

Restitution in Canadian criminal justice

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Law Now, Apr/May 1998, Vol. 22, Iss. 5; pg. 17
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Everyone wants justice. But arranging that is not as easy as one would wish. As society, and our government representatives, struggle to rework the criminal justice system to more justly balance the interests and rights of offenders and victims of crimes, one remedy which may please victims of property offences is restitution. The rules governing restitution in the Criminal Code have changed recently. However, they are not widely known and are little used, although recovery of property or money would be a welcome relief for many victims.

Restitution and Compensation

Restitution, by definition, is limited to the return of property to the victim. One concern is whether the victims' legitimate expectations for redress can be satisfied; another is that any contact with the offender does not further injure the victim who was an unwilling participant in the original crime.

The concept of restitution is well known in civil law categories such as torts and contracts. If a contract is, for example, to be unravelled, one party may ask for restitution of money or property transferred in order to be brought back to one's original position. These principles of restitution continue to be developed at common law.

Compensation goes farther than the mere return of property. Again, as a private law matter, it seeks transfer of that amount of money (so far as money can suffice) from the wrongdoer to fully restore the injured person. An Ontario court highlighted the difference between restitution and compensation in *R. v. Groves* (1977):

"An examination of the language ... indicate[s] that Parliament viewed the term 'restitution' as dealing with the return of identical property obtained as a result of the commission of an offence to its owner, while the term 'compensation' covers the making of a financial payment as a replacement for property so taken, or as damage to property as a result of the offence."

The recent Criminal Code amendments have moved the victims toward being able to receive something closer to compensation. Such restitution or compensation has the potential to be an important instrument in crime control. It can contribute to the healing and restoration of the victim. While that is a worthwhile goal in itself, restitution also deters criminals. If they are ordered to fully return the property illegally acquired, offenders may be less anxious to engage in those types of crimes. It is also morally repugnant that, for example, an embezzler of a half million dollars would serve a year or two in prison, then be released to lavish in the loot. If it makes so much common sense, why is it so difficult to actually obtain restitution?

Why Restitution is Sparingly Applied

Three reasons stand in the way of the widespread use of restitution. * criminal law historically has not been concerned with civil consequences, e.g., financial damages; * the fear exists that victims may be re-offended by further contact with the perpetrators; * property and other money is often quickly disposed, hidden, hard to trace, or in the hands of innocent third parties; altogether difficult to regain.

Public law, not civil

Criminal law is public law; that is crimes are offences against the public, the whole society. When one is a direct victim of a crime, such as a theft or an assault, that crime may seem very personal. However, the control of crime is a social concern. This makes sense because when we learn of a crime being committed, usually we are all offended by it, sometimes frightened, often upset. Think of how you feel when you see a drunk driver swerving dangerously down a roadway or hear that your neighbour's house was burglarized. It is accurate to say that crime affects everyone. Thus, criminal sanctions are not imposed with the victim in mind. Instead, justice is sought for all of society, not merely the personal victim. Fines are paid to the state and community service is paid to the community. The investigation, prosecution of the alleged crime, and enforcement of the sanction are handled by public authorities (i.e., the police, Crown prosecutors, prison officials, etc.).

Practically speaking, once a matter gets as far as the criminal sentencing stage, there may not be much property left for restitution. Is partial recovery worthwhile for all involved? The criminal may have sold the stolen property to an honest third party buyer. In such a case, how should the interests of two different innocent parties be resolved? If the property or money has disappeared, often the criminal has no means to pay restitution or will choose a strategy of avoiding payment. Since victims of crime do still have recourse to parallel civil law remedies, the policy of the criminal law traditionally has not been sympathetic to restitution or compensation orders.

Making a Claim for Restitution and Compensation

Despite the problems of restitution in criminal law, it is a possibility. The Criminal Code provides for restitution of property of innocent persons as a result of the commission of an offence or the arrest of the offender.

The New Procedure

Under the Criminal Code, s. 738, only the Crown prosecutor, presumably at the victim's request, may apply for a restitution order. The judge may also initiate such relief. However, it cannot be characterized as a pure right of the victim. Prosecutors are usually too busy with their dockets and over-worked to embark upon inquiries about restitution. Furthermore, they frequently do not want to get involved in property valuations, the domain of civil law.

Another change is that a restitution order can now be granted for bodily harm. The victim can recover for "all pecuniary damages, including loss of income or support, incurred as a result of the bodily harm." Moreover, if the victim was a member of the offender's household, that person can also recover "actual and reasonable expenses incurred ... as a result of moving out of the

offender's household, for temporary housing, food, child care and transportation." In this case, one can make a claim on the grounds of a threat of bodily harm, and does not have to demonstrate actual bodily harm. This is not restitution per se, because it does not call for the return of property. Instead, it is the restitution of expenses, or partial compensation.

In all instances, the amount that is recoverable must be readily ascertainable. This helps make certain no criminal court will get mired in lost-asset evaluations. Non-pecuniary losses, such as pain and suffering, are not recoverable by way of restitution. These would be, simply, too difficult to ascertain in a criminal justice context. If the victim's claim is not readily ascertainable, no restitution order will be made at all. Thus a victim may wish to provide current and credible property appraisals and statements of economic loss to the prosecutor.

This framework is intended to serve as a summary procedure where receipts and submissions are tendered to the judge in support of the order, without the need for sworn evidence or cross-examination. It is also a scenario where rounded figures may be more acceptable to the judge than detailed and intricate calculations. The restitution order is to be made "in addition to any other measure imposed on the offender", although one can expect judges to keep the totality of the sentence in mind when addressing restitution.

Section 740 gives further direction on this point. If the judge believes that the criminal could not pay both a restitution order and a fine, the judge shall make the restitution order first and determine what resources, if any, are available for payment of a fine. Similarly, if the property is already subject to forfeiture to the government, the forfeiture will be waived in favour of a restitution order. As new criminal legislation which places the accused in greater economic jeopardy without normal criminal standards of procedure, a challenge to the constitutionality of section 738 is likely under the Charter of Rights. Whenever the federal government treads into spheres of provincial legislative jurisdiction (civil remedies), it risks constitutional invalidation. However, the combining of criminal and civil recourse in the same hearing under federal legislation is not new. The Supreme Court of Canada has ruled in several cases, such as *General Motors of Canada v. City National Leasing Ltd.* (1989) that the federal government has the proper authority to do this.

Enforcement and Other Restitution Provisions

The new legislation offers an ingenious solution to the problem of balancing the interests in the property between two innocent persons. Section 739 deals with an innocent buyer who has already acquired the property by giving "valuable consideration ... acting in good faith and without notice" that it was, for example, stolen property. If the property is returned to the first owner, a restitution order might issue against the offender to pay the purchase price. It is up to the judge to determine who is the "lawful owner or person lawfully entitled to possession of the property" between these two persons. Who actually receives the property is in a better position, because the other person may end up with an unenforceable judgment.

The value of any legal remedy is determined by its practical effectiveness. A restitution order against someone serving time in jail without assets may, like any civil judgment, have little value. The injured person will not receive any restitution and the whole process will be fraught

with unhappiness. On the other hand, where the property is under seizure with the court, it can be immediately transferred to the true owner. If the property is damaged or incompletely returned, one would still have status for a section 738 restitution order. However, in most cases, where money compensation is the subject of restitution, getting the money may still be a problem.

If the accused actually has money on his or her person at the time of arrest, and ownership of that money is not contested, it can be immediately scooped to satisfy any restitution order. If not, the victim must take the restitution order and file it at the Clerk of the Court of Queen's Bench, or equivalent superior court, and take proceedings, usually by way of garnishment or seizure, to enforce it. Anyone who has tried personally to take the technical steps necessary to enforce a civil judgment knows the wrenching difficulties inherent in that process. Indeed, this restitution legislation itself provides that the victim is free to pursue any civil remedy available, with or without an order of restitution. Where physical injury has occurred, a civil lawsuit for pain and suffering would have to be independently brought because this category of injury could never be included in a statutory restitution order.

Conclusion

Centuries ago a court had no power at all to order restitution. It was not until 1592 that in England one was allowed to apply for a Writ of Restitution. When one considers that victims of crime have not always had the right in law to get their property back, we have made remarkable progress from rights of restitution toward rights of compensation for victims of crime. Today, the victim is not limited to recovered property or to instances involving the loss of physical property in order to make a claim for restitution. Today, one may claim compensation in criminal court which, up to now, had to be taken forward exclusively in civil litigation. What is the benefit, therefore, of pursuing a restitution order that goes beyond confiscated property? Simply, such an order represents the best legal action for a victim in most circumstances. If the offender has assets or is likely to be employed after the sentence is served, it may be worthwhile having a judgment on the record with the Clerk of the Court. This judgment can be periodically renewed until it is paid.

This restitution process may eliminate the need to hire a lawyer and launch a civil action which would, in many cases, yield no greater benefit than that contained in a restitution order. It is still too early to know how these sections will develop in practice. Much will depend on how many eligible victims learn of this law to obtain a restitution order and how determined they are to pursue their claims. How much will the Crown co-operate in advancing a restitutionary claim? What evidence will they require of the victim? One hopes that the practical requirements will not necessitate the victims hiring their own lawyer in the cause. How will the judiciary embrace this new power to compensate victims of crime? At this point, however, one thing is clear. Victims of crime can claim a potentially potent tool to obtain restitution and compensation under this new legislative regime. This was clearly designed in response to the call for more direct personal accountability on the part of offenders and for more rights on the part of victims.

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