

1983

## Criminal Law - Power of Court to Impose Particular Kinds of Punishment - Trial Court Had Power to Order Defendant to Make Restitutions to Survivors of Auto Accident to Compensate Them for Their Injuries

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### Recommended Citation

Shoemaker, John R. (1983) "Criminal Law - Power of Court to Impose Particular Kinds of Punishment - Trial Court Had Power to Order Defendant to Make Restitutions to Survivors of Auto Accident to Compensate Them for Their Injuries," *North Dakota Law Review*. Vol. 59 : No. 3 , Article 10.  
Available at: <https://commons.und.edu/ndlr/vol59/iss3/10>

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CRIMINAL LAW — POWER OF COURT TO IMPOSE PARTICULAR KINDS OF PUNISHMENT — TRIAL COURT HAD POWER TO ORDER DEFENDANT TO MAKE RESTITUTION TO SURVIVORS OF AUTO ACCIDENT TO COMPENSATE THEM FOR THEIR INJURIES

Karl Morgan was intoxicated when he was involved in an automobile collision that killed Mr. and Mrs. Clarkin and seriously injured three girls riding with them.<sup>1</sup> The State of Montana charged and convicted Morgan of negligent homicide.<sup>2</sup> The trial court ordered Morgan to make restitution to the accident survivors in accordance with section 46-18-201 of the Montana Code Annotated.<sup>3</sup> On appeal Morgan challenged<sup>4</sup> the trial court's

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1. *State v. Morgan*, \_\_\_ Mont. \_\_\_, \_\_\_, 646 P.2d 1177, 1178 (1982). The defendant, Karl Morgan, drank several alcoholic beverages at a Bozeman bar and then started home. Brief for Respondent at 2, *State v. Morgan*, \_\_\_ Mont. \_\_\_, 646 P.2d 1177 (1982). A few miles from the bar Morgan drove his car over the centerline and collided with Holly Clarkin's car. Brief at 2-3. Karl Morgan was hospitalized for the injuries he suffered. *Id.* at 1.

2. \_\_\_ Mont. at 646 P.2d at 1178. On January 8, 1981, a jury convicted Karl Morgan of negligent homicide pursuant to § 45-5-104 of the Montana Code Annotated. Brief for Respondent at 1, *State v. Morgan*, \_\_\_ Mont. \_\_\_, 646 P.2d 1177 (1982). See MONT. CODE ANN. § 45-5-104 (1981). Section 45-5-104 describes the crime of negligent homicide as follows: "Criminal homicide constitutes negligent homicide when it is committed negligently." *Id.* § 45-5-104(1).

3. \_\_\_ Mont. at \_\_\_, 646 P.2d at 1182. The trial court deferred sentencing of the defendant for three years under the conditions that he serve 60 days in jail on a work release program and make payments to the accident survivors. *Id.* The trial court ordered Morgan to make payments to the clerk of the district court in the amount of \$75.00 each month for three years. See MONT. CODE ANN. § 46-18-201 (1981). Section 46-18-201, which specifies the types of sentences that a district court may impose, provides:

1. Whenever a person has been found guilty of an offense upon a verdict or a plea of guilty, the court may:

a. defer imposition of sentence. . . . The sentencing judge may impose upon the defendant any reasonable restrictions or conditions during the period of the deferred imposition. Such reasonable restrictions or conditions may include:

. . . .  
iv. restitution.

*Id.* § 46-18-201 (1) (a) (iv).

4. \_\_\_ Mont. at \_\_\_, 646 P.2d at 1178. Morgan raised two other issues on appeal.

jurisdiction and power to order restitution to the accident survivors.<sup>5</sup> Morgan further argued that the injured girls were not within the class of persons injured by the crime of negligent homicide.<sup>6</sup> The Supreme Court of Montana *held* that the trial court had power to order restitution<sup>7</sup> in the form of payment of the out-of-pocket losses,<sup>8</sup> but that payment in excess of actual damages was not permissible.<sup>9</sup> The court also *held* that the survivors of the collision were within the class of persons injured by the crime,<sup>10</sup> and therefore, the trial court properly ordered restitution.<sup>11</sup> *State v. Morgan*, \_\_\_ Mont. \_\_\_, 646 P.2d 1177 (1982).

Criminal law statutes often provide for restitution as either a condition of probation<sup>12</sup> or as a separate sentencing alternative.<sup>13</sup>

\_\_\_ Mont. at \_\_\_, 646 P.2d at 1179-80. The first issue was whether Morgan was in a condition rendering him incapable of withdrawing his implied consent for a blood alcohol test. *Id.* at \_\_\_, 646 P.2d at 1179. *See* MONT. CODE ANN. § 61-8-402 (1981) (Montana's implied consent law on chemical blood, breath, or urine tests). The second issue involved the effect on the fairness of the proceedings of the prosecutor's illegal jury instruction regarding the presumed level of intoxication in Montana. \_\_\_ Mont. at \_\_\_, 646 P.2d at 1180.

5. Brief for Appellant at 13-14, *State v. Morgan*, \_\_\_ Mont. \_\_\_, \_\_\_, 646 P.2d 1177, 1182 (1982). Morgan argued that the definition of restitution did not include payment in the nature of civil damages, but contemplated only the restoration of an object wrongfully taken, or its money's worth, by reason of a defendant's wrongful act. Brief at 13-14. Morgan contended that the district court's order requiring him to pay the surviving victims was not restitution, but was in the nature of civil damages. *Id.* at 14. Therefore, Morgan concluded that the district court had exceeded its jurisdiction and sentencing power. *Id.*

6. \_\_\_ Mont. at \_\_\_, 646 P.2d at 1182. Morgan based his argument on *State v. Stalheim*. *Id.* *See State v. Stalheim*, 275 Or. 683, \_\_\_, 552 P.2d 829, 832 (1976). Section 137.540 of the Oregon Revised Statutes provides that a defendant shall make "restitution to the aggrieved party." OR. REV. STAT. § 137.540 (1981). In *Stalheim* the Supreme Court of Oregon construed "aggrieved party" to mean the direct victim of the crime and not other persons who suffered loss because of the victim's death or injury. 275 Or. at \_\_\_, 552 P.2d at 832.

7. \_\_\_ Mont. at \_\_\_, 646 P.2d at 1182. The Montana court followed the trend of criminal sanctions in the United States by providing for the use of restitution in cases in which a court defers imposition of sentence. *Id.*

8. *Id.* at \_\_\_, 646 P.2d at 1183. The *Morgan* court held that medical expenses were an out-of-pocket loss. *Id.*

9. *Id.* Because the record from the district court did not show the actual damages caused to each of the survivors, the Supreme Court of Montana was not able to determine whether the restitution had exceeded the actual damages. *Id.* Thus, the court vacated that portion of the sentence that required payment of money and remanded to the district court for resentencing on that point. *Id.*

10. *Id.* The *Morgan* court stated that § 46-18-201 of the Montana Code Annotated, which provides for restitution, failed to aid the court in construing the meaning of the phrase "the class of persons injured by the crime." *Id.* (quoting 3 AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE § 18.114-.115 (2d ed. 1980)). Therefore, the *Morgan* court looked to the Crime Victims Compensation Act of Montana and found that under § 53-9-103 of the Act "a person who has suffered as a result of criminally injurious conduct is classed as a victim, without a relationship to a crime for which a conviction was obtained." \_\_\_ Mont. \_\_\_, 646 P.2d at 1183. *See* MONT. CODE ANN. § 53-9-103 (1981).

11. *State v. Morgan*, \_\_\_ Mont. \_\_\_, \_\_\_, 646 P.2d 1177, 1183 (1982). The *Morgan* court considered the three surviving girls to be persons injured by the crime because each of the girls suffered bodily harm due to Morgan's criminal act of negligent homicide. *Id.*

12. *See* 18 U.S.C. § 3651 (1976). Section 3651, which governs suspension of sentence and probation after a judgment of conviction of any offense not punishable by death or imprisonment, provides that "while on probation and among the conditions thereof, the defendant may be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had." *Id.* *See also* N.D. CENT. CODE § 12.1-32-07 (2) (e) (1975) (As a condition of probation the court may order the defendant to "make restitution . . . to the victim of his conduct for the damage or injury which was sustained.").

13. *See* N.D. CENT. CODE § 12.1-32-02 (1975). Section 12.1-32-02 sets forth sentencing alternatives, including restitution for damages resulting from the commission of an offense. *See id.*

Courts traditionally have used the terms "restitution" and "reparation" interchangeably.<sup>14</sup> The Supreme Court of Oregon in *State v. Stalheim*,<sup>15</sup> however, construed "restitution" to mean "the return of a sum of money, an object, or the value of an object" that the defendant wrongfully acquired during the perpetration of the crime.<sup>16</sup> The *Stalheim* court defined "reparation" to be "a repairing or . . . [a] restoration to good condition."<sup>17</sup>

Case law has established that a claimant must be within the class of persons injured by the crime to be eligible to receive restitution.<sup>18</sup> The United States District Court for the Eastern District of Pennsylvania in *United States v. Follette*<sup>19</sup> held that when restitution is a condition of probation, the trial court can order the defendant to make payment to an "aggrieved party."<sup>20</sup> The *Follette* court limited the application of restitution by defining the phrase "aggrieved party or parties" to include only those individuals who are "directly and financially aggrieved by the criminal acts of the defendants."<sup>21</sup>

The Ninth Circuit Court of Appeals in *Karrell v. United States*<sup>22</sup> also limited the concept of restitution by requiring that the indictment name the claimant to have a proper restitution order.<sup>23</sup>

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Under this section the trial court must convict the defendant of the offense. *Id.* See also MONT. CODE ANN. § 46-18-201 (1981) (restitution is listed among the types of sentences that the trial courts may impose).

14. See generally Annot., 79 A.L.R. 3d 976 (1977) (discusses the propriety of a probation condition that requires that defendant convicted of a violent crime to make reparation to the injured victim).

15. 275 Or. 683, 552 P.2d 829 (1976). The Oregon Supreme Court held that § 137.540 (10) of the Oregon Revised Statutes, which authorizes the imposition of restitution or reparation as a condition of probation, allowed restitution to the direct victim only. *State v. Stalheim*, 275 Or. 683, 552 P.2d 829, 833 (1976). The court restricted recovery to sums that were readily measurable. *Id.*

16. *Id.* at \_\_\_\_, 552 P.2d at 832.

17. *Id.* The *Stalheim* court construed "reparation" to encompass only reimbursement for the victim's liquidated or easily measurable damages resulting from the charged offense. *Id.* It embraced such damages as medical expenses, wages actually lost, and reimbursement for easily measurable property damages. *Id.*

18. See *Morgan*, \_\_\_\_, Mont. at \_\_\_\_, 646 P.2d at 1182 (quoting 3 AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE § 18.114-.115 (2d ed. 1980)).

19. 32 F. Supp. 953 (E.D. Pa. 1940). The defendant pleaded guilty to charges of embezzlement and conversion. *United States v. Follette*, 32 F. Supp. 953, 953-54 (E.D. Pa. 1940). The trial court suspended her sentence and placed her on probation on the condition that she make restitution to the surety who covered the amount embezzled. *Id.* at 954.

20. *Id.* The federal district court decided that the phrase "aggrieved party or parties" included "such persons as the owner of the contents of a letter stolen from the mail, the person defrauded by a scheme involving the use of the mails, the bank from which funds have been embezzled, and the innocent person to whom a counterfeit note has been passed." *Id.* at 955.

21. *Id.* at 955. While the *Follette* court did limit restitution to direct victims, it found that the phrase "aggrieved party or parties" included parties other than the United States Government. *Id.* The use of both singular and plural forms in the phrase "aggrieved party or parties" contained in 18 U.S.C. § 724 persuaded the court that the United States alone was not intended. *Id.* at 954-55 (construing 18 U.S.C. § 724 (1940), amended by 18 U.S.C. § 3651 (1952), current version at 18 U.S.C. § 3651 (1976 & Supp. V 1981)).

22. 181 F.2d 981 (9th Cir. 1950). In interpreting 18 U.S.C. § 3651, the Ninth Circuit Court of Appeals found from the statutory language an underlying congressional intent to restrict the scope of restitution. *Karrell v. United States*, 181 F.2d 981, 986 (9th Cir. 1950).

23. *Id.* at 986-87.

Moreover, the *Karrell* court held that the trial court must convict the defendant on the indictment count for restitution to be proper.<sup>24</sup> The Colorado Court of Appeals in *People v. King*<sup>25</sup> strictly construed the term "victim" in section 16-11-204.5 of the Colorado Revised Statutes<sup>26</sup> to exclude those who "suffer loss because of some relationship, contractual or otherwise, to the directly aggrieved party."<sup>27</sup> Thus, the *Follette*, *Karrell*, and *King* courts limited the applicability of restitution to the situation in which the trial court convicts the defendant of an offense and the loss sustained by the victims or aggrieved parties is a direct result of the criminal act.<sup>28</sup>

The Supreme Court of Washington in *State v. Gunderson*<sup>29</sup> expanded the class of "aggrieved parties" to include the parents of a deceased child.<sup>30</sup> The *Gunderson* court held that it was appropriate for the trial court to require the defendant to reimburse any person who has suffered loss or damage because of the commission of the crime.<sup>31</sup> Further expansion of the applicability of restitution in criminal sentencing occurred when the Oregon Supreme Court in *State v. Dillon*<sup>32</sup> noted that the Oregon Legislature had reacted to *Stalheim* by extending the class of "aggrieved parties" beyond

24. *Id.* The trial court in *Karrell* convicted the defendant for knowingly issuing false certificates and papers relating to claims for veterans' home loan guaranty benefits. *Id.* at 982-83. On appeal the Ninth Circuit Court of Appeals held that although the record contained substantial evidence in support of the jury's guilty verdict, the trial court erroneously had ordered restitution for losses sustained by any veteran other than those directly interested in the counts upon which the court convicted the defendant. *Id.* at 986-87.

25. \_\_\_ Colo. App. \_\_\_, 648 P.2d 173 (Ct. App. 1982). The Colorado Court of Appeals held that an insurance company was not a "victim" within the meaning of § 16-11-204.5 of the Colorado Revised Statutes. *People v. King*, \_\_\_ Colo. App. \_\_\_, 648 P.2d 173, 175 (Ct. App. 1982).

26. *Id.* at \_\_\_, 648 P.2d at 174 (citing COLO. REV. STAT. § 16-11-204.5(1) (Supp. 1982)). Section 16-11-204.5(1) provides: "As a condition of every sentence to probation, the court shall provide that the defendant make restitution to the victim of his conduct for the actual damages which were sustained." COLO. REV. STAT. § 16-11-204.5(1) (Supp. 1982).

27. \_\_\_ Colo. App. at \_\_\_, 648 P.2d at 175. It was the view of the Colorado Court of Appeals that restitution was not a substitute for a civil action. *Id.*

28. *Karrell*, 181 F.2d at 987 (trial court erred in awarding restitution to veterans other than those directly concerned in counts upon which the defendant was convicted); *Follette*, 32 F. Supp. at 954 (restitution as a condition of probation could be awarded only to an "aggrieved party" for "actual damages"); *King*, \_\_\_ Colo. App. at \_\_\_, 648 P.2d at 175 (restitution awarded only to parties immediately and directly aggrieved by a criminal act).

29. 74 Wash. 2d 226, 444 P.2d 156 (1968). The trial court in *Gunderson* convicted the defendant of negligent homicide arising from a traffic accident and ordered him to pay \$7,500 as restitution to the parents of the deceased child. *State v. Gunderson*, 74 Wash. 2d 226, \_\_\_, 444 P.2d 156, 159-60 (1968).

30. *Id.* at \_\_\_, 444 P.2d at 160. The Supreme Court of Washington construed § 9.95.210 of the Revised Code of Washington. *Id.* Section 9.95.210 permits a court to require the defendant to make restitution "to any person or persons who may have suffered loss or damage by reason of the commission of the crime in question." WASH. REV. CODE § 9.95.210 (1974).

31. 74 Wash. 2d at \_\_\_, 444 P.2d at 160. The *Gunderson* court noted that "certainly the defendant does not argue that the parents of the deceased child did not suffer a loss." *Id.*

32. 292 Or. 172, 637 P.2d 602 (1981). The Oregon Supreme Court in *Dillon* held that a trial court may properly order restitution when the loss is a result of the defendant's criminal activities for which he is convicted and is an item for which the defendant may be liable in a civil action. *State v. Dillon*, 292 Or. 172, \_\_\_, 637 P.2d 602, 608 (1981).

direct victims.<sup>33</sup> The *Dillon* court recognized that those who are "legally responsible for the pecuniary damage of victims," such as insurance companies and parents of injured family members, are also injured, and thus, they are "aggrieved parties."<sup>34</sup> Thus, Washington and Oregon have expanded the applicability of restitution by defining "aggrieved parties" or "victims" to include those who are legally responsible for the cost of the damage or injury caused by the defendant.<sup>35</sup>

A second well-recognized restriction on the use of restitution is that the ordered amount shall not exceed the actual damages or loss caused by the offender.<sup>36</sup> The Eire County Court of New York State in *People v. Funk*<sup>37</sup> addressed the issue of how much restitution a court properly could order the defendant to pay.<sup>38</sup> The court in *Funk* held that it is proper for a trial court to order restitution in any amount except to the extent that it exceeds the "actual losses or damages" caused by the defendant's offense.<sup>39</sup> The Fifth Circuit Court of Appeals in *United States v. Landay*<sup>40</sup> held that the rule that limits the restitution amount to counts upon which the trial court convicted the defendant<sup>41</sup> eliminates any doubt about when the

33. *Id.* at \_\_\_\_, 637 P.2d at 605 (citing OR. REV. STAT. § 137.103(4) (1981)). Section 137.103(4) provides that the term "victim means any person whom the court determines has suffered pecuniary damages as a result of the defendant's criminal activities." OR. REV. STAT. § 137.103(4) (1981).

34. 292 Or. at \_\_\_\_, 637 P.2d at 605. The *Dillon* court quoted § 137.103(2)-(3) of the Oregon Revised Statutes, which provides the following definitions:

(2) "Pecuniary damages" means 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 constituting the defendant's criminal activities and shall include, but not be limited to, the money equivalent of property taken, destroyed, broken or otherwise harmed, and losses such as medical expenses.

(3) "Restitution" means full, partial or nominal payment of pecuniary damages to a victim.

OR. REV. STAT. § 137.103(2)-(3) (1981).

35. *State v. Dillon*, 292 Or. 172, \_\_\_\_, 637 P.2d 602, 606 (1981) (construing OR. REV. STAT. § 137.103 (4) (1981)); *State v. Gunderson*, 74 Wash. 2d 226, \_\_\_\_, 444 P.2d 156, 160 (1968) (trial court properly ordered defendant to make restitution payments to parents of deceased child).

36. *See Morgan*, \_\_\_\_, Mont. at \_\_\_\_, 646 P.2d at 1182 (quoting 3 AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE § 18.115 (2d ed. 1980)). For an example of a federal statute that limits restitution to actual damages, see 18 U.S.C. § 3651 (1976 & Supp. V 1981).

37. 117 Misc. 778, 193 N.Y.S. 302 (Eire County Ct. 1921). The Eire County Court in *Funk* held that the trial court could not require the defendant, convicted of one petit larceny in the amount of \$3.80, to make restitution for any amount greater than \$3.80. *People v. Funk*, 117 Misc. 778, \_\_\_\_, 193 N.Y.S. 302, 303 (Eire County Ct. 1921).

38. *Id.* at \_\_\_\_, 193 N.Y.S. at 303. At the trial the court charged the appellant with one count of petit larceny in the sum of \$3.80. 117 Misc. at \_\_\_\_, 193 N.Y.S. at 302. The court found the defendant guilty, placed him on probation, and ordered him to pay restitution in the amount of \$1,500. *Id.*

39. *Id.* at \_\_\_\_, 193 N.Y.S. at 303.

40. 513 F.2d 306 (5th Cir. 1975). The trial court convicted the defendant of the crime of transporting forged securities in interstate commerce. *United States v. Landay*, 513 F.2d 306, 307 (5th Cir. 1975). A condition of probation was that the defendant immediately execute documents necessary to make restitution of the amounts fraudulently obtained. *Id.*

41. *Id.* at 308. The *Landay* court cited 18 U.S.C.A. § 3651, which provides that the defendant "[m]ay be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had." *Id.* at 308 n.5. *See* 18 U.S.C.A. § 3651 (Supp.

amount of restitution has been repaid and avoids the possibility of postsentencing disagreement between the parties about the amount the defendant must pay.<sup>42</sup> Thus, the *Funk* and *Landay* courts found that restitution is proper in the amount upon which the trial court convicts the defendant, but that restitution shall not exceed the actual damages or losses caused by the wrongdoer.<sup>43</sup>

Case law also has established that restitution is a viable remedy only when the defendant is able to pay.<sup>44</sup> In *People v. Cunningham*<sup>45</sup> the Criminal Court of the City of New York held that restitution is inappropriate when the defendant lacks the ability to pay and his financial condition is such that a civil judgment against him would be incapable of satisfaction because of indigency.<sup>46</sup> The issue of a defendant's ability to pay also was presented in *State v. Dillon*.<sup>47</sup> The Oregon Supreme Court explained that restitution is not intended to be the equivalent of a civil award of damages and that the trial court must consider the defendant's ability to pay the restitution ordered.<sup>48</sup> The *Dillon* court also noted that the theory of restitution is penological because it is intended to assist rehabilitative and deterrent purposes by causing a defendant to realize the relationship between his criminal offense and the damage suffered by the victim.<sup>49</sup> Thus, the *Cunningham* and *Dillon* courts followed the principle that a trial court must consider the

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1982).

42. *Landay*, 513 F.2d at 308. The *Landay* court noted that the disagreement between the parties did not involve the amount of restitution, but only the method of making restitution. *Id.* At the time of sentencing, the trial judge relied on a consent judgment in which the defendant freely and voluntarily admitted the exact amount that the bank claimed he owed. *Id.* The *Landay* court found that there was no question that the amount of the consent judgment was the amount of restitution that the trial judge considered in fixing the condition of probation. *Id.*

43. *Id.* at 308 (although the probation order failed to state that it was limited to "actual damages," the court found that the parties did not disagree on the amount of restitution, but only on the method of making restitution); *Funk*, 117 Misc. at \_\_\_\_, 193 N.Y.S. at 303 (trial court could not require the defendant to make restitution of more than the amount taken in the larceny for which the court convicted the defendant).

44. *See, e.g.,* *People v. Knowles*, 92 Ill. App. 3d 537, \_\_\_\_, 414 N.E.2d 1322, 1325 (App. Ct. 1980) (Although a statutory provision on restitution did not condition restitution on the defendant's ability to pay, the *Knowles* court held that amounts had to be "reasonable and just.").

45. 106 Misc. 2d 326, 431 N.Y.S.2d 785 (Crim. Ct. 1980). The *Cunningham* court held that renewal of prosecution for failure of the indigent defendant to make restitution was improper. *People v. Cunningham*, 106 Misc. 2d 326, \_\_\_\_, 431 N.Y.S.2d 785, 787 (Crim. Ct. 1980).

46. *Id.* at \_\_\_\_, 431 N.Y.S.2d at 787. The Legal Aid Society represented the defendants, and one of the defendants was dependent on public assistance. *Id.*

47. 292 Or. 172, 637 P.2d 602 (1981). The trial court convicted the defendant of assault, reckless endangerment, criminal mischief, and driving under revocation of his license. *State v. Dillon*, 292 Or. 172, \_\_\_\_, 637 P.2d 602, 604 (1981). On appeal the *Dillon* court held that the trial court properly ordered restitution based on damage sustained by two patrol cars, one of which was hit by police gunfire and the other by the defendant's car. *Id.* at \_\_\_\_, 637 P.2d at 608-09.

48. *Id.* at \_\_\_\_, 637 P.2d at 607. The *Dillon* court noted that numerous civil law concepts are incorporated into the restitution process, but those incorporated concepts do not transform a criminal sanction into civil compensation. *Id.* These concepts do have the important function in a criminal proceeding of restricting the trial court's restitution authority "to what would otherwise be special damages recoverable in civil proceedings by specified persons or entities." *Id.*

49. *Id.* The *Dillon* court noted that restitution in criminal law is penal in nature, while in civil law the emphasis in restitution is on compensating the injured party. *Id.*

defendant's ability to pay, his other obligations, the burden a restitution order will impose upon him, and the rehabilitative effect of a restitution order.<sup>50</sup>

In *State v. Morgan*<sup>51</sup> the issue was twofold: whether the recipients of the restitution payments were "aggrieved parties,"<sup>52</sup> and if so, whether the district court had ordered the proper amount of restitution.<sup>53</sup> The *Morgan* court pointed out that while section 46-18-201 of the Montana Code Annotated<sup>54</sup> did not specifically define "aggrieved parties," the Crime Victims Compensation Act of Montana<sup>55</sup> defined a "victim" to be "a person who suffer[ed] bodily injury or death as a result of . . . criminally injurious conduct."<sup>56</sup> The *Morgan* court construed section 53-9-103 of the Crime Victims Compensation Act of Montana to mean that a person can be a victim "without a relationship to a crime for which a conviction [is] obtained."<sup>57</sup> The *Morgan* court held that the three surviving girls in the vehicle were within "the class of persons injured by the crime," making restitution proper.<sup>58</sup>

The *Morgan* court followed the general rule that restitution must not exceed the actual damages.<sup>59</sup> Unfortunately, section 46-18-201 of the Montana Code Annotated did not provide significant guidance to the district court regarding the method that the court should use in applying restitution or the limitations applicable in a

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50. *Cunningham*, 106 Misc. 2d at \_\_\_\_, 431 N.Y.S. 2d at 787 (restitution is a viable remedy when the defendant is able to pay); *Dillon*, 292 Or. at \_\_\_\_, 637 P.2d at 606 (a sentencing judge may consider anything he would ordinarily consider at a sentencing hearing, but he must focus on the defendant's circumstances in deciding whether to order restitution and in deciding the amount of restitution). See OR. REV. STAT. § 137.106 (1981) (restitution is a proper sentencing alternative).

51. \_\_ Mont. \_\_\_\_, 646 P.2d 1177 (1982). The *Morgan* court did not discuss whether restitution was proper as a principle. *State v. Morgan*, \_\_ Mont. \_\_\_\_, 646 P.2d 1177, 1186 (1982). Instead the court framed the issue as whether the amount of restitution was proper under the facts. *Id.* at \_\_\_\_, 646 P.2d at 1182.

52. *Id.* at \_\_\_\_, 646 P.2d at 1186. *Morgan* argued that the trial court could order restitution only to the victims of the crime charged and that only the deceased were victims of the crime of negligent homicide. Brief for Respondent at 22, *State v. Morgan*, \_\_ Mont. \_\_\_\_, 646 P.2d 1177 (1982).

53. \_\_ Mont. at \_\_\_\_, 646 P.2d at 1186. For the amount of restitution ordered, see *supra* note 3.

54. See MONT. CODE ANN. § 46-18-201 (1981).

55. See *id.* § 53-9-103 (1977). Section 53-9-103 is part of the Uniform Crime Victims Reparations Act. See UNIF. CRIME VICTIMS REPARATIONS ACT, 11 U.L.A. 35 (1973). Minnesota, Missouri, Montana, North Dakota, and Ohio have adopted portions of the Act. See *id.* (Supp. 1981).

56. \_\_ Mont. at \_\_\_\_, 646 P.2d at 1183 (quoting MONT. CODE ANN. § 53-9-103 (6) (1977)). Cf. N.D. CENT. CODE § 12.1-32-07 (e) (1975) (trial court may order restitution to victim of the defendant's conduct).

57. \_\_ Mont. at \_\_\_\_, 646 P.2d at 1183. The *Morgan* decision arguably sets forth an expansive definition of "aggrieved parties." See *id.* But see *United States v. Follette*, 32 F. Supp. 953 (E.D. Pa. 1940) (claimant must have direct concern in counts upon which the trial court convicts the defendant).

58. \_\_ Mont. at \_\_\_\_, 646 P.2d at 1183. For a discussion of the *Morgan* court's reasoning, see *supra* notes 10-11.

59. \_\_ Mont. at \_\_\_\_, 646 P.2d at 1183. Because the district court's findings failed to show actual damages, the supreme court remanded the case for a determination of whether the restitution order exceeded actual damages. *Id.*



restitution situation.<sup>60</sup> To correct this problem the *Morgan* court looked to section 3-601 of the Model Sentencing and Corrections Act.<sup>61</sup> The court held that the district courts could order restitution in the amount of "out-of-pocket losses for medical expenses,"<sup>62</sup> but not in excess of the actual money equivalent.<sup>63</sup>

The *Morgan* court held that section 46-18-232 of the Montana Code Annotated<sup>64</sup> applies to restitution cases even though the provision failed to mention restitution.<sup>65</sup> Section 46-18-232 provides standards for trial courts to follow in determining whether to sentence the defendant to pay costs.<sup>66</sup> In adopting these guidelines for restitution cases the *Morgan* court held that the district courts must take into consideration the defendant's financial resources in ascertaining the amount and manner of the payment of restitution.<sup>67</sup> Additionally, the court held that district courts must not sentence a defendant to pay restitution unless the defendant is or will be able to pay the amount.<sup>68</sup> Finally, the guidelines allow a defendant to petition the sentencing court for remission of the payment of restitution or any unpaid portion thereof when he is having difficulty in making the payments.<sup>69</sup>

In summary, the *Morgan* court held that only persons who have suffered bodily injury or death due to criminally injurious conduct are eligible for restitution payments based on out-of-pocket losses.<sup>70</sup> Furthermore, the *Morgan* court provided guidance on the manner in which district courts should apply restitution as a sentencing option by directing the district courts to follow the guidelines in section 46-18-232 of the Montana Code Annotated.<sup>71</sup>

The *Morgan* decision fails to guide the district courts in

60. *Id.* The supreme court stated that § 46-18-201 of the Montana Code Annotated permitted the trial court to defer imposition of sentence and order the defendant to make restitution. *Id.* at \_\_\_\_, 646 P.2d at 1182. See MONT. CODE ANN. § 46-18-201 (1981).

61. \_\_\_\_, Mont. at \_\_\_\_, 646 P.2d at 1183. The Montana Legislature had not adopted the Model Sentencing and Corrections Act at the time of the *Morgan* decision. \_\_\_\_, Mont. at \_\_\_\_, 646 P.2d at 1184. See MODEL SENTENCING AND CORRECTIONS ACT § 3-601, 10 U.L.A. 106 (Supp. 1982).

62. \_\_\_\_, Mont. at \_\_\_\_, 646 P.2d at 1183. In addition, the district courts could order restitution based on payment of the money equivalent of loss resulting from property taken, destroyed, broken, or otherwise harmed. *Id.* For cases concerning losses for which the trial court may order reparations, see *Dickson v. State*, 230 Ark. 491, 323 S.W.2d 432 (1959) (out-of-pocket medical and hospital expenses); *State v. Behrens*, 204 Neb. 785, 285 N.W.2d 513 (1979) (victim's pain and suffering growing out of injuries received at the hands of defendant).

63. \_\_\_\_, Mont. at \_\_\_\_, 646 P.2d at 1183.

64. See MONT. CODE ANN. § 46-18-232 (1981).

65. \_\_\_\_, Mont. at \_\_\_\_, 646 P.2d at 1183-84. The *Morgan* court found that § 46-18-232 contained reasonable standards to apply to restitution payments. *Id.* at \_\_\_\_, 646 P.2d at 1184.

66. See MONT. CODE ANN. § 46-18-232 (1981).

67. \_\_\_\_, Mont. at \_\_\_\_, 646 P.2d at 1183-84 (quoting MONT. CODE ANN. § 46-18-232 (1981)).

68. \_\_\_\_, Mont. at \_\_\_\_, 646 P.2d at 1183 (quoting MONT. CODE ANN. § 46-18-232 (1981)). The *Morgan* court declared that the district courts must take into consideration "the nature of the burden" imposed on the defendant by the restitution amount. *Id.* at \_\_\_\_, 646 P.2d at 1184.

69. *Id.* at \_\_\_\_, 646 P.2d at 1184.

70. *Id.* at \_\_\_\_, 646 P.2d at 1183.

71. *Id.* at \_\_\_\_, 646 P.2d at 1183-84.

situations in which a postsentencing change in the defendant's financial status enables him to pay a larger, more equitable sum of restitution to the aggrieved parties.<sup>72</sup> The *Morgan* decision also fails to address whether the husband or wife of a deceased victim in a wrongful death situation may qualify as an "aggrieved party."<sup>73</sup>

North Dakota recognizes restitution as a sentencing alternative in section 12.1-32-02 of the North Dakota Century Code.<sup>74</sup> The primary goal of restitution under chapter 12.1-32 is the rehabilitation of the wrongdoer.<sup>75</sup> Restitution is also available as a condition of probation under section 12.1-32-07.<sup>76</sup> Once a court determines that restitution should apply, section 12.1-32-08 requires the court to hold a restitution hearing to determine the amount of damage, the ability of the defendant to pay the amount ordered, and the rehabilitative effect of ordering restitution.<sup>77</sup> A restitution award in North Dakota is limited in amount to "fruits of the criminal offense and expenses actually incurred as a direct result of the defendant's criminal action."<sup>78</sup> Thus, the North Dakota Legislature has provided the trial courts with the statutory tools to choose and implement restitution in criminal law cases.<sup>79</sup>

In 1975 the North Dakota Legislature adopted portions of the

72. *See id.* at \_\_\_\_\_, 646 P.2d at 1184. The *Morgan* decision only provides for modification of a restitution order when the defendant petitions the sentencing court because he is having difficulty in making restitution payments. *Id.*

73. *See id.* at \_\_\_\_\_, 646 P.2d at 1183. The *Morgan* court noted that under the Crime Victims Compensation Act of Montana a person who has "suffered as a result of criminally injurious conduct" is classified as a victim. *Id.* Nevertheless, the court failed to define specifically the boundaries of the "aggrieved party" class. *See id.*

74. *See* N.D. CENT. CODE § 12.1-32-02 (Supp. 1981). Section 12.1-32-02(1)(e) provides: "Every person convicted of an offense who is sentenced by the court shall be sentenced to one or a combination of the following alternatives, unless the sentencing alternatives are otherwise specifically provided in the statute defining the offense: . . . Restitution for damages resulting from the commission of the offense." *Id.* § 12.1-32-02 (1)(e).

75. *See id.* § 12.1-32-08 (1976). Section 12.1-32-08 (1)(c) provides that the sentencing court at the restitution hearing must consider the possibility that ordering restitution would serve a valid rehabilitative purpose. *Id.* § 12.1-32-08 (1)(c).

76. *See id.* § 12.1-32-07 (1976). Section 12.1-32-07 (2)(e) provides:

2. When imposing a sentence to probation, the court may impose such conditions as it deems appropriate, and may include any one or more of the following:

c. Make restitution or reparation to the victim of his conduct for the damage or injury which was sustained, or perform other reasonable assigned work. When restitution, reparation, or assigned work is a condition of the sentence, the court shall proceed as provided in section 12.1-32-08.

*Id.* § 12.1-32-07 (2)(e). For a North Dakota case considering restitution as a condition of probation, see *Decker v. State*, 209 N.W.2d 879 (N.D. 1973).

77. *See* N.D. CENT. CODE § 12.1-32-08 (1976). Section 12.1-32-08 provides that at the hearing the court shall determine "the reasonable damages sustained by the victim or victims of the criminal offense" and the "amount the defendant can or will be able to pay." *Id.* For cases in North Dakota covering restitution hearings, see *State v. Thorstad*, 261 N.W.2d 899 (N.D. 1978); *State v. Spiekermeier*, 256 N.W.2d 877 (N.D. 1977).

78. *See* N.D. CENT. CODE § 12.1-32-08 (1976).

79. *See id.* ch. 12.1-32 (1976 & Supp. 1981).

Uniform Crime Victims Reparations Act.<sup>80</sup> The purpose of the Act is to assist and compensate innocent victims for their economic loss from criminally injurious conduct.<sup>81</sup> Under the Act, however, "criminally injurious conduct does not include conduct arising out of the . . . use of a motor vehicle except when intended to cause personal injury or death."<sup>82</sup> Thus, the Act appears to be inapplicable in the typical negligent homicide case involving a drunk driver and an injured party or parties.<sup>83</sup>

The North Dakota Legislature has developed general standards that are applicable during a restitution hearing<sup>84</sup> and specific factors for the trial courts to consider in a sentencing decision.<sup>85</sup> Nevertheless, North Dakota does not have case law construing the statutory terms "aggrieved parties" and "actual damages."<sup>86</sup> Furthermore, the North Dakota Supreme Court has yet to outline explicit standards for trial courts to follow in ordering restitution.

The significance of the *Morgan* decision to the use of restitution in North Dakota is that the Supreme Court of Montana defined key terms involved in the criminal law concept of restitution.<sup>87</sup> The *Morgan* court addressed the problems involved with determining the "aggrieved parties," the actual damages, and the factors that the trial courts should consider when sentencing the defendant to pay restitution.<sup>88</sup>

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80. See Uniform Crime Reparations Act, ch. 587, 1975 N.D. Sess. Laws 1535 (codified at N.D. CENT. CODE ch. 65-13 (Supp. 1981)).

81. See N.D. CENT. CODE § 65-13-02 (Supp. 1981). Section 65-13-02 sets forth the legislative purpose and intent. *Id.* Compensation under the Act is allowed only in "the amount of expenses actually suffered as a direct result of the criminal acts of other persons." *Id.*

82. *Id.* § 65-13-03 (4)(c).

83. See *id.*

84. For applicable statutes and case law on restitution hearings, see *supra* note 77.

85. See N.D. CENT. CODE § 12.1-32-04 (1976) (provides factors for consideration in the sentencing decision).

86. For North Dakota cases concerning restitution hearings and restitution as a condition of probation, see *supra* notes 76-77.

87. See *Morgan*, \_\_\_ Mont. at \_\_\_, 646 P.2d at 1183-84.

88. See *id.*