute’s text, where that legislative history appears useful to the court’s analysis. However, the extent of the court’s consideration of that history, and the evaluative weight that the court gives it, is for the court to determine. The third, and final step, of the interpretative methodology is unchanged. If 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.”

Gaines, 346 Or at 171-72.

As examination of the text, context, and legislative history of the restitution statutes shows, when the legislature enacted the statutes in 1977 and

amended them in 1987, 2003, and 2005, it intended sentencing courts to rely on civil law damages concepts to determine which victim expenses and other “objective monetary losses” are compensable as criminal restitution. Criminal restitution and civil damages claims do not serve exactly the same interests or policy goals—though those interests and goals are coterminous in many instances—but civil damages concepts provide a helpful, fair, and, as limited in the restitution context, constitutionally sound framework for making accurate and consistent restitution determinations. It is therefore unsurprising that the legislature intended sentencing courts to use those familiar legal concepts and did not intend to institute a novel system for determining victims’ damages.

II. The plain meaning of the text “has resulted in economic damages” in the restitution statute is that victim expenses must flow directly, immediately, and logically from the defendant’s wrongful conduct to be “economic damages” for restitution purposes.

In Oregon, a person must pay restitution for economic damages that result from her criminal conduct. ORS 137.106(1)(a) provides in part:

“When a person is convicted of a crime * * * that has resulted in economic damages, the district attorney shall investigate and present to the court, at the time of sentencing or within 90 days after entry of the judgment, 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 137.103(2)(a) provides that “‘economic damages’ * * * [h]as the meaning given that term in ORS 31.710, except that ‘economic damages’ does not include future impairment of earning capacity.” ORS 31.710, which appears in the chapter of the Oregon Revised Statutes governing civil tort actions, defines economic damages as

“[o]bjectively 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.”

This case turns on the meaning of the verb “to result in”—the infinitive form for the present perfect verbal phrase “has resulted in”—and the meaning of the phrase “economic damages.” Specifically, the issue is whether “economic damages” encompasses any cost incurred by the victim because of the defendant’s crime or whether such damages are limited by the same principles that limit liability for damages in the civil context.

A. “To result in”

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. *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” (as in, “I used to wake up at 4 a.m. and start sneezing * * *. I tried to find out what sort of allergy I had but finally came to the conclusion that it must be an allergy to consciousness.” James Thurber, *Barbed Shafts of a Veteran Wit*, *Life Magazine* 108 (Mar 14, 1960)) or, more generally, “the last part of anything.” *Id.* at 471.

The ordinary meanings of the terms “result,” “consequence,” “effect,” and “conclusion,” indicate that ORS 137.106(1)(a) requires courts to order restitution when a person’s crime has “directly,” “immediately,” and in “logical sequence” given rise to a victim’s economic damages. Taken together, those definitions demonstrate that the verb “result” requires a close, logical causal relationship between crime and damages rather than a mere but-for connection. The word “result” connotes the “rational,” “necessary” relationship that exists between immediate 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).

The notion of but-for causation does not capture the more heightened, logically grounded connection between crime and damages that the statutory language suggests is required before restitution is awarded. Indeed, but-for causation may be so attenuated and vague that it connects a cause loosely with any number of remote effects. But-for cause is therefore of limited utility as a principle by which to determine with any precision how closely related a particular cause and effect actually are. A recent California case stated the problem succinctly, citing familiar tort law authorities:

“In the words of Prosser and Keeton: ‘[T]he consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose

responsibility upon such a basis would result in infinite liability for all wrongful acts, and would “set society on edge and fill the courts with endless litigation.” Therefore, the law must impose limitations on liability other than simple causality.”

People v. Jones, 187 Cal App 4th 418, 425, 114 Cal Rptr 3d 8 (2010) (internal citation omitted) (applying tort concepts of liability in a criminal case to determine restitution).¹

B. “Economic damages”

The term “economic damages” is defined in ORS 31.710 as limited in ORS 137.103(2)(a) as:

“[O]bjectively 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 * * * 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.”

To construe the term “economic damages” requires in turn the examination of key words within the statutory definition that are not themselves defined. First, the word “damages” itself bears consideration. “Damages” is a legal term of art. When construing such terms, this court looks to legal sources

¹ See also Edward Lorenz, *Predictability: Does the Flap of a Butterfly’s Wings in Brazil Set Off a Tornado in Texas?* Paper presented to the American Association for the Advancement of Science, available at http://eaps4.mit.edu/research/Lorenz/Butterfly_1972.pdf (last visited May 28, 2015).

to ascertain their meaning. *See, e.g., Comcast Corp v. Department of Revenue*, 356 Or 282, 296, 337 P3d 768 (2014) (“[W]e look to the meaning and usage of [terms of art] in the discipline from which the legislature borrowed them. So, for example, when a term is a legal one, we look to its ‘established legal meaning’ as revealed by, for starters at least, legal dictionaries.”).

“Damages” means “money claimed by, or ordered to be paid to, a person as compensation for loss or injury.” *Black’s Law Dictionary* 416 (8th ed 2004). *Webster’s* defines “damages” as “the estimated reparation in money for detriment or injury sustained : compensation or satisfaction imposed by law for a wrong or injury caused by a violation of a legal right * * *.” *Id.* at 571. ² In essence, then, “damages” means an amount of money, determined through some legal proceeding, paid to compensate someone for injury or loss.

The losses that form the basis for economic damages must be “objectively verifiable.” Relying on dictionary definitions, the Court of Appeals interpreted “objectively verifiable” to mean that the loss is “capable of confirmation by reference to empirical facts.” *DeVaux v. Presby*, 136 Or App

² The term “economic damages” is itself a term of art in Oregon law. As a statutory term it was enacted in 1987 along with the term “noneconomic damages” as a change in nomenclature to replace the terms “special damages” and “general damages” in tort cases. Or Laws 1987, ch 774, § 6. “Economic damages” replaced the term “special damages.” *See generally Whitman v. McCoy v. Department of Corrections*, 132 Or App 45, 50, 887 P2d 375 (1994) (discussing the change in terms of art used to describe damages).

456, 462, 902 P3d 593 (1995) (citing *Webster's* at 2453 (1993)). This court too should rely on that definition in construing ORS 137.106.

“Monetary” means “of or relating to money or to the instrumentalities by which money is supplied to the economy : PECUNIARY.” *Webster's* at 1457-58. “Loss” is “the deprivation of [something]” or “the harm or privation resulting from losing or being separated from something * * *.” *Id.* at 1338. “Monetary loss” therefore is either a loss of money itself or some other loss that is expressed in money terms.

ORS 31.710(2)(a) contains an illustrative list that provides further interpretive clues to the bounds of “economic damages.” Such damages include “reasonable charges necessarily incurred” for medical care and the like; “reasonable and necessary expenses incurred for substitute domestic services[,]” and “reasonable and necessarily incurred costs due to a loss of property or for replacement of damaged property.” The watchwords of this definition are “reasonable” and “necessary.” They are words of restraint, of proportion.

“Reasonable” commonly means “being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous * * * being or remaining within the bounds of reason.” *Webster's* at 1892. Since “reasonable” is also frequently used as a legal term of art in Oregon law, it is

appropriate to consult the legal dictionary as well: “reasonable” means “fair, proper, or moderate under the circumstances[.]” *Black’s* at 1293.

“Necessary” has both an ineffable, existential meaning: (“1a : that must be by reason of the nature of things : that cannot be otherwise by reason of inherent qualities : that is or exists or comes to be by reason of the nature of being * * *”), and a more prosaic meaning: “1b : of, relating to, or having the character of something that is logically required or logically inevitable or that cannot be denied without involving contradiction 2 : that cannot be done without : that must done or had : absolutely required.” *Webster’s* at 1510. Taken together, and relying on the least restrictive meaning of “necessary,” these dictionary definitions indicate that “reasonable” charges or costs that are “necessarily” incurred are those outlays of money that are fair and proper, not absurd or ridiculous, and fall within the bounds of what an ordinary person would think were logically required under the circumstances.

Another portion of the statutory text supports this interpretation. . ORS 137.106(1)(a) provides that “if the trial court finds from the evidence presented that a victim suffered economic damages * * *, the court shall enter a judgment” requiring the defendant to pay restitution for those damages. This procedure presumes that there will be times when the court evaluates the evidence presented and finds that no economic damages exist. For that to be so, there must be circumstances when a victim has paid out money or sustained loss

of some sort, but the court determines that the loss is not compensable as damages. Put another way, the statute assumes the existence of situations in which victim costs, losses, or expenses are not “economic damages.”

The manner in which the legislature used the terms discussed above strongly suggests that it used the phrase “economic damages” for two main reasons: first, to ensure that crime victims are compensated fully and appropriately for their injuries by making the measure of damages concrete and readily verifiable; and second, by the same token, to guarantee that the wrongdoer, guilty or liable as she may be, is not held accountable for losses not directly or reasonably related to her wrongful conduct. As this court has noted, Oregon’s general rule in regard to assessing damages is that “a plaintiff should recover only such sums as will compensate the plaintiff for the injury suffered as a result of the defendant’s wrong * * *.” *Zehr v. Haugen*, 318 Or 647, 657, 871 P2d 1006 (1994) (citing *Yamaha Store of Bend, Inc v. Yamaha Motor Corp*, 310 Or 333, 344, 798 P2d 656 (1990)). The legislature’s incorporation of the tort-statute definition of economic damages into the criminal restitution statute indicates that the legislature meant for courts to determine economic damages for restitution in the same common-sense fashion as they determine tort damages.

Applying the plain and ordinary meanings and the legal “term-of-art” meanings of the relevant terms yields the following standard for determining

economic damages in the criminal restitution setting: a criminal defendant is liable to the victim for those damages that are reasonably and foreseeably within the scope of the risk of harm created by the defendant’s criminal conduct. The legislature incorporated that tort standard into the restitution context. Although this incorporation of tort damages principles into the restitution statute is clear from the meanings of the terms themselves, it is made even clearer by the fact that the legislature *literally* integrated the tort damages statute—ORS 31.710—into the restitution statute.

III. The context and legislative history of the restitution statute since its enactment in 1977 confirm that the legislature intended to incorporate civil damages concepts into the determination of criminal restitution.

“The context for interpreting a statute’s text includes the preexisting common law and the statutory framework within which the law was enacted.” *State v. Ofodrinwa*, 353 Or 507, 512, 300 P3d 154 (2013) (internal citation and quotation marks omitted).

A. ORS 137.540(10) (1973), the statute that governed restitution before 1977, contained no guidance for trial courts in determining whether and how to order restitution in criminal cases.

Until 1977, ORS 137.540, the probation-conditions statute, governed criminal restitution in Oregon. ORS 137.540(10) (1973) authorized a sentencing court to require as a condition of probation that the defendant “make reparation or restitution to the aggrieved party for the damage or loss caused by the

offense, in an amount to be determined by the court.” That provision was the sole statute that empowered criminal courts to order restitution. Because the restitution order was not a term of the sentence as it is today, but rather a condition of probation, restitution was difficult to enforce and collect. Likewise, the probation statute did not authorize a court to order an offender receiving a prison sentence to pay restitution. The unsatisfactory generality of the provision prompted this court to address the issue in 1976.

B. In *State v. Stalheim*, this court interpreted ORS 137.540(10) (1973), to require the application of civil damages concepts to determine restitution.

In 1976, this court decided *State v. Stalheim*, 275 Or 683, 552 P2d 829 (1976). The question in *Stalheim* was who was an “aggrieved party” for purposes of receiving restitution under ORS 137.540(10) (1973). *Id.* at 685-86. The direct victims in that case, a mother and daughter, had been killed in the car crash that gave rise to the criminal charges, and the trial court ordered the defendant to pay restitution to the surviving husband who had not been involved in the accident. *Id.* at 685.

The court construed ORS 137.540(10) (1973) to determine whether the surviving husband was an “aggrieved party” under the statute. The court began by observing that ORS 137.540(10) (1973) was “drawn in general terms” and was therefore equally susceptible to both broad and narrow interpretations as to “the persons entitled to receive benefits under [the statute] and as to the

character of the reparation or restitution which is to be made.” *Id.* at 686. A

broad interpretation, the court noted, led to potentially thorny legal problems:

“* * * If the [ORS 137.540(10) (1973)] is interpreted broadly so as to permit the imposition of unliquidated damages, thus including such losses as pain and suffering, decreased earning capacity, loss of consortium and the like, the trial judge will be forced to make evaluations of losses usually reserved to civil juries. In the usual case, the trial judge will not have the benefit of pleadings which frame the issues nor the testimony of witnesses to develop evidence relevant to the loss resulting from the defendant’s wrongdoing. Thus, the trial judge is left in the difficult if not impossible position of having to assign a value to a loss he knows little about. 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.

“There are other reasons for removing the adjudication of uncertain losses from the sentencing proceedings. There is a real danger that the defendant may be prejudiced by the introduction of civil damages issues into his criminal trial. At the sentencing proceeding the defendant does not have the benefit of defenses such as contributory negligence or assumption of risk, nor does he receive a jury determination of damages which would be available to him in a civil trial. Further, when faced with the alternative of paying what he might regard as an exorbitant measure of damages or of going to prison, the defendant might hesitate to argue with an award of restitution or reparation no matter how speculative or unfair it might be or however summary the procedure under which it was imposed.”

Id. at 686-87 (footnotes omitted). *See also State v. Sullivan*, 24 Or App 99, 104-

06, 544 P2d 616 (1976) (Schwab, C.J., dissenting) (footnote omitted) (“The

serious legal problems raised [by the current method of imposing restitution]

are legion. The defendant is being deprived of property without an opportunity

to be heard. Both the defendant and the victim are being deprived of their right to have a jury trial on the civil liability question.”).

The difficulties that the court identified prompted it to interpret ORS 137.540(10) (1973) narrowly, restricting damages recoverable as restitution to the return or replacement of lost money or objects and the reimbursement of “the victim’s liquidated or easily measurable damages” resulting from the offense, including such things as medical expenses, actual lost wages, and easily measureable property damage. *Id.* at 688. The court further held that only the direct victim of the crime at issue was the “aggrieved party” for purposes of receiving restitution. *Id.* Finally, the court held that if there was “some question as to the amount of the victim’s loss, the defendant [was] entitled to a hearing on that issue.” *Id.* All of this, the court wrote, was consistent with the basic rehabilitative purpose of restitution. *Id.* at 689. The court ended its opinion with an invitation to the legislature to address the issue:

“Because there are a number of policy considerations which are presented by a broad treatment of the statute, we think that it is advisable to leave these for legislative scrutiny. We hold, therefore, that ORS 137.540(10) permits restitution or reparation to the victim only and limits recovery to amounts which are readily measurable.”

Id. at 689-90.

C. The legislature enacted ORS 137.103 and 137.106 in 1977, in part to codify and in part to change this court’s holdings in *Stalheim*, and expressly incorporated civil damages concepts into criminal restitution.

The legislature accepted this court’s invitation and enacted the new restitution statutes in 1977. The Legislative Interim Committee on the Judiciary had been working on a number of corrections issues, including restitution, since 1975. *See, e.g.*, HB 2012 (1977) Restitution—Summary, (February 13, 1976) (summary of proposed legislation describing the principle and intended impact of the bill).³ That committee developed draft legislation intended in part to codify and in part to change the *Stalheim* restitution scheme. *See* Report of the Subcommittee on Corrections, Legislative Interim Committee on the Judiciary at 17-20 (September 9, 1976) (containing draft legislation and commentary, noting that the proposed statutory provisions reflected this court’s decision in *Stalheim*, and the Court of Appeals’ decision in *Sullivan*).

In the fall of 1976, the Governor’s Task Force on Corrections, charged with developing community-based corrections programs and chaired by Edward Sullivan, legal counsel to Governor Robert Straub, recommended that, “[f]ollowing the [*Stalheim*] decision * * *, further studies of restitution sentencing options should be conducted.” *Report of the Governor’s Task Force*

³ *See* Oregon State Archives Legislative Tracing for House Bill (HB) 2012 (1977) at 2, describing Archives’ holdings of the interim judiciary committee’s records.

on Corrections 69 (1976). The task force’s report to the legislature included draft restitution legislation and recommended that the legislature (1) amend ORS 137.540(10) (1973) to provide that, contrary to the holding in *Stalheim*, “any party” who was “affected by the offender’s criminal actions” could receive restitution; and (2) consider legislation that would “empower the [trial] court” to order restitution as a term of the sentence, and therefore an enforceable part of the judgment, rather than as a condition of probation. *Id.*, Position Papers 49-50, Draft Legislation, 1-2.

The House Judiciary Committee took up restitution in the 1977 regular legislative session. Minutes, House Committee on Judiciary, Jan 18, 1977, 3; Feb 21, 1977, 1-4. After considering a number of different bills, the legislature settled on House Bill (HB) 2012 (1977), one of the draft bills proposed by the governor’s corrections task force. The bill, like the bill developed by the interim committee in 1976, was meant to implement certain parts of the *Stalheim* decision and to “fix” others. Minutes, House Committee on the Judiciary, Jan 18, 1977, 3.

HB 2012 (1977) created restitution as a term of the criminal sentence rather than a condition of probation, allowing but not requiring the court to sentence the defendant to pay it. In direct response to *Stalheim*’s holding that only the direct victim was an “aggrieved party,” the legislature broadened the class of who could recover to include “any person whom the court determines

has suffered pecuniary damages as a result of the defendant's criminal activities." Minutes, House Committee on the Judiciary, Feb 21, 1977, 1. As to damages, the bill provided that restitution would compensate victims for "pecuniary damages," defined as "all special damages, but not general damages, which a person could recover against the defendant in a civil action arising out of the facts or events" at issue. *Id.*, 2. Damages were limited to special damages because, like the *Stalheim* court, some legislators feared that allowing for broader recovery or general damages would force trial judges into constitutionally problematic territory with respect to the determination of damages. *Stalheim*, 275 at 687-89; Tape Recording, House Committee on the Judiciary, Jan 18, 1977, Tape 1, Side 2(discussion between committee counsel Dennis Bromka and Representatives Kulongoski, Gardner, and unidentified speaker); Minutes, House Committee on the Judiciary, Feb 21, 1977, 2, 3-4, 9. The bill gave the trial court discretion (1) whether to order restitution in the first instance, and (2) whether to order complete, partial, or nominal restitution based on the defendant's circumstances and the likely rehabilitative effect of the restitution order. Or Laws 1977, ch 371, § 1. Additionally, the bill provided that the defendant had the right to a hearing if he or she objected to the restitution order, and required an offset against damages in any civil case that might follow the criminal case. *Id.*

The principal policy goals behind HB 2012 (1977) were to reinforce restitution's rehabilitative and deterrent effect on defendants, to remedy "some of the damage done to victims of crimes[,]” and to show justice-system concern for the plight of victims. Gov Task Force on Corrections Memorandum, House Committee on the Judiciary, HB 2012, Feb 21, 1977, Ex B, 1, 6 (task force counsel Sullivan's summary and comparison of various restitution bills). At one of the first hearings on the issue, committee legislative counsel Bromka, put forth the idea that an offender who must both suffer loss himself and repair the loss that he has caused is less likely to reoffend. Tape Recording, House Committee on the Judiciary, Tape 1, Side 2, Jan 18, 1977. It might be just a "gut feeling[,]” he said, but it seemed that restitution could have a significant rehabilitative effect. *Id.* The legislature sought also to demonstrate that the state was responsive to victims' needs by making restitution both more enforceable and more widely available. Gov Task Force on Corrections Memorandum, House Committee on the Judiciary, HB 2012, Feb 21, 1977, Ex B.

Lawmakers apparently felt that the discretionary, limited nature of restitution as set forth in the bill saved it from implicating the civil jury trial right as to the determination of damages, and that the provision for a hearing protected defendants' right to due process and allayed the concerns regarding the determination of damages that this court had raised in *Stalheim*. Minutes, House Committee on the Judiciary, April 5, 1977, 2-4; April 12, 1977, 2, 4, 9;

April 29, 1977, 12, 20. HB 2012 (1977) was codified as ORS 137.103, 137.106, and 137.109, and signed into law in July 1977. Or Laws 1977 ch 371, § 1.

D. *State v. Dillon*, this court’s lead case interpreting the restitution statutes, announced the basic rule regarding causation that still governs restitution today.

In *State v. Dillon*, 292 Or 172, 179, 637 P2d 602 (1981), this court first interpreted the new statute, characterizing the statutory scheme as a “peculiar blend of both civil and criminal law concepts.” The court noted that the statute borrowed from civil law “in that it limits the type and amount of restitution to that which could be recovered as special damages in a civil suit[,]” and required the defendant to pay the victim directly rather than making payments to the state as with a criminal fine. *Id.* For all that, the court said, restitution was not intended to be the equivalent of a civil award. *Id.* Restitution did not necessarily compensate the victim fully because general and punitive damages were excluded, and the trial court could tailor the restitution order how it saw fit to accomplish restitution’s purposes as a sentencing tool. *Id.* at 179-80.

In *Dillon*, the court announced the rule that became and should remain the *sine qua non* of Oregon’s restitution law: the three prerequisites to a restitution order are (1) criminal conduct, (2) pecuniary damages (economic damages under the current statute), and (3) a causal relationship between the two. *Id.* at 181. The question remains what degree of causal relationship must

exist between the defendant's conduct and the victim's expenses for those expenses to be economic damages and thus cognizable as restitution. As the legislature's actions in the decades since enactment of the restitution statutes suggest, the law requires a robust connection—tort-style foreseeability—between criminal conduct and damages.

E. The 1983 amendment to ORS 137.106 ensured that trial courts would have the evidence necessary to determine accurately whether victim expenses were compensable as damages for restitution purposes.

In SB 520 (1983), the legislature amended ORS 137.106 to require that the district attorney investigate and present evidence of the nature and amount of damages to the trial court before the time of sentencing. Or Laws 1983, ch 724, § 1. That change was intended to give sentencing courts the information they needed to determine accurately the damages at issue so that they could make informed decisions regarding whether and how to order restitution. *See, e.g.,* SB 520 (1983) Exhibit P (Letter from Circuit Court Judge Alan Bonebrake proposing the text at issue and explaining its potential utility). Judge Bonebrake explained in his written testimony that the requirement would help victims accomplish the legitimate goal of obtaining compensation for damages while safeguarding “the rights guaranteed to criminal defendants.” *Id.*

F. By guaranteeing full recovery of damages to victims as restitution, the 2003 amendment to ORS 137.106 made restitution even more like a civil damages award than it had been before, thus demonstrating the continuing utility of civil damages concepts in determining restitution.

In 2003, the legislature passed Senate Bill (SB) 617, amending ORS 137.106 to make restitution mandatory rather than discretionary. Or Laws 2003, ch 670, § 1. The concern underlying the bill was that the existing discretionary scheme allowed defendants to dodge responsibility for the damages they caused, with the result that victims were not receiving restitution, either because the defendant did not pay and no effective mechanism existed to make him pay, or because the court simply did not order restitution in the first instance. SB 617 (2003), Recording, Public Hearing, Senate Judiciary Committee, Mar 25, 2003, audio recording at 01:38:25.⁴

SB 617 altered the landscape. No longer could the trial court decide whether and how much restitution to award based on its evaluation of the individual defendant's circumstances and its conclusions concerning rehabilitation or deterrence of future crime. Now, the court was required to order restitution in the full amount of the victim's pecuniary damages regardless

⁴ A recording of this hearing and recordings of the other House and Senate Judiciary Committee hearings referred to in this brief are available on the Oregon Legislative Information System website at https://www.oregonlegislature.gov/citizen_engagement/Pages/Legislative-Video.aspx. Recordings are organized by session year, then by committee or subcommittee, and then by date.

of the defendant's circumstances at the time of sentencing. *Id.*, recording at 01:43:20; Or Laws 2003, ch 670, § 1. Some discretion remained to the court: if the defendant had no money or other resources at the time of sentencing, the court could allow him or her to make restitution on a court-administered payment plan rather than all at once at the time of the judgment. Public Hearing, House Judiciary Committee, May 20, 2003, audio recording at 00:44:00.⁵

As Attorney General Hardy Myers, chair of the Attorney General's Task Force on Restitution Reform, testified at a May 2003 hearing, SB 617 illustrated a fundamental shift in Oregon policy to "full accountability" so that offenders would be under a "strict legal obligation" to recompense victims

⁵ Those changes flowed from the growing societal concern in the 1990s with crime victims' rights and with "just deserts" punishment of offenders. In 1996, for example, pursuant to Senate Joint Resolution 32 referred to the voters as Ballot Measure 26, the voters amended Article I, section 15, of the Oregon Constitution to remove the mandate that Oregon's criminal laws must be based on principles of "reformation and not of vindictive justice." Oregon Voters' Pamphlet (1996) 4-8; Recording, Public Hearing, House Judiciary Committee, May 20, 2003, audio recording at 00:32:40. The new text stated that the foundational principles of criminal punishment under Oregon law must be "protection of society, personal responsibility, accountability for one's actions and reformation." Or Const Art I, § 15. In 1999, the voters enacted Article I, section 42, which, *inter alia*, ensconced crime victims' right to prompt restitution in the state constitution. Groups like Crime Victims United and Crime Victims for Justice advocated with great success for increased attention to be paid to the needs of victims. *See, e.g.*, Recording, Public Hearing, Senate Judiciary Committee, Mar 25, 2003, recording at 01:46:15 (testimony of Arwen Bird, executive director of Crime Victims for Justice)

fully. Recording, Public Hearing, House Judiciary Committee, May 20, 2003, recording at 00:22:00. The focus of the statute had shifted from offender-specific considerations such as the defendant's resources and the rehabilitative impact of restitution, to making the victim economically whole. *See, e.g.*, Recording, Work Session, House Judiciary Committee, June 26, 2003, recording at 00:54:17 (comments of Representative Barker concerning philosophy behind restitution).

By making full recovery of economic damages a central purpose of restitution, the legislature demonstrated ever more clearly restitution's kinship with civil damages awards, highlighting the central goal of restitution as a recovery device meant to make victims whole. *Id.* At a work session on SB 617, then-Representative Floyd Prozanski highlighted the increasingly hybrid civil/criminal nature of restitution: he approved of allowing the victim to ask the criminal court to award the damages they would be able to get in a civil judgment because it allowed the victim to recover what they had a right to without having to go through the additional arduousness of a civil case. *Id.* At 01:01:33. Similarly, Representative Lane Shetterly noted the fundamental policy change in restitution, observing that it personalized the restitution judgment and made it more like a civil judgment between two people than a criminal judgment imposed on the defendant by the state. *Id.*

- G. The 2005 amendments to ORS 137.103 and 137.106 were housekeeping amendments meant to simplify and streamline the restitution process, not to broaden the scope of restitution; the legislature once again expressly incorporated civil damages concepts into restitution, demonstrating the continuing viability of the civil damages model in determining restitution.**

In House Bill (HB) 2230 (2005), the legislature made the change to ORS 137.103 and 137.106 that is most relevant here. The bill removed the phrase “pecuniary damages” and its entire definition from the statute. Most significantly for this case, that definition contained the “recoverable in a civil proceeding” predicate that required a sentencing court to identify a civil action arising out of the facts or events of the criminal conduct under which the victim could recover damages. HB 2230 (2005) replaced the term “pecuniary damages” with the term “economic damages,” defined by reference to ORS 31.710,⁶ a section of Oregon Revised Statutes chapter 31, the chapter on tort actions. Or Laws 2005, ch 564, § 2. The import of that change is key to the resolution of defendant’s case.

⁶ Originally codified as ORS 18.560, ORS 31.710 was part of SB 323 (1987), the Oregon Tort Reform Act, a capacious tort-reform bill that the legislature passed based on the recommendations of a Joint Interim Task Force on Liability Insurance. *See generally* Kathy T. Graham, *1987 Oregon Tort Reform Legislation: True Reform or Mere Restatement?*, 24 Willamette L. Rev. 283 (1988). A centerpiece of that bill was its cap on noneconomic damages. ORS 37.710(1). In the section that contained the cap, the legislature defined the terms “economic damages” and “noneconomic damages.” ORS 31.710(2)(a), (b). Those terms were meant to replace the terms “special damages” and “general damages.” *See Clarke v. OHSU*, 343 Or at 608 n 17.

As the legislative history below shows, that shift was a housekeeping change rather than a tectonic shift in statutory meaning. The legislature intended to streamline and simplify the operation of the statute, not to remove existing limitations on restitution damages. The legislation was meant to make it easier for sentencing courts to determine and award restitution consistently.

Fred Boss, then chief counsel of the Civil Enforcement Division of the Attorney General's office, shepherded HB 2230 through numerous committee hearings and work sessions. According to Boss, the change in the definition of damages was meant to clarify the statute and make it easier for trial courts to use. Recording, Public Hearing, House Judiciary Committee, Subcommittee on Civil Law, Jan 24, 2005, recording at 00: 34:36. Boss explained to the committee that the reason for substituting the term "economic damages" for "pecuniary damages" was to get rid of the "vague" term "pecuniary damages," and its confusing definition. *Id.* He said that courts and litigants struggled with the definition, and read the portion of the restitution statute referring to "special damages but not general damages" recoverable in a civil action. *Id.*

The confusion that Boss referred to likely arose from the fact that those statutorily undefined terms of art—"general damages," "special damages," and

“pecuniary damages.”⁷—were no longer in common parlance in Oregon law, and even when they were, were the subject of debate as to their contours.⁸ The Oregon Revised Statutes contained no definition of those terms. The intent was for the new restitution statute to reflect the statutory terms currently in use defining tort damages. *See, e.g., Clarke v. Oregon Health Sciences University*, 343 Or 581, 608 n 17, 175 P3d 418 (2007) (“General damages * * * now are described as noneconomic damages and encompass nonmonetary losses, including damages for pain and suffering, emotional distress, injury to reputation, and loss of companionship. * * * Special damages now are described as economic damages and refer to the verifiable out-of-pocket losses, including medical expenses, loss of income and future impairment of earning capacity, and costs to repair damaged property.”) The “economic damages” definition was simpler, Boss said. *Id.* What is more, the definition contained an illustrative list of things that constituted economic damages so that courts could

⁷ As far as defendant can determine, the phrase “pecuniary damages” was *never* in common parlance in Oregon law except in the restitution context as a result of ORS 137.103(2) (1977). Nearly all of the Oregon cases that use the phrase are Court of Appeals cases interpreting ORS 137.103 and ORS 137.106 before the 2005 removal of that phrase.

⁸ *See, e.g., Wheeler v. Huston*, 288 Or 467, 471, 605 P2d 1339 (1980) (noting years-long “confusion” among the bench and bar with respect to how “special damages” and “general damages” interact with each other, and how jury is to apportion damages).

easily determine what they were and consistently order restitution accurately and fairly. *Id.*

Committee Chair Ackerman noted that the definition of economic damages from ORS 31.710 was the definition commonly used in tort cases and that it referred only to objectively verifiable losses such as medical bills.

Recording, Public Hearing, House Judiciary Committee, Subcommittee on Civil Law, Jan 24, 2005, recording at 00:40:48. Boss affirmed Ackerman's impression that the new definition did not change the law to allow for recovery for pain and suffering, but rather kept the current limitations on damages. *Id.*

Connie Gallagher, Administrator of the Crime Victim's Assistance Section of the Department of Justice's Criminal Justice Division, testified in favor of HB 2230 at the May 16, 2005, hearing. Public Hearing, Senate Judiciary Committee, May 16, 2005, recording at 00:17:13. She spoke about the losses that crime victims suffered and the desirability of placing the burden of the losses on those who caused them, not those who suffered them. *Id.* In her view, changing the definition of damages from "pecuniary damages" to "economic damages" would promote consistency in restitution orders; she stated that the term "pecuniary damages" had led to inconsistency in restitution orders because the term was not "well-defined in statute[,]” whereas "economic damages" was clearly defined in ORS 31.710 in a way that was familiar to

courts. *Id.* See also Senate Judiciary Committee, May 16, 2005, Ex E (Connie Gallagher’s written testimony in support of HB 2230).

Fred Boss reiterated the testimony he offered during prior hearings in support of the bill. May 16, 2005, Public Hearing, Senate Judiciary Committee, recording at 00:21:30.

Kelly Skye of the Oregon Criminal Defense Lawyer’s Association (OCDLA) testified against the bill. *Id.*, recording at 00:28:33. She stated that OCDLA was concerned that the definitional fix, which appeared merely “technical” on its face, would broaden restitution by allowing restitution for damages that were general damages, which had not been the subject of a restitution award under the old scheme. *Id.* She pointed out that the illustrative list in the “economic damages” definition in ORS 31.710 included one item—future impairment of earning capacity—that had been considered “general damages” under the pre-tort reform model, and therefore would not have been available as restitution under the “pecuniary damages” definition. *Id.* Skye said that OCDLA believed that the changes of the last two legislative sessions⁹

⁹ *I.e.*, the removal of judicial discretion regarding whether to order restitution, ORS 137.106(1)(a); the requirement that the defendant pay the entire amount of the victim’s economic damages, *Id.*; the addition of subrogation “victims” such as insurance companies and the Crime Victim’s Compensation Fund, ORS 137.103(4)(c), (d); and the possible inclusion of types of damages that had previously been considered “general damages.” HB 2230 (2005).

could expand restitution to the point where the civil jury trial right would be implicated and she urged the committee to keep that in mind when enacting the new legislation. *Id.* See also, Senate Judiciary Committee, May 16, 2005, Ex H (Kelly Skye written testimony explaining OCDLA objection to HB 2230). As a result of the issues that Skye identified, the enacted version of the bill stated expressly that economic damages did *not* include future impairment of earning capacity. Recording, Work Session, Senate Judiciary Committee, June 16, 2005, recording at 01:20:12 (Fred Boss testimony summarizing current state of HB 2230); Or Laws 2005, ch 564, § 1.

At a final work session in the Senate Judiciary Committee, Fred Boss again explained the intent behind HB 2230. Work Session, Senate Judiciary Committee, June 16, 2005. After outlining the bill's provisions, including the amendment that excluded loss of future earning capacity from the definition of economic damages, he stated outright that the goal of the change in the definition was to maintain the status quo with respect to what damages were, but to clarify the definition. *Id.*, recording at 01:20:12. Committee Chair Senator Burdick noted that the HB 2230 was meant to clean up the restitution statute at the attorney general's behest, and *not* to expand the scope of damages. *Id.*

As the legislative history shows, no one who worked on the definitional change contemplated that its purpose was to expand the concept of restitution

damages beyond what it had been under the “pecuniary damages” formulation, or to unmoor restitution damages from the civil-damages model. The problem with the old definition was not that it directly linked restitution to what a person could recover in a civil case—that rule required only that the sentencing court make the same determinations made in civil actions. Rather, the problem was that the old definition used imprecise, outdated damages terms of art that were not statutorily defined, and it seemed that trial courts were applying them inconsistently.

From the time of the enactment of the restitution statute, the legislature has expressly linked restitution damages to civil damages. This court did the same thing in *State v. Stalheim*. There is no good reason now to read a housekeeping amendment like the definitional change in 2005 to dismantle a useful framework that is fair and familiar, accords with the text of the restitution statute overall, and serves the policy purposes that the legislature identified in enacting those statutes.

IV. For restitution purposes, “economic damages” are those damages that the victim could recover under civil tort damages principles.

As discussed above, the legislature expressly incorporated the tort definition of damages into the restitution statute, indicating that it intended for courts to continue to rely on civil concepts in determining economic damages in criminal cases, as they had from the time the restitution statute was enacted.

From its inception, the restitution statute has referred sentencing courts to civil damages law to determine restitution. Nothing has changed save that in 2005 the legislature removed the requirement that the state identify a particular theory of civil liability under which the victim could recover damages if the case were civil rather than criminal. Regardless of the theory of liability, the assessment of economic damages is still guided by the civil damages model. In tort, a person who has suffered harm can recover damages to compensate for loss or harm that was a reasonably foreseeable result of the defendant's wrongful conduct. *Fazzolari v. Portland School Dist No 1J*, 303 Or 1, 734 P2d 1326 (1987); *see also Towe v. Sacagawea*, 357 Or 74, 86-87, 347 P3d 766 (2015) (examining the interaction of duty of care and foreseeability of risk in light of *Fazzolari* and its progeny).

Oregon law does not use the familiar law-school parlance that “cause in fact” plus “proximate” or “legal cause” equals liability. As this court discussed in *Fazzolari*, “proximate cause” in that traditional formation is actually a “value judgment” determining as a policy matter where to draw the line with respect to the scope of the defendant's liability. The phrase is not a literal requirement that a defendant's conduct be a “proximate cause” of the harm or loss. *Id.*, 303 Or at 8.

Oregon courts moved away from the “proximate cause” model in the 1960s, and in 1970 this court set forth the Oregon standard for determining the

scope of tort liability in *Stewart v. Jefferson Plywood Co.*, 255 Or 603, 469

P2d 783 (1970):

“[L]iability is confined to harms actually resulting that are of the general kind to be anticipated from the conduct and, for the same reason, liability is confined to situations in which the person harmed is one of the general class threatened.

“This idea of limiting liability to that which can be anticipated is formulated into the foreseeability test for negligence, which states that one is negligent only if he, as an ordinary reasonable person, ought reasonably to foresee that he will expose another to an unreasonable risk of harm. Foreseeability is an element of fault; the community deems a person to be at fault only when the injury caused by him is one which could have been anticipated because there was a reasonable likelihood that it could happen.”

Id. at 608-09 (internal citation and quotation marks omitted).

As they have for years, these general tenets continue to provide a useful framework within which to determine economic damages for restitution purposes. In most instances the initial question of factual causation is not disputed in criminal restitution cases—it is often patent that the defendant’s criminal conduct was a “but-for” cause of a host of victim expenses. The second inquiry, whether the harm that resulted was of “the general kind to be anticipated from the conduct,” and is thus compensable as “economic damages,” is a helpful and necessary guiding principle for cases where the scope of liability is disputed.

By the same token, costs and expenses that are not considered “economic damages” in civil tort proceedings are not properly compensable as restitution

in a criminal case. The legislature made clear that only “economic damages” are cognizable as restitution.

V. lost wages were not a foreseeable result of defendant’s criminal conduct.

The concept of reasonable foreseeability refers to generalized risks of the type of things that could happen as a result of the conduct at issue rather than the predictability of the actual sequence of events in a particular case.

Fazzolari, 303 Or at 13 (citing *Stewart v. Jefferson Plywood*, 255 Or at 610-11).

The question here, then, is whether as a general matter prosecutors subpoena crime victims to attend court hearings that are either patently unnecessary (as the trial dates here were, once defendant pleaded guilty on April 3, 2013) or arguably caused by the prosecutor’s failure to attend to the details of his or her prosecution (as the restitution hearing was), thereby causing them to miss work.

This record does not support the conclusion that it is generally reasonably foreseeable that prosecutorial inattention to detail during criminal cases will result in lost wages for crime victims. Defendant doubts that any record would support such a claim—while it is necessary to hold offenders accountable for the damages they cause, it is unreasonable to make them pay for damages that did not flow naturally and directly from their criminal conduct, but were, rather the result of an intervening cause. Here, defendant agreed to pay for wages that he lost when he had to miss work to deal with the actual effects of

defendant's crime, *viz.*, the broken door and necessary repairs. But the remainder of lost wages were not a direct result of defendant's criminal conduct, but rather of the prosecutor's neglect. The prosecutor's conduct was an intervening cause that interrupted the sequence of foreseeably occurring events and was the cause of lost wages. *See Miami Quarry Co v. Seaborg Packing Co*, 103 Or 362, 370-72, 204 P 492 (1922) (discussing the effect of intervening cause on liability of original tortfeasor).

VI. Alternatively, the lost wages at issue in this case are not “economic damages” and are therefore not the proper subject of a restitution award.

A. Wages lost to attend court hearings are costs of prosecution not “economic damages.”

ORCP 68 B defines costs as “reasonable and necessary expenses incurred in the prosecution or defense of an action other than for legal services.”

Assuming for the sake of argument that it was “reasonable and necessary” for

to comply with the state's subpoenas to attend the cancelled trial dates and the restitution hearing, the wages he lost by doing so were “expenses incurred in the prosecution * * * of an action” rather than “economic damages.”

The restitution statute does not contain a provision allowing victims to recover costs; it limits recovery to damages. Other statutes indicate that where the legislature intended costs to be recoverable, it specified that they were recoverable. For example, ORS 30.866, the civil stalking statute, which provides that a stalking plaintiff may recover damages *and* attorney fees and

costs, ORS 30.866(4)(a)-(c); ORS 194.405(1),(2), the statute governing violations of the uniform law on notarial acts, provides that an injured person may recover damages *and* costs. In addition to the stalking provision, ORS chapter 30, Actions and Suits in Particular Cases, contains other examples of statutory provisions allowing for the recovery of costs in addition to damages. *E.g.*, ORS 30.876 (actions arising out of interference with agricultural research); ORS 30.701 (actions against maker of dishonored check); ORS 30.030 (distribution of damages in wrongful death actions).

The legislature differentiates between damages and costs across the statutory spectrum. And this court does, too, in implementing those statutes. *See, e.g., Halperin v. Pitts*, 352 Or 482, 287 P3d 1069 (2012) (interpreting statute providing for award of attorney fees in small tort action); *Strawn v. Farmers Ins Co*, 353 Or 210, 297 P3d 439 (2013) (dealing with allocation of attorney fees and costs in a class-action breach of contract suit); *Patton v. Target Corp*, 349 Or 230, 242 P 3d 611 (2010) (on a question certified to this court from the Ninth Circuit, interpreting and applying ORS 31.735, the “split recovery” statute that requires part of any Oregon punitive damages award to be paid to the Oregon crime victim compensation account).

It is clear that costs are not damages. Only damages may form the basis of a restitution award. It is therefore not permissible for a sentencing court to order a defendant to pay costs as restitution. Because the lost wages at issue

here were costs not damages, it was impermissible for the court to order defendant to pay them as restitution.

CONCLUSION

For the foregoing reasons, defendant respectfully asks this court to reverse the trial court's order that he pay restitution for the victim's wages lost as a result of attendance at court hearings. That requires reversing the decisions of the trial court and the Court of Appeals.

Respectfully submitted,

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

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (1) the word-count of this brief (as described in ORAP 5.05(2)(b)) is 10,465 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 Petitioner's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on June 8, 2015.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Brief on the Merits will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Doug Petrina, #963943, Assistant Attorney General, attorney for Respondent on Review.

Respectfully submitted,

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