MINUTES OF MEETING
SENATE JUDICIARY COMMITTEE
February 1, 1983

The nineteenth meeting of the Senate Judiciary Committee was called to order by Chairman Jean A. Turnage on February 1, 1983 at 10:03 a.m. in Room 325, State Capitol.

ROLL CALL: All members were present.

CONSIDERATION OF SENATE BILL 196: Senator VanValkenburg, sponsor, explained the intent of the bill to the Committee. Section 1 would provide for the base salary of a court reporter to be raised to a minimum of $18,000 and maximum of $26,000. It would also attempt to provide for an annual cost-of-living adjustment to their salary. Section 2 deals with storage of court reporters' notes and requires that the county provide for safe and secure storage of these notes for a period of 10 years. Senator VanValkenburg also felt that the Bar should be advised of this change. Section 3 attempts to change the method of payment for production of transcripts from the folio basis to a per page rate of pay.

PROPONENTS: Bob Nieboer, representing the Montana Shorthand Reporters' Association, spoke in support of SB196 and explained how court reporters' salaries are currently inadequate when compared to other states. He stated this is a difficult, stressful and high preasure job. He then distributed a handout which commented on the necessity of passing SB196 (Exhibit "A").

Marlene Jordan, representing the Montana Shorthand Reporters' Association, also testified in support of the bill. She distributed a typical week's schedule for a district court reporter and detailed the stress and long hours of the job (Exhibit "B"). She also stated that the folio method of calculating pay for transcripts was very old fashioned while a per page rate would enable court reporters to calculate costs of appeals more easily.

There being no further proponents, and no opponents, the hearing was opened to questions from the Committee.

Senator Mazurek questioned if there would be a need to vary court reporter salaries between counties. Jerry Anderson, representing the Montana Shorthand Reporters' Association, responded that court reporters' duties vary between small and large counties, but the judge normally sets the salaries accordingly. He did not feel the legislature should have to do this.

Chairman Turnage requested Jerry Anderson to calculate the cost of living increases for the past three years and provide these figures to the Committee. Chairman Turnage also inquired if

the wording "for purposes of perfecting an appeal" could be interpretted to mean a court reporter could prepare an appeal transcript at their discretion in all other cases. Marlene Jordan advised that this was not their intention. They merely meant to update the language in the bill. Chairman Turnage then inquired as to what the actual expenses were for preparation of appeal transcripts as referred to in page 4, line 23 of the bill. Jerry Anderson advised that this was to include paper and supplies and not to include the salary of the reporter.

Senator VanValkenburg closed by saying he would be happy to meet with the Committee to work on any amendments necessary for the passage of this bill. He also made note that there were other court reporters present in the hearing room. The essential purpose of his bill is to raise court reporters' salaries so as to continue to attract competent people to the district courts. He felt that since a mill levy could be assessed for district court purposes, there should be no problem in funding these salary increases.

Chairman Turnage closed the hearing by advising that other letters of support had been received and mention of them should be included in these minutes.

CONSIDERATION OF SENATE BILL 220: Senator Daniels advised that he was sponsoring this bill on behalf of the Department of Institutions. He then introduced Nick Rotering who would explain the intention of the bill.

PROPONENTS: Nick Rotering, representing the Department of Institutions, stated that SB220 would give legislative authority to the Warden of the Montana State Prison to restore good time to eligible prisoners with the approval of the Department. It was his opinion that the Warden should have this prerogative.

Curt Chisholm, Executive Director for the Department of Institutions, advised that the need for this bill arose from a Supreme Court decision. He went on to enumerate how essential the role of good time is as an incentive and encouragement for prisoners to progress through the system.

Hank Risley, Warden of Montana State Prison, testified in support of this bill. He advised that good time is an important tool to managing an institution and is most significant as an incentive. He advised that discipline problems have increased in those prisons where good time was discontinued.

There being no further proponents, and no opponents, the hearing was opened to questions from the Committee.

Senator Mazurek questioned the need for the approval by the Department before the warden could reinstate the good time. Hank Risley advised that the current statute requires approval by the Department before the Warden can take away good time, so as to prevent any mischief on the part of the Warden.

There being no further questions, the hearing was closed.

CONSIDERATION OF SENATE BILL 225: Senator Daniels advised that he was again sponsoring this bill on behalf of the Department of Institutions.

PROPONENTS: Nick Rotering, representing the Department of Institutions, presented this bill to the Committee. He stated that it would allow the staff at the institutions an additional five days to complete evaluations and paperwork before the release of a person who had voluntarily committed himself. He felt this additional five days is necessary as it would allow the institution more time to make a good programatic decision, and that sometimes the patients change their mind after requesting release. He feels this bill is in the interests of the patient.

Curt Chisholm, representing the Department of Institutions, also spoke in support of SB225. He advised that it was drafted after much internal discussion by the Department of Institutions and it was their opinion that the five days would allow them more time to adequately assess the problems of the patient. He explained the "intake" program a patient goes through. He then emphasized that it is not their objective to try to detain the patient any longer than necessary.

OPPONENTS: Joy McGrath, representing the Mental Health Association of Montana, enumerated three reasons for the Association's opposition to this bill: (1) the current law provides adequate time to file a petition, (2) extension of time by 5 days would promote less efficient operation of the institution, and (3) the bill is a violation of the individual who commits himself's rights. She urged careful consideration and a do not pass recommendation from the Committee.

There being no further proponents or opponents, the hearing was opened to questions from the Committee.

The Committee questioned Curt Chisholm extensively regarding evaluation programs, liability for release, average stay of committed and out-patient programs. There being no further questions, the hearing was closed.

CONSIDERATION OF SENATE BILL 237: Senator Halligan, sponsor of this bill, explained that it was prompted by the Montana Supreme Court case of State v. Morgan (Exhibit "C"). Courts currently have no direction to follow for the collection of restitution for victims. SB237 would provide procedures for restitution as a condition of a defendant's suspended or deferred sentence. This bill was drafted using the Model Sentencing Directives Act as a guideline. It specifically addresses victims of property crimes and crimes against the person and would require the offender to pay restitution.

PROPONENTS: Representative Asay testified in support of the bill and concurred with Senator Halligan's statements. He is concerned about the restitution process and feels the legislature needs to take some action.

Representative Swift also supported SB237 and felt it would help deter future crimes if an initial offender was required to make restitution.

Curt Chisholm, representing the Department of Institutions, stated that this bill would make a defendant responsible for his action. He did express some concern with the wording of the bill in relation to probation officers and how they will be used. He questioned if these officers would be assigned to determine damages and felt this would be inappropriate to their role. He also questioned if the officer would be responsible for the collection of the restitution money.

John Maynard, representing the Attorney General's Office, supported the need for this legislation. He advised that Montana law provides for restitution, but does not define "victim" or "damages." He felt that the legislature is in a position to adopt standards to give the courts direction. A copy of the Sentence Corrections Act was distributed to the Committee (Exhibit "D"). It was John Maynard's opinion that the bill intends for a probation or parole officer to act in a supervisory capacity by obtaining damage reports and submitting these estimates to the court through their presentence investigation report, and does not intend that the officer actually collect the money. He also though that the officer would supervise the payments of restitution as he would any other condition of a sentence imposed on a defendant. He also distributed an article from the "Independent Record" (Exhibit "E") describing a restitution program.

Cathy Campbell, representing the Montana Association of Churches, also spoke in support of this bill and submitted her written testimony (Exhibit "F").

Maxine Homer, representing the League of Women Voters, wished to go on record as a proponent to SB237.

There being no further proponents, and no opponents, the hearing was opened to questions from the Committee.

Chairman Turnage expressed concern that the bill was limited to special damages. He also questioned if a victim could recover damages twice -- once in a civil action and once by restitution.

Senator Mazurek expressed concern that county attorneys would be trying cases with civil issues and standards rather than criminal. Senator Crippen questioned the default provisions and if satisfaction of restitution would provide for a defendant's release. John Maynard assured the Committee that all the provisions of the bill were subject to due process laws. Senator Crippen questioned if other assets of the defendant's could be seized and utilized to pay restitution. He was advised that all procedural safeguards would apply to the new law. Representative Asay advised that a defendant would also have adequate access to the court to review sentencing.

Chairman Turnage asked if this would apply to the Justice Courts. John Maynard advised him it would. Chairman Turnage felt this could put the Justice of the Peace in a position of ordering a probation officer around. He also questioned if the defendant would have equal opportunity to challenge the findings of the probation officer and expressed concern about the equality of opportunity. John Maynard advised that the defendant would have counsel present if there was a claim to dispute and that this law will give enforceable standing to restitution.

Chairman Turnage felt there was a need to define who is a victim. Senator Halligan advised that he would propose an amendment to do this. He then closed by saying the major intent of this bill is to deter an initial offender from committing future crimes and to give the courts procedures to follow for the imposing of restitution on sentences.

ADJOURN: There being no further business before the Committee, the meeting was adjourned at 11:58.

Jean A. Turnage

JEAN A. TURNAGE
Chairman, Judiciary Committee

ROLL CALL

JUDICIARY COMMITTEE

48th LEGISLATIVE SESSION - - 1983 Date 2-1-83

NAME	PRESENT	ABSENT	EXCUSED
Berg, Harry K. (D)	✓		
Brown, Bob (R)	✓		
Crippen, Bruce D. (R)	✓		
Daniels, M. K. (D)	✓		
Galt, Jack E. (R)	✓		
Halligan, Mike (D)	✓		
Hazelbaker, Frank W. (R)	✓		
Mazurek, Joseph P. (D)	✓		
Shaw, James N. (R)	✓		
Turnage, Jean A. (R)	✓		

DATE February 1, 1983

COMMITTEE ON Judiciary BILL NO. [illegible]

[illegible]

VISITOR'S REGISTER

NAME	REPRESENTING	Check One Support	Oppose
[illegible]	Montana Assn of Churches	237	
Jon McGrath	MHAM, Bd. of Visitors, Pt A Hu of Health		225
Kelly [illegible]	[illegible] Reporters Assn	196	
Marlene B. Jordan	Montana Shorthand Reporters' Assoc.	196	
Robert Niepoor	Montana Shorthand Reporters Assn.	196	
Jim Hathaway	" " " "	196	
Tom Asay	Rep Dist 40	237	
Jerome Cushman	Montana Shorthand Reporters Assn	SB [illegible] 196	
James D VanRiper	Div. of Workers' Compensation - 237		
Mike Abley	Supreme Court		
Bernie Swift	Dist 91 - Hamilton	237	
MAXINE HOMER	LWV	237 220	
[illegible] CHISHOLM	INSTITUTIONS	237 225 220 AS AMENDED	
Nick Rotering	" "	237 225	
John Maynard	Attorney General	237	
Hank Ricley	MSP	220	

(Please leave prepared statement with Secretary)

EXHIBIT "A"
February 1, 1983

COMMENTS IN SUPPORT OF S.B.196

Senate Bill 196, introduced by Senator Van Valkenberg and others, addresses three principal matters concerning official court reporters--those being: (1) salary limitations; (2) cost of living adjustments; (3) compensation for preparation of transcript on appeal; and (4) provision of storage facilities for reporters' notes. This legislation does not affect "free-lance" reporters who are not employed by a district judge.

SALARY AND COST OF LIVING ADJUSTMENT

Present law provides that a court reporter shall be paid an annual salary of not less than $14,000 nor more than $20,000. The actual salary amount is set by the Judge for whom the reporter works. SB196 proposes to raise the salary range to not less than $18,000 nor more than $26,000 per year.

SB196 also adds to the statute a provision for an annual cost of living adjustment to be added to the court reporter's base annual salary each year. The proposed cost of living adjustment is the same as that now provided for juvenile probation officers. The amount of the adjustment is the equivalent of 70% of the previous calendar year's consumer price index.

The increase in annual salary levels and the application of a cost of living adjustment is requested in SB196 to end the necessity for court reporters to come to each general session of the legislature seeking salary adjustments.

Salaries of official court reporters in Montana vary from $15,000 to $20,000 per year. In contrast, one Federal Court reporter in Montana is paid $32,000 per year and another is working for a Federal Judge under contract for $30.00/hour with a $200.00 per day maximum.

Salaries for court reporters in surrounding states are generally higher than Montana and in some cases include cost of living adjustments. Salaries in other states are:

North Dakota

Class I	$18,000 to $27,000	(The lower figure is entry figure; after 6 months the salary is increased.)
Class II	$21,600 to $31,000	(Average salary being paid Class II reporters is $28,000 per year.)

Idaho

$24,000 per year with cost of living index.

Wyoming

$27,795 per year.

Washington

$15,000 to $30,000 per year, varying with the size of the counties and with cost of living index for lower paid reporters.

Utah

$21,000 per year with 3% increment.

South Dakota

$17,180 per year with cost of living adjustment.

During the month of January 1983, a court reporter for a District Judge in Helena accepted a position with a Judge in Lander, Wyoming, at the Wyoming salary of $27,795 per year.

The statutory salary maximum for court reporters was $16,000 per year in 1975 and was increased to $18,000 per year in 1979, and to $20,000 per year in 1981. If a 7% per year increase had been applied during the period 1975 through 1981, the salary maximum should have been set at $24,000 rather than the present $20,000 figure.

The proponents believe that the amounts set in SB196, together with the COLA, allow sufficient flexibility in establishing reporters' salaries so that reporters will not have to come back to the legislature session after session for salary relief.

COMPENSATION FOR PREPARATION OF TRANSCRIPTS ON APPEAL

Section 3 of SB196 provides for specific amounts to be paid by litigants for preparation of transcripts on appeal. This is the amount set by the U.S. Judicial Conference to be paid in connection with appeals in Federal Court.

Whenever a party in a civil or criminal action desires to appeal from a judgment or order of a district court or administrative agency under circumstances where a hearing or trial has been held, all or certain portions of the testimony or proceeding in the district court will be designated as part of the record on appeal. This is called the transcript and is prepared by the court reporter from the stenographic notes made by the reporter at the time of the testimony or proceedings. The cost of preparation of the transcript is

paid by the parties to the law-suit. The only time the cost is borne by the county or the state is in cases of appeals by indigent defendants in criminal cases or when the state is a litigant.

Montana law (Sec. 3-5-604, MCA) presently provides that the reporter be compensated at the rate of 10¢ per folio for preparation of the transcript. While there is some variance as to the definition of a "folio" it is generally accepted that one page contains three (3) folios. Thus, the present statute only allows payment of 30¢ per page. The appellant must file one original and four copies of the transcript. Thus, the reporter is paid $1.50 per page for one original and four copies of the transcript. This amount does not adequately compensate a reporter for the work done and materials furnished by the reporter in preparation of the transcript. It is pertinent to note that transcript preparation involves work done by the reporter which is in addition to the reporter's normal duties and is generally accomplished at night or on weekends.

In contrast, the following transcript rates are paid in surrounding states:

Wyoming

$2.25 per page for original and for one copy.
.90 per page for each additional copy

(Is $4.95 per page for 1 original and 4 copies, as compared to $1.50 per page in Montana.)

South Dakota

~~60¢~~ $1.50
~~$1.50~~ per folio or ~~$1.50~~ per page for original.
~~.50 per folio or $1.50~~ per page for copies.
$1.50 50¢

(Is ~~$1.50~~ per page for original and 4 copies as compared to $1.50 per page in Montana for the same number.)

Washington

$2.00 per page for indigents.

(Is $10.00 per page for original and 4 copies as compared to $1.50 per page for same number in Montana.)

In all other cases the rate is established by agreement between the reporter and the appellant.

North Dakota

$1.90 per page for original
.35 per page for first copy
.15 per page for each additional copy

"A"
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North Dakota (continued)

(Is $2.70 per page for original and 4 copies as compared to $1.50 per page for same number in Montana.)

Idaho

$2.00 per page for original. Copies in the amount agreed to.

Utah

$0.50 per folio for all pages. (Is $1.50 per page.)

(Is $7.50 per page for original and 4 copies as compared to $1.50 in Montana.)

A review of the above figures makes it clear that reporters in Montana receive substantially less than reporters in other surrounding states for transcript work.

The amount of transcript work done by each reporter varies with the activity of the court in which they serve. Some may have none during a year's time and others may have several.

We re-emphasize that transcript work is work that is in addition to the normal work done by reporters.

SB196 additionally provides that in civil cases all transcripts required by the judge or the county shall be furnished by the reporter and only the reporter's actual costs of preparation (paper, ink, etc.) shall be paid by the county.

STORAGE OF REPORTERS' NOTES

Section 2 of SB196 adds a provision in the statute which requires the county to provide for the Clerk of Court a safe and secure place for the storage of all official notes of court proceedings. These are notes taken by the court reporter. Present practice with regard to storage of these notes has varied from one district to another because, in many districts, the Clerks of Court have not had sufficient room available for such storage. Such notes should be filed with the Clerk of Court so that the notes are in the custody of a permanent and continuing office. This provision of SB196 simply ensures that a place will be made available for such storage.

-oOo-

Prepared and circulated by Jerome Anderson, Registered Lobbyist for the Montana Short-Hand Court Reporters Association.

EXHIBIT "B"
February 1, 1983

TYPICAL WEEK'S SCHEDULE

Monday - Missoula (Law & Motion):

8:30 a.m. - 6:00 p.m.

Reporter's Duties:	Number of Hours
In-court duties; i.e., making a verbatim stenographic record of all matters before the Court, including criminal cases; probates, default divorces, and other ex parte matters; show-cause hearings; non-jury trials; and sanity hearings	6
Duties performed for judge, including reading of stenographic notes in cases pending decision, screening of phone calls, and transcription of judge's comments made to defendants on sentencing in criminal cases (no fee charged for transcripts)	2.5
Assembly of notes to be filed with the Clerk of Court	1/2
Miscellaneous duties, including filing of notes, calendaring of cases, scheduling of judge's appointments, and maintenance of shorthand machine	1/2
[Lunch]	1/2
Total Number of Hours	10

Tuesday - Thompson Falls (Law & Motion)

7:00 a.m. - 2:45 p.m.

Reporter's Duties:	Number of Hours
Meet judge for drive (windshield time)	2
In-court duties	2.5
[Lunch]	3/4
Return drive (windshield time)	2
Number of Hours (Subtotal)	7.25

Tuesday - Missoula (Non-jury trials; show-cause hearings)

2:45 p.m. - 6:00 p.m.

Reporter's Duties:	Number of Hours
In-court duties	2
Duties performed for judge	1
Assembly of notes and miscellaneous duties	1/4
Number of Hours (Subtotal)	3.75
Total Number of Hours	11

Wednesday - Polson (Law & Motion)

7:30 a.m. - 7:00 p.m.

Reporter's Duties:	Number of Hours
Meet judge for drive (windshield time)	1.5
In-court duties	6
Assembly of notes	1/2
Duties performed for judge	1
[Lunch]	3/4
Return drive (windshield time)	1.5
Miscellaneous duties (Missoula)	1/4
Total Number of Hours	11.5

Thursday - Polson (Law & Motion; non-jury trials)

7:30 a.m. - 7:30 p.m.

Reporter's Duties:	Number of Hours
Meet judge for drive (windshield time)	1.5
In-court duties	6
Assembly of notes	1/4
Duties performed for judge	1.5
[Lunch]	3/4

Thursday (continued)

Reporter's Duties:	Number of Hours
Return drive	1.5
Miscellaneous duties (Missoula)	1/2
Total Number of Hours	12

Friday - Missoula (Non-jury trials)

8:30 a.m. - 7:30 p.m.

Reporter's Duties:	Number of Hours
In-court duties	6.5
Assembly of notes	1/4
Duties performed for judge	2
Miscellaneous duties	1.5
[Lunch]	3/4
Total Number of Hours	11
TOTAL NUMBER OF HOURS FOR WEEK	55.5*

*N.B. When jury trials are scheduled, of course, this schedule could not apply. The number of hours spent during jury terms, generally speaking, would add another two hours for each day of the week, so that the total would be 65.5 hours spent in one of those weeks. Jury terms usually last for at least a month at a time.

FOURTH JUDICIAL DISTRICT
MISSOULA, RAVALLI, SANDERS,
MINERAL AND LAKE

JULIE A. MARTIN
COURT REPORTER

John S. Henson
JUDGE OF THE DISTRICT COURT
MISSOULA COUNTY COURTHOUSE
MISSOULA, MONTANA
PHONE: (406) 721-5700

January 24, 1983

Senator Jean A. Turnage
Montana State Senate
Capitol Station
Helena, Montana 59601

Dear Jean:

I am writing to request your support for Senate Bill 196, a measure which would increase the salaries and transcript fees paid to court reporters.

The court reporters in our district have a heavy caseload, just as we do, and work hard to earn their salaries, which are among the lowest in the nation. If we can pay them salaries comparable to those in other states, we can retain our experienced reporters. Otherwise, Montana may serve as a training ground for unqualified reporters.

Transcript fees in Montana are verylow, and do not adequately compensate the reporters for their expenses, to say nothing of the many hours they must spend in transcript production.

My reporter has had numerous requests for appeal transcripts in criminal cases, and she must perform most of the work required in completing those transcripts on her own time, with little or no compensation for those hours of overtime work on her part.

I realize that there are budget considerations which may make salary increases a difficult proposition, but I feel that their proposal deserves serious consideration.

Since transcript fees are quite often paid by private litigants, the effect of an increase in this area would be simply to give the reporters a fair shake, rather than to make a large dent in the budget.

Your support will be appreciated.

Sincerely,

John S. Henson

James B. Wheelis
District Judge

Missoula County Courthouse
Missoula, MT 59801
(406) 543-7612

January 24, 1983

Senator Jean A. Turnage
Montana State Senate
Capitol Station
Helena, Montana 59601

Dear Jean:

Senate Bill 196, a measure to increase the salaries and transcript fees paid to court reporters, has my support, and I hope it will have yours.

As you know, the Fourth Judicial District has a very large caseload, and we judges and our reporters spend a good many hours in court. Our reporters frequently work in excess of sixty hours per week in the performance of their duties; however, they are paid at a rate which is lower than those paid in other parts of the country.

Despite the budget considerations you have to deal with, I submit that the request of the reporters for an increase merits approval. The interests of justice will be served by guaranteeing that we keep our qualified, experienced reporters in the courts.

The transcript fees paid to reporters, generally by private parties and not through State or county funds, are the lowest in the nation. Our heavy court schedule compels the reporters to work on transcript production on holidays, nights, and weekends, yet their costs of production are barely covered by the current fees. The reporters receive only minimal compensation for the hours they must spend preparing transcripts on appeal.

For these reasons, I urge you to give SB 196 your support.

Sincerely,

James B. Wheelis

JBW/thc

Printed by Mountain Moving Press
Not Printed at Public Expense

NAME: Marlene B. Jordan DATE: 2/1/83

ADDRESS: P.O. Box 7635

PHONE: 721-4073

REPRESENTING WHOM? Montana Shorthand Reporters' Association

APPEARING ON WHICH PROPOSAL: SB 196

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENTS: Fully support legislation, and am appearing to give testimony as president of MSRA.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: Robert Nieboer DATE: 2-1-83

ADDRESS: 175 Buckboard Lane, Kalispell, MT

PHONE: 755-2678

REPRESENTING WHOM? Montana Shorthand Reporters Assn

APPEARING ON WHICH PROPOSAL: SB 196

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENTS: Chairman MSRA Legislative Committee. Will present testimony in support of SB 196.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: JIM HATHAWAY DATE: 2-1-83

ADDRESS: 1405 TOMPY, MILES CITY, MT. 59301

PHONE: 232-4423

REPRESENTING WHOM? MONTANA SHORTHAND REPORTERS ASSN.

APPEARING ON WHICH PROPOSAL: SB 196

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENTS: In support of SB196 pertaining to Official Court Reporters in the State of Montana.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

EXHIBIT "C"
February 1, 1983

Gallatin, Joseph B. Gary, J., of negligent homicide and he appealed. The Supreme Court, Weber, J., held that: (1) defendant's physical condition after the accident was serious enough as determined by his doctor to render him incapable of refusing to consent to a blood-alcohol test; (2) the prosecutor's statement to the jury regarding the legal rate of intoxication, made despite the trial court's explicit holding that the jury should not be informed of the legal rate of intoxication, was improper, but was not prejudicial; and (3) the court had the power to order the defendant to make restitution to the survivors of the accident in the amount of their out-of-pocket losses for medical expenses.

Affirmed in part and vacated in part.

Haswell, C. J., and Shea, J., filed opinions concurring and dissenting.

1. Automobiles ⇐144.1(1)

Defendant's injuries sustained in automobile accident were serious enough to render him incapable of refusing consent to blood test, even though he was conscious and apparently coherent, where physician thought that defendant was in such serious condition that he would not allow police officer to talk with defendant. MCA 61-8-402(2).

2. Criminal Law ⇐717

In prosecution for negligent homicide arising out of defendant's involvement in automobile accident after he had been drinking, prosecutor's repeated references to "legal rate of intoxication" of .10% of blood alcohol, made despite trial court's specific holding that jury would not be instructed as to presumed level of intoxication, was unacceptable and improper, but did not deny defendant a fair trial where there was sufficient evidence as to what defendant's .17% blood-alcohol level meant.

3. Criminal Law ⇐1208(4)

In prosecution for negligent homicide arising out of defendant's involvement in automobile accident in which two persons

KEY NUMBER SYSTEM

The STATE of Montana, Plaintiff and Respondent,

v.

Karl W. MORGAN, Defendant and Appellant.

No. 81-183.

Supreme Court of Montana.

Submitted Feb. 22, 1982.

Decided June 18, 1982.

Defendant was convicted in the Eighteenth Judicial District Court, County of

were killed, trial court had power to order defendant to make restitution to survivors of accident to compensate them for their injuries. MCA 46-18-201(1)(a).

4. Criminal Law ⇐1208(4)

Restitution may be allowed by payment of money equivalent to loss resulting from property taken, destroyed, broken, or otherwise harmed, and also out-of-pocket losses such as medical expenses. MCA 46-18-201.

5. Criminal Law ⇐1208(4)

Restitution due auto accident survivors from defendant convicted of negligent homicide was measureable by their out-of-pocket losses for medical expenses, but not in excess of actual money equivalent. MCA 46-18-201.

6. Criminal Law ⇐1208(4)

Court may not sentence defendant to pay restitution unless defendant is or will be able to pay and, in determining amount and method of payment, court shall take into account financial resources of defendant and nature of burden that payment of restitution will impose. MCA 46-18-201.

7. Criminal Law ⇐996(1.1)

Defendant who has been sentenced to restitution and who is not in default in payment thereof may at any time petition court that sentenced him for remission of payment of restitution or of any unpaid portion thereof and, if it appears to satisfaction of court that payment of amount due will impose manifest hardship on defendant or his immediate family, court may remit all or part of amount due in restitution or modify method of payment. MCA 46-18-201.

McKinley Anderson argued, Bozeman, for defendant and appellant.

Mike Greely, Atty. Gen., Mike McGrath, Asst. Atty. Gen., argued, Anne Sheehy, Helena Intern, argued, Donald E. White, County Atty., Robert Throssell, Deputy County Atty., argued, Bozeman, for plaintiff and respondent.

WEBER, Justice.

Defendant Karl Morgan appeals from a conviction of negligent homicide following a trial before a jury in the Eighteenth Judicial District, Gallatin County. He presents the following issues for review:

(1) Whether the motion to suppress the evidence of the defendant's blood alcohol test should have been granted.

(2) Whether the County Attorney's statement to the jury regarding the legal rate of intoxication in Montana, which was not included in the instructions to the jury, was prejudicial to the defendant.

(3) Whether the court has the power to order the defendant to make restitution to the survivors of the accident.

We affirm in part, vacate and remand in part.

On August 12, 1980, Karl Morgan left work about 5:00 P.M. and went to the MSU gym where it was his custom to workout and take a sauna. Morgan left the gym between 6:00 and 6:30 P.M. and on his way home stopped at a Bozeman bar, the Cat's Paw. He testified that he drank four drinks of scotch and water. After 7:30 P.M. he left the bar and started for home, westbound on old Highway 10.

Between 7:00 and 8:00 P.M., Holly Clarkin, her mother and father, her niece, and her niece's friend left Belgrade, Montana, to go shopping in Bozeman. Dark clouds had massed in the summer sky and it looked like rain. The Subaru Holly Clarkin was driving approached Bozeman in the eastbound lane of old Highway 10.

Karl Morgan recalled turning on his headlights as he was about to enter a storm and then a yellow flash. The next thing he remembered was an ambulance attendant standing beside his car.

Highway Patrolman Robert Koch was called to the scene at 7:55 P.M. Officer Koch found Morgan seated behind the wheel of his Dodge with the windshield shattered and the door sprung open. In response to questions, Morgan gave only a blank stare. Officer Koch also found that Holly Clarkin's mother and father, Pauline

and Edwin Clarkin, were dead and that the other occupants of the Clarkin vehicle had received serious injuries.

After finishing his investigation of the accident, Officer Koch went to Bozeman Deaconess Hospital to obtain blood from Morgan to determine the alcohol content thereof.

Morgan was taken first to the emergency room and then to the intensive care unit. Morgan's brother Jerry testified that he was with his brother in the intensive care unit between 9:00 and 9:30 P.M. and that he had about a five minute conversation with him. At around 9:30 P.M. Jerry Morgan was asked to leave to permit the medical staff to work on the patient.

It was during this period, at 9:55 P.M., that Officer Koch arrived. When Morgan was located, he was being treated in the intensive care unit where he lay with his eyes closed, I.V. tubes issuing from his body, and a nurse was in attendance. Observing the gravity of the situation, Officer Koch sought the doctor in charge, Dr. Newsome, to inquire about Morgan's condition, to ask if he could speak to Morgan, and to determine if the doctor would authorize drawing a blood sample.

According to Officer Koch's testimony he asked the doctor "if Mr. Morgan was conscious, if he was able to understand if I would place him under arrest and advise him of the implied consent law of the State of Montana; and at that time the doctor said 'he would not be able to understand. He is unconscious.'" The doctor authorized a nurse to draw blood, which she did and gave to Officer Koch. Koch made no attempt to talk to Morgan.

Dr. Newsome testified that Morgan was coherent and conscious and that he did not appear to be intoxicated. Dr. Newsome further testified that he talked to the officers, and authorized the drawing of a blood sample, but "wouldn't allow them (officers) to speak with him (Morgan) just at that time."

The blood sample was sent to the State Investigation Laboratory for analysis. The results showed a blood alcohol content of 0.17%.

I.

[1] Whether the motion to suppress the evidence of the defendant's blood alcohol test should have been granted.

Section 61-8-402, MCA, provides:

"(1) Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent, subject to the provisions of 61-8-401, to a chemical test of his blood, breath, or urine for the purpose of determining the alcoholic content of his blood if arrested by a peace officer for driving or in actual physical control of a motor vehicle while under the influence of alcohol. The test shall be administered at the direction of a peace officer having reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle upon the public highways of this state while under the influence of alcohol. The arresting officer may designate which one of the aforesaid tests shall be administered.

"(2) Any person who is unconscious or who is otherwise in a condition rendering him incapable of refusal shall be deemed not to have withdrawn the consent provided by subsection (1) of this section.

"(3) If a person under arrest refuses upon the request of a peace officer to submit to a chemical test designated by the arresting officer as provided in subsection (1) of this section, none shall be given..."

When Morgan's blood was taken, he was neither under arrest nor had he been given an opportunity to withdraw his consent. The taking of the blood could still have been proper, however, if either of the situations in 61-8-402(2) occurred. The testimony of Morgan, his brother, and the attending physician indicate that Morgan was conscious, so for the taking of the blood sample to have been proper, Morgan must have been "in a condition rendering him incapable of refusal."

to what .17% alcohol meant. If we found that the County Attorney's statements could have reasonably affected the verdict, we would have reversed without hesitation. Although the County Attorney's statements were improper, the evidence already admitted was so extensive that the defendant was not prejudiced.

III.

[3] Whether the court has the power to order the defendant to make restitution to the survivors of the accident.

Sentencing of Morgan was deferred for three years with certain conditions including that he serve 60 days in jail on a work release program and make payments to the accident survivors. The District Court in paragraph 5 of its judgment dated January 19, 1981, ordered in part:

"That the defendant is to make restitution upon his release from the county jail to the Clerk of the District Court for the Eighteenth Judicial District in the amount of $75.00 per month. The first payment shall be April 5, 1981 and on the 5th of each month thereafter for a period of three (3) years from the date of this sentence. Said restitution is to be distributed among Mary Janelle Saltz, Holly Clarkin and Rhonda VanDiest."

Section 46-18-201, MCA, provides the type of sentences that a District Court can impose. Section 46-18-201(1)(a) provides for deferment of sentencing with conditions such as the one received by Morgan.

"(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."

In providing for the use of restitution where a court defers imposition of sentence, the State of Montana is following the trend of criminal sanctions in the United States. As stated in the American Bar Association Standards for Criminal Justice (2d ed. 1980) at 18.112-113:

"The sanction of restitution is currently receiving unprecedented legislative and scholarly attention, as the focus of criminal justice reform has begun to shift to the victim of the crime. A 1978 survey found that some sixteen states had either enacted restitution legislation during 1976-1977 alone or had pending in their legislatures bills that would establish some mechanism by which offenders would make good the losses caused their victims. More than fifty localities have undertaken experimental programs involving restitution, and a new form of penal institution has come into use—the restitution shelter at which the offender resides while 'working off' the offense."

We agree with the conclusion set forth in the ABA Standards at 18.114-115 regarding the class of persons covered and the limitation to actual damages:

"Basically, case law has established that to be eligible to receive restitution, a claimant must be within the class of persons injured by the crime... A second well recognized limitation is that restitution must not exceed the actual damages or loss caused by the offender."

The defendant argues that the three girls injured in the collision do not fall within the class of persons injured by the crime. He bases his argument on *State v. Stalheim* (1976), 275 Or. 683, 552 P.2d 829. In *Stalheim* the wife and daughter of the plaintiff were killed in an accident. The plaintiff was not personally involved in the accident, but sought damages for the loss of both his wife and daughter. The Oregon statute provided that a defendant shall make "restitution to the aggrieved party." The Oregon court did not allow restitution and construed "aggrieved party" to refer to the direct victim of the crime, and not to other persons who suffer loss because of the victim's death or injury. The ABA Standards at 18.114-115 provide with regard to the claimants as follows:

"As to the breadth of this class, courts have disagreed, although both sides of the debate recognize that a remoteness standard should be employed to disqualify some claimants whose injuries can be said to have resulted from the defendant's conduct under a purely 'but for' test... Traditionally, the claimant had to be named in the indictment [*Karrell v. U. S.*, 181 F.2d 981 (9th Cir. 1950)], and restitution could only be awarded with respect to those counts in a multicount indictment that resulted in conviction [*U. S. v. Follette*, 32 F.Supp. 953 (E.D.Pa. 1940); *People v. Funk* [117 Misc. 778], 193 N.Y.S. 302 (1921)]. More recently, courts have split on whether restitution might be ordered with respect to counts that did not result in conviction but were dropped as a result of plea bargaining [*U. S. v. Buechler*, 557 F.2d 1002 (3rd Cir. 1977); *U. S. v. Landay*, 513 F.2d 306 (5th Cir. 1975)]. It is not the function of these standards to resolve these questions, but their existence shows the need for special legislative attention to the topic of restitution..."

While the Montana statute providing for restitution does not specifically address this problem, "The Crime Victim's Compensation Act of Montana" adopted in 1977 does give helpful guidance. That Act defines "victim" as follows:

"(6) 'Victim' means a person who suffers bodily injury or death as a result of:

"(a) criminally injurious conduct;

"(b) his good faith effort to prevent criminally injurious conduct; or

"(c) his good faith effort to apprehend a person reasonably suspected of engaging in criminally injurious conduct." Section 53-9-103(6), MCA.

Under that 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. That is a persuasive approach. We hold that the three girls in the vehicle fall within "the class of persons injured by the crime," making restitution proper.

As above-mentioned, the second limitation is that restitution must not exceed the actual damages. The record here does not show the actual damages caused to each of the three girls, and we are not able to determine if the restitution could exceed the actual damages.

[4, 5] Unfortunately, our statutes do not give significant guidance to the District Court as to the manner in which restitution is to be applied and as to the limitations which are applicable. The Uniform Law Commissioners Model Sentencing and Corrections Act (1979), U. S. Department of Justice, does set forth in considerable detail various of these factors to be applied in the application of the restitution theory. We now conclude that restitution may be allowed by payment of the money equivalent of loss resulting from property taken, destroyed, broken, or otherwise harmed, and also out-of-pocket losses such as medical expenses. (*See* section 3-601 of the Model Sentencing and Corrections Act.) In this case, the District Court may provide for payments to those suffering out-of-pocket losses for medical expenses, but not in excess of the actual money equivalent.

The District Court did not indicate the out-of-pocket expenses or losses for which restitution was being made, nor did it determine the amount of the losses as to each of the three recipients. It is not possible for this Court to determine if the order of restitution was proper.

[6, 7] We vacate that part of the sentence which requires payment of money and remand to the District Court for resentencing on that point. The District Court should hold such additional hearing as may be necessary, and set forth in written findings its basis for the restitution order. Unfortunately, the statutes do not set out standards to be applied on restitution awards similar to those on costs which are set out in section 46-18-232, MCA, as follows:

"(2) The court may not sentence a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of pay-

ment of costs, the court shall take into account the financial resources of the defendant and the nature of the burden that payment of costs will impose.

"(3) A defendant who has been sentenced to pay costs and who is not in default in the payment thereof may at any time petition the court that sentenced him for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or his immediate family, the court may remit all or part of the amount due in costs or modify the method of payment."

We find the foregoing standards are reasonable standards for application to restitution payments. The District Court should apply the foregoing provisions to the present fact situation. In its findings the District Court should include sufficient facts to show compliance with the foregoing paragraphs.

Restitution is a theory being applied throughout the District Courts of Montana. Therefore, we suggest that it would be appropriate for the Montana Legislature to consider the various materials on restitution which are available, including the Model Sentencing and Corrections Act as well as the American Bar Association Standards for Criminal Justice, in order to determine if additional restitution provisions should be added to our statutes.

The judgment is affirmed with the exception of the vacation of that portion of the sentence requiring the defendant to begin making restitution upon his release from the county jail, in order that the District Court may take such additional steps as are necessary to comply with this opinion.

DALY, HARRISON and MORRISON, JJ., and GORDON BENNETT, District Judge,* concur.

HASWELL, Chief Justice, concurring in part and dissenting in part:

I concur with the majority that evidence of defendant's blood alcohol test is admissible and that the county attorney's statements were harmless error.

I dissent from the majority holding vacating the District Court's judgment and sentence requiring restitution. In my view the majority have written conditions and limitations on restitution on the basis of the Uniform Law Commissioners Model Sentencing and Corrections Act which has never been enacted in Montana. Additionally, the majority opinion denies the District Court judgment the presumption of regularity to which it is entitled by statute. Section 26 1 602(15) and (17), MCA.

The District Court is empowered to defer imposition of sentence on condition of restitution. No restrictions have been imposed on restitution although several legislative sessions have passed since 1973 where it was first statutorily authorized. See Chap. 513, Sec. 31, 1973 Session Laws; section 46 18 201(1)(a)(iv), MCA. On the other hand, the Uniform Law Commissioners Model Sentencing and Corrections Act imposes a variety of limitations on the sentencing court's authority to require restitution: a presentence report documenting the victim's pecuniary loss, limitations on what kind of losses are subject to restitution, the financial resources of the offender, etc. As I see it, this Court should be slow in limiting restitution by judicial decisions based upon Model Acts that have no counterparts in Montana.

I also object to vacating a judgment and sentence valid on its face because there is no underlying record which has been certified to us affirmatively showing the dollar amount of out of pocket expenses, the dollar amount of loss of each victim and related matters. This puts the shoe on the wrong foot. The burden is properly in the defendant to show error in the restitution order. Here the defendant has made no showing. Until he does, the District Court judgment and sentence should be upheld.

SHEA, Justice, concurring and dissenting:

Although I agree with the majority's decision on the restitution issue, I would order

* Sitting for SHEEHY, J.

a new trial because the prosecutor not only violated the trial court's order, but in doing so, he twice misstated the law to the jury. In addition, I feel that the Chief Justice, in his dissent to the restitution holding, has overlooked some basic reasons why a restitution order, to be acceptable, should be supported by the evidence.

In holding the prosecutor's violation of the trial court's order to be harmless error, the majority has simply issued a bland warning not to do it again. I feel that the only proper remedy in light of this flagrant violation of the court's order is to order a new trial. This is the only way in which the prosecutors will know that they cannot violate a trial court's order and the defendant's rights with impunity. The prosecutor's actions were designed to bring the information to the jury's attention which the court held could not be done.

Further, the information brought before the jury was incorrect. The prosecutor supplied the doctor and the jury with the forbidden information by asking the doctor if he was "familiar with the fact that .10 is the legal rate in Montana of intoxication." This information, couched in the form of a question, not only violated the court's order, but it was also incorrect. A .10 percent blood alcohol level is not the legal rate of intoxication in Montana; rather, it gives rise to a *presumption* that the defendant was under the influence of alcohol. (Section 61-8-401(3)(c), MCA.) The jury could well have believed, because of this misinformation that a .10 percent blood alcohol level means that a person, under Montana law, is intoxicated. And the prosecutor's final argument to the jury again pounded this point home by arguing that a .10 percent blood alcohol level was the "legal rate of intoxication in Montana" and that the defendant's blood alcohol count of .17 percent "is almost twice the legal rate of intoxication in the State of Montana under our laws."

It is insufficient for the majority to pass off these flagrant violations and misstatements of the law by a statement that ". . . there was already sufficient evidence in the testimony of Mr. Anderson as to what .17% alcohol meant. . . ." The undeniable fact is that the prosecutor not only twice violated the court's order but in doing so also misstated the effect in Montana of a .10 percent blood alcohol level. Because the prosecutor twice stated that a .10 percent blood alcohol level is the "legal rate of intoxication" in this state, the jury was left with the impression that as a matter of law, defendant was intoxicated. We have then two violations of a court order coupled with two misstatements of the law on which the prosecutor clearly intended the jury to rely. I cannot state, beyond a reasonable doubt, that these misstatements of the law did not contribute to the defendant's conviction. See *Chapman v. California* (1967), 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705. Therefore, I would vacate the judgment and order a new trial.

I feel some comment on the restitution issue is necessary because the dissent of Chief Justice Haswell seems to indicate that in imposing guidelines for restitution, this Court has arrogated to itself a power which belongs only to the legislature.

In permitting a district court to impose restitution as a condition of a deferred sentence (section 46-18-201(1)(a)(iv), MCA, the legislature has utterly failed to give any guidelines about when restitution is to be considered an option. The dissent suggests that only the legislature can provide guidelines for restitution, and that any district court judgment imposing restitution is protected by the disputable presumptions contained in section 26-1-602, MCA. Subsection 15 of this statute provides a disputable presumption "that official duty has been regularly performed." And subsection (17) provides a disputable presumption "that a judicial record, when not conclusive, does still correctly determine or set forth the rights of the parties." I have no quarrel with these presumptions but they do not address the problems involved here. Translated, these presumptions mean only that the party taking the appeal must convince at least a majority of this Court that the trial court was wrong. Or put another

way, it means that the party defending the appeal does not have the burden of going forward to establish that the judgment is correct.

I do not think the legislature intended that district courts order restitution in any amount they desire; I do think that the legislature would consider it a laudable goal to have an evidentiary record in support of any restitution ordered by the district court. Otherwise, an order would be nothing less than a fiat, based only on the personal predilections of the sentencing court. And certainly this Court, in the exercise of its appellate jurisdiction, has the right to determine whether an order of the sentencing court is supported by the evidence.

Restitution can be likened to a civil judgment for damages. Each element of damages must be supported by the evidentiary record. And so must each factor on which restitution is based. In permitting a trial court to order restitution, it can hardly be said that the legislature intended that the district court have plenary power to decide the issue without benefit of appellate review.

By analogy, the legislature has created a cause of action for wrongful death (section 27–1–513, MCA), but the elements of recoverable damages are not listed in this statute or in any other statute. Instead, this Court, by its decisions, has given meaning to the cause of action by setting forth in various decisions the items of damages that are recoverable. I see our function as being no different here, where we are simply setting forth the guidelines for district courts to follow when restitution is considered as a sentencing option. This Court has followed a clear, if unsteady, policy of requiring the sentencing courts to set forth their reasons for their sentences. Our failure to require sentencing courts to justify their sentences would eventually result in these courts never giving reasons for their decisions. These courts would simply fall back on the so-called presumptions of regularity contained in sections 26–1–602(15) and (17), MCA, as their justification for not explaining their decisions.

This Court was faced with the situation of determining not whether restitution was proper as a principle, but whether the amount of restitution was proper under the facts. As the majority opinion states: "The record here does not show the actual damages caused to each of the three girls, and we are not able to determine if the restitution could exceed the actual damages." Clearly, then, it is proper for this Court to remand for resentencing, and in doing so, to set forth guidelines for the district courts to use when ordering restitution. These guidelines will help the district courts, the public will have confidence that the function of restitution is not being abused, and these guidelines will certainly aid this Court in performing its function of appellate review.

Michael C. PREZEAU, Plaintiff and Respondent,

v.

The CITY OF WHITEFISH, Defendant and Appellant.

No. 81–424.

Supreme Court of Montana.

Submitted March 30, 1982.

Decided June 21, 1982.

City appealed from judgment entered in the District Court, Eleventh Judicial District, Flathead County, James M. Salansky, J., enjoining city from authorizing construction of indoor rifle range in public park until project was approved by majority of voters of city in special election. The Supreme Court, Sheehy, J., held that: (1) applicable statute commands that sale or lease of municipal property held in trust for specific purpose must be approved in election

Comment

The section authorizes but does not require the establishment of a released offender loan fund. Experience with such funds in many institutions has been disappointing. The provision is included to insure the availability of the authority to operate such a fund if the director of corrections believes it can be done successfully.

Library References

Prisons ⇐14. C.J.S. Prisons § 20.

Part 6. Restitution

§ 3-601. [Sentence of Restitution.]

(a) A sentencing court may sentence an offender to make restitution to the victim of the offense.

(b) Whenever the court believes that restitution may be a proper sentence or the victim of the offense or the prosecuting attorney requests, the court shall order the presentence service officer to include in the presentence report documentation regarding the nature and amount of the victim's pecuniary loss.

(c) The court shall specify the amount and time of payment or other restitution to the victim and may permit payment or performance in installments. The court may not establish a payment or performance schedule extending beyond the statutory maximum term of community supervision that could have been imposed for the offense.

(d) In determining the amount and method of payment or other restitution, the court shall consider the financial resources and future ability of the offender to pay or perform. The court may provide for payment to the victim up to but not in excess of the pecuniary loss caused by the offense. The defendant is entitled to assert any defense that he could raise in a civil action for the loss sought to be compensated by the restitution order.

(e) For purposes of this section "pecuniary loss" means:

(1) all special damages, but not general damages, substantiated by evidence in the record, which a person could recover against the offender in a civil action arising out of the facts or events constituting the offender's criminal activities, including without limitation the money equivalent of loss resulting from property taken, destroyed, broken, or otherwise harmed and out-of-pocket losses, such as medical expenses;

(2) reasonable out-of-pocket expenses incurred by the victim resulting from the filing of charges or cooperating in the investigation and prosecution of the offense[.][; and]

[(3) interest on the amount of pecuniary loss from the time of loss until payment is made.]

(f) An insurer or surety that has paid any part of the victim's pecuniary loss is not a victim for purposes of obtaining restitution.

(g) The court may order a community-service officer to supervise the making of restitution and to report to the court a default in payment.

Comment

This section outlines the elements of a sentence to pay restitution to the victim of the offense. It reflects a growing recognition that the criminal justice system has tended to ignore the victim of the offense and the loss he has suffered. Indeed, other sanctions traditionally employed by the criminal law including fines and imprisonment deprive the victim of any realistic opportunity to recoup his loss from the offender. The interest of the victim is

increasingly being recognized and the use of restitution is being expanded. *See* Drapkin & Viano, Victimology: A New Focus (1973); Hudson & Galaway, Restitution in Criminal Justice 107 (1977) (cataloguing 19 active restitution projects in the United States). These programs tend to provide an active supervised form of restitution which includes employment counseling for the offender. In addition, many sentencing judges have imposed payment of restitution as a condition of probation. This Act lifts restitution to the status of a sentencing alternative in order to emphasize its importance and to encourage more careful consideration of its potential impact.

Most other national proposals have recommended that restitution be an authorized condition of probation. ABA, Probation, § 3.2 (1970); Model Penal Code, § 301.1; Proposed New Federal Criminal Code, § 3103. Several states have enacted detailed restitution provisions: Iowa Code Ann., § 789A.8 (1977) ("it is the policy of this state that restitution be made by each violator of the criminal laws to the victims of his criminal activities"). Pa.Const. Stat.Ann. tit. 18, § 1103 (1977).

Subsection (b) requires information relating to restitution to be included in the presentence report. This provides some advance notice to the defendant of the amount requested and allows time for him to contest the information in the sentencing hearing. Subsection (c) by authorizing installments over a limited time places a maximum on the amount of restitution that can be ordered. Subsection (d) makes clear that the ability of the offender to pay is a relevant consideration and in addition the amount to be paid is limited by the loss sustained by the victim. A limitation based on ability to pay may be constitutionally required. People v. Kay, 36 Cal.App. 759, 111 Cal.Rptr. 894 (1973); State v. Harris, 70 N.J. 586, 362 A.2d 32 (1976). The limitation is also included in the Maine and Iowa code provisions, *supra*.

One of the potential legal obstacles to a more extensive use of restitution is the conflict with the civil law system. The last sentence in subsection (d) authorizes the defendant to assert any defense he would be entitled to assert in a civil action brought by the victim for compensation. This seeks to limit the potential variance between civil liability and a restitution order.

Subsection (e) defines the type of loss that can be considered in awarding a restitution order. General damages, such as pain and suffering and disfigurement, are excluded. *See* Me.Rev. Stat.Ann. tit. 17-A, § 1204 (1975); Iowa Code Ann., § 789A.8(1)(b) (1977) (all damages recoverable in civil action "except punitive damages and damages for pain, suffering, mental anguish, and loss of consortium."). Paragraph (2) also authorizes reimbursement for reasonable out-of-pocket expenses resulting from the investigation. These expenses would include transportation, lost wages, etc., incurred in order to attend hearings, line-ups, or other investigatory proceedings. Paragraph (3) which authorizes interest on pecuniary loss is bracketed because of the variance among the states on the awarding of prejudgment interest in tort cases. The rule regarding interest should be the same both in tort and for purposes of restitution.

Subsection (f) precludes a surety or insurer from obtaining restitution through the criminal process. The section does not prevent such a party from asserting its contractual subrogation rights in a civil action against the defendant.

Subsection (g) authorizes the use of community-service officers to supervise the payment of restitution.

Library References

Criminal Law ⇐1220. C.J.S. Criminal Law § 2007.

§ 3-602. [Modification or Waiver.]

An offender at any time may petition the sentencing court to adjust or otherwise waive payment or performance of any ordered restitution or any unpaid or unperformed portion thereof. The court shall schedule a hearing and give the victim notice of the hearing, date, place, and time and inform the victim that he will have an opportunity to be heard. If the court finds that the circumstances upon which it based the imposition or amount and method of payment or other restitution ordered no longer exist or that it otherwise would be

unjust to require payment or other restitution as imposed, the court may adjust or waive payment of the unpaid portion thereof or other restitution or modify the time or method of making restitution. The court may extend the restitution schedule, but not beyond the statutory maximum term of community supervision that could have been imposed for the offense.

Comment

The section gives the court power to modify or waive payment of restitution if the economic condition of the defendant changes during the payment period. The provision is similar to Section 3–403 for fines, but with regard to restitution the section requires the victim be notified and be given an opportunity to be heard on the requested modification. This additional procedure reflects the victim's interest in the restitution order.

Library References

Criminal Law ⇐1220. C.J.S. Criminal Law § 2007.

§ 3–603. [Default.]

(a) If an offender sentenced to make restitution defaults for 60 days, the court upon the motion of the prosecuting attorney, the victim, or its own motion may issue an order requiring the offender to show cause why he should not be confined for failure to obey the sentence of the court. The court may order the offender to appear at a time, date, and place for a hearing or issue a warrant for his arrest. The order or warrant shall be accompanied by written notice of his right to a hearing and the rights and procedures applicable thereto. The procedures and rights of the offender at the hearing shall be the same as those applicable to a hearing to revoke community supervision.

(b) Unless the offender shows that his default was not attributable to an intentional refusal to obey the sentence of the court or to a failure on his part to make a good faith effort to obtain the necessary funds for payment, the court may order the offender to serve a term of periodic or continuous confinement not to exceed [—— years] if imposed for conviction of a felony or [—— years] if imposed for conviction of a misdemeanor. The term runs consecutively with any other term of confinement being served by the offender. The court may provide in its order that payment or satisfaction of the restitution order at any time will entitle the offender to his release from confinement or, after entering the order, at any time for good cause shown may reduce the term of confinement, including payment or satisfaction of the restitution order.

(c) The court shall comply with applicable guidelines of the sentencing commission and the provisions of Section 3–207 in imposing confinement for nonpayment of a restitution order.

(d) If restitution is imposed on an organization, it is the duty of any person authorized to order the disbursement of assets of the organization, and his superiors, to pay the restitution from assets of the organization under his control. Failure to do so renders a person subject to an order to show cause why he should not be confined.

(e) An order to pay restitution constitutes a judgment rendered in favor of the State and following a default in the payment of restitution or any installment thereof, the sentencing court may order the restitution to be collected by any method authorized for the enforcement of other judgments for money rendered in favor of the State.

Comment

The provision establishes provisions for nonpayment of a restitution order. They are identical to those enacted for nonpayment of fines except that the victim is given a greater role in the process. As in cases of nonpayment of

fines, once the fact of nonpayment is proved, the defendant has the burden to show that nonpayment is a result of his inability to pay or obtain funds to do so.

Subsection (e) makes applicable to a restitution order, the procedures available to collect money judgments rendered in favor of the State. These procedures usually give the State higher priority to a debtor's funds than would normally be given to a private party. This seems appropriate because the restitution order includes not only a compensatory element but is also part of the sentence imposed for the criminal offense.

Library References

Criminal Law ⇐1220. C.J.S. Criminal Law § 2007.

§ 3-604. [Victim's Compensation.]

(a) Whenever a victim is paid by a crime victim's reparation fund for loss arising out of a criminal act, the fund is subrogated to the rights of the victim to any restitution ordered by the court and to any funds paid into a trust in lieu of a fine to satisfy civil judgments.

(b) The rights of the crime victim's reparation fund are subordinate to the claims of victims who have suffered loss arising out of the offenses or any transaction which is part of the same continuous scheme of criminal activity.

Comment

This section coordinates payments to victims under a restitution order with payments by any public victim's compensation act. States without a victim's compensation fund may wish to remove this provision unless there are local funds that provide victims with compensation. Subsection (a) gives the fund a right of subrogation against any order of restitution to the extent the fund has paid the victim. Because of the length of many criminal proceedings, it may be appropriate for a fund to compensate the victim immediately. This subsection provides the fund with an incentive to do so rather than to wait to see if any money is paid under a restitution order.

Subsection (b) speaks to the problem of multiple victims and their relationship to restitution and a victim's compensation fund. The section gives victims priority over the fund in collecting funds from the defendant. Thus the subrogation right granted in subsection (a) is subordinate to the claims of other victims seeking restitution from the offender.

Library References

Criminal Law ⇐1220. C.J.S. Criminal Law § 2007.

§ 3-605. [Civil Actions.]

(a) This Act does not limit or impair the right of a victim to sue and recover damages from the offender in a civil action.

(b) The findings in the sentencing hearing and the fact that restitution was required or paid is not admissible as evidence in a civil action and has no legal effect on the merits of a civil action.

(c) Any restitution paid by the offender to the victim shall be set off against any judgment in favor of the victim in a civil action arising out of the facts or events which were the basis for the restitution. The court trying the civil action shall hold a separate hearing to determine the validity and amount of any set-off asserted by the defendant.

Comment

This section coordinates payments to victims under a restitution order with potential civil suits based on the same event. Although receiving restitution does not prevent the victim from bringing a civil action, amounts paid to the victim are set off against any award. This prevents the victim from

receiving double recovery and the defendant from paying for the same loss twice.

Subsection (b) insures that the judgment in the criminal proceeding that restitution is appropriate and the findings based thereon are not admissible in any civil litigation. The burden of proof at the sentencing hearing and the procedures applicable thereto including the type of evidence that can be considered is more flexible and less restricted than in civil litigation.

The last sentence in subsection (c) requires a separate hearing to determine the validity of any set off. This is to prevent the fact that restitution has been ordered from influencing the determination of liability or damages in the civil case.

Library References

Criminal Law ⇐1220. C.J.S. Criminal Law § 2007.

ARTICLE 4. TREATMENT OF CONVICTED AND CONFINED PERSONS

Prefatory Note

Article 4 is the legislative embodiment of a prescriptive code of treatment of offenders. It reflects an express assumption of the philosophy that "a prisoner retains all the rights of an ordinary citizen except those expressly or by necessary implication taken from him by law." Coffee v. Reichard, 143 F.2d 413 (6th Cir. 1944). *Accord, e. g.*, Morales v. Schmidt, 340 F.Supp. 544, 553–54 (W.D.Wis. 1972); United States *ex rel.* Wolfish v. United States, 428 F.Supp. 333 (S.D.N.Y. 1977) (opinion on motion for summary judgment). *Cf.* Procunier v. Martinez, 416 U.S. 396 (1974); Bounds v. Smith, 45 U.S.L.W. 4411 (1977). It is a philosophy supported by many authorities, and it is gaining increasing recognition by the courts. *See e. g.*, ABA Joint Comm. on the Legal Status of Prisoners, *Standards Relating to the Legal Status of Prisoners*, § 1.1 and Commentary (Tent.Dr.1977) *reprinted in* 14 Am.Crim.L.Rev. 377 (1977) [hereinafter cited as ABA Joint Comm.]; S. Kranz, R. Bell, & M. Magruder, Model Rules and Regulations on Prisoners' Rights and Responsibilities 1–4 (1977) [hereinafter cited as Kranz]; Nat'l Advisory Comm'n on Criminal Justice Standards & Goals, Corrections 17–21 (1973) [hereinafter cited as Nat'l Advisory Comm'n]. It has, moreover, been enacted into law in at least one state. Cal.Penal Code, § 2001 (West 1976) (a confined offender is "deprived of such rights, and only such rights, as is necessary in order to provide for the reasonable security of the institution in which he is confined and for the reasonable protection of the public").

The legislative recognition that a confined person generally retains the rights of a free citizen is by no means meant to deprecate the legitimate interests of institutional security and public safety. There is throughout Article 4 an affirmation that these security and safety interests are and must be of paramount importance. Article 4 represents the view that security and safety can be maintained consistent with the treatment of confined persons that is mandated or encouraged in the various sections. Thus, the Article describes a just—and safe—correctional system in which attention is paid to the societal interest in humane treatment of confined persons as well as to the personal interests of confined persons themselves in the treatment provided them. By so describing the system, it is believed that society will more nearly achieve the goal of every correctional system—to return to society confined persons who will adjust to the outside world and not recidivate. As was stated by the ABA Joint Committee:

> Virtually all prisoners will someday be released to a society in which . . . they will daily be required to make choices and exercise self-restraint. If our institutions of confinement do not replace self-restraint for compelled restraint, and encourage choice rather than rote obedience, released prisoners will continue to be unable to deal with the "real" world.

ABA Joint Comm. at 418–19.

Provision of rehabilitative programs and services is mandated throughout the Act. *See e. g.*, Section 2-105 *supra*. It is intended that confined persons will be encouraged to avail themselves of opportunities presented by these programs and services. And many of the provisions are clearly drafted to provide incentives to

FROM MONTANA'S CAPITAL

ECORd

THURSDAY
January 27, 1983
Helena, Montana
Vol. 40 No. 67

EXHIBIT "E"
February 1, 1983

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fenders paid their crime victims in 1982.

That's an 86 percent increase over the previous year and shows the success of the restitution program started in the First Judicial District youth court with a Board of Crime Control grant in 1978. It was expanded to include adults two years later.

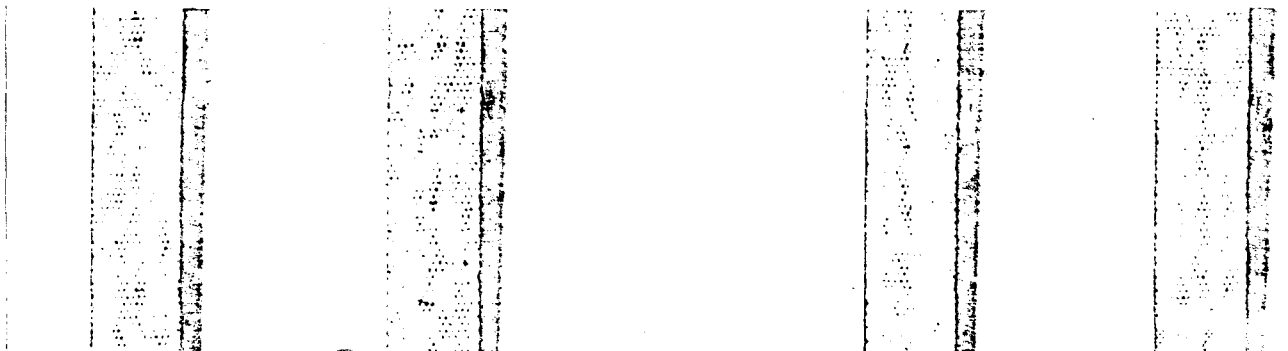
A total of $206,044 has been returned to victims so far from the restitution program, and offenders have paid another $20,185 in fines and attorney's fees — more than half of that amount in 1982.

An estimated $26,000 in additional fines and restitution was collected in a separate effort by the county's two Justice of the Peace courts, and the city police court has its own collection system too.

And money is only half of the story. The district and youth court offenders in 1982 performed 972 hours of public service — everything from picking up trash on the downtown mall to helping the Salvation Army deliver holiday food to the needy.

Sey believes the work requirement spells an important message: "The court is not a revolving door any more. Public service gives credibility to the criminal justice system."

(More on CRIME, page 8A)



Crime

Continued from Page 1A

The incidence of repeat offenses in 1982 among the 251 adults and youths in the program was 10 percent, but Sey said the national average is close to 85 percent.

District Judge Gordon Bennett, who handles most youth cases, said he will lean even more heavily on the public service aspect of the program this year — for practical reasons. "Public service takes the profit out of crime," he said. "And there are a lot of (public service) jobs around here to be done."

Bennett said the state of the economy dictates public service instead of monetary restitution in some criminal cases: Most offenders are broke and can't pay their victims back.

In adult cases, restitution and public service are imposed as conditions of suspended sentences. If the offenders don't pay, Bennett said, they go to jail or prison.

Sey warns the program is not a "panacea" for all victims. There were 22 adult revocations in 1982 and $8,464 was "written off" as uncollectible restitution from youths.

The biggest drawback with public service is that it takes extra time and supervision, Bennett said. Sey attributes the success to social agencies willing to "hire" offenders for volunteer work.

Sey said she prefers that judges require criminal offenders to make restitution and perform public service — especially youths who she says are impressionable and tend to learn from their mistakes.

Public service jobs teach youths that "you have to take time out of your day, from cruising the drag or playing video games," Sey said.

"I'll fight like a dog for victims to get their money back, but I see a lot of promise with public service," she said. "It's just got to be rehabilitative."

Sey strives to make the "punishment" fit the crime. She said the object isn't necessarily to make the punishment unpleasant, but rather therapeutic. "People may say I'm idealistic. But I can be hard core too."

Two juvenile offenders were ordered to do maintenance work at the YMCA's Camp Child last summer. Not only did they make new friends, one of them will return next summer — with a paid job.

Sey put two boys to work cleaning police cruisers after they were caught breaking windshields. "I wanted them to see that those guys who nabbed them were also doing their job," Sey explained. "I wanted them to come away with a renewed respect for the police. And I think they did."

Another window breaker was ordered to collect litter that had become glued to chain-link fences along North Montana Avenue during high winds.

Making and delivering Christmas baskets to the needy was good for youth offenders from middle- to upper-income families, Sey said. "Kids have a tendency to be selfish. Mom and Dad are paying the bills. It's good for them to see other people are suffering, that maybe their victims are suffering."

Sometimes Sey arranges for offenders to meet their victims and she plays mediator. But she must be certain ahead of time that nobody will be in physical danger. "I think they (offenders) deserve to be chewed out and see their victim's anger, but we don't want to see a fight." Such confrontations are voluntary on the part of both parties.

In a case that Sey calls her "most profound" so far, she encouraged two boys, age 15 and 16, to apologize in person to the woman whose purse they had stolen from an office in a local church.

At first they said no. Then they went to her office with Sey and presented her a check for full restitution — $37.50 each. The victim gave each boy a handmade gift to which she attached a special significance.

Said Sey: "I'd be real surprised if those boys ever got in trouble again."

EXHIBIT "F"
February 1, 1983

Montana Association of Churches

MONTANA RELIGIOUS LEGISLATIVE COALITION • P.O. Box 1708 • Helena, MT 59601

WORKING TOGETHER:

American Baptist Churches of the Northwest

American Lutheran Church Rocky Mountain District

Christian Church (Disciples of Christ) in Montana

Episcopal Church Diocese of Montana

Lutheran Church in America Pacific Northwest Synod

Roman Catholic Diocese of Great Falls

Roman Catholic Diocese of Helena

United Church of Christ Montana Conference

United Presbyterian Church Glacier Presbytery

United Methodist Church Yellowstone Conference

United Presbyterian Church Yellowstone Presbytery

February 1, 1983

Chairman Turnage and Members of the Senate Judiciary Committee:

I am Cathy Campbell of Helena, speaking on behalf of the Montana Association of Churches. I am speaking in support of SB 237.

The nine member denominations represented by the Montana Association of Churches have been concerned about the innocent victims of crime for many years. The Association first adopted a position in 1976 supporting the enactment of a Victim of Crime Compensation Law.

We feel that laws relating to compensation of victims of crime should be consistent with the just need of reparation for the victim. The reparation should relate to the crime committed and its effect on the victim.

SB 237 would seem to help accomplish these goals. I urge your support of SB 237.