

# Restitution

James M. Markham

## CONTENTS

<b>I. Restitution Generally</b>	2	<b>V. Limits on Restitution</b>	8
<b>II. Who May Receive Restitution</b>	2	A. Pain and Suffering	8
A. Victims	2	B. Punitive Damages	8
B. Crime Victims’ Rights Act Victims	2	C. Victims of Dismissed, Acquitted, or Uncharged Conduct	8
C. Non-Victims	2	D. Accomplice Liability for Restitution	9
<b>III. Determining the Restitution Amount</b>	3	E. Restitution to Government Agencies	9
A. Bodily Injury	3	F. Restitution for Costs of Investigation and Prosecution	9
B. Injury to Property	3	G. Drug-Buy Money	9
C. Special Statutory Restitution Provisions	3	H. Laboratory Fees	10
D. Future Damages	3	<b>VI. Unpaid Restitution</b>	10
<b>IV. Restitution Procedure</b>	4	A. Failure to Pay Restitution as a Violation of Probation	10
A. Determination of the Restitution Amount	4	B. Remitting Restitution	10
B. Delegation to Probation Officer— Collection Schedule Only	4		
C. Proof of the Restitution Amount	4		
D. Burden of Proof	5		
E. Stipulation	5		
F. Consideration of the Defendant’s Ability to Pay	5		
G. Time to Pay	6		
H. Restitution and Plea Bargains	6		
I. Insurance and Insurance Companies	6		
J. Restitution in Active Punishment Cases	6		
K. Restitution and Civil Judgments	6		
L. Bankruptcy	7		
M. Crime Victims Compensation Fund	8		

---

[James M. Markham](#) is a professor of public law and government at the School of Government. His area of interest is criminal law and procedure, with a focus on the law of sentencing and corrections.

## I. Restitution Generally

Restitution is court-ordered compensation from a criminal defendant to a crime victim or to a party that provided assistance to the victim. It is a constitutionally authorized punishment in North Carolina.<sup>1</sup>

In every criminal case, the court is required to consider whether the defendant shall be ordered to make restitution to the victim of the offense.<sup>2</sup>

Victims of crimes against or involving the person of the victim or crimes equivalent to a felony property crime have a constitutional right to receive restitution in a reasonably timely manner when ordered by the court.<sup>3</sup>

## II. Who May Receive Restitution

### A. Victims

A “victim” is a person directly and proximately harmed as a result of a defendant’s commission of a criminal offense.<sup>4</sup> The court may, in addition to any other penalty authorized by law, require the defendant to make restitution to a victim or to the victim’s estate.<sup>5</sup> The court may not order restitution to victims of offenses that do not result in a conviction,<sup>6</sup> although that does not limit the court’s authority to award restitution to only those victims specifically named in the indictment.<sup>7</sup>

### B. Crime Victims’ Rights Act Victims

Special restitution rules apply to those who fall under the definition of “victim” in the Crime Victims’ Rights Act (CVRA), Article 46 of Chapter 15A of the North Carolina General Statutes.<sup>8</sup> For these individuals, the court shall, in addition to any penalty authorized by law, require defendants to make restitution to them or to their estates.<sup>9</sup>

### C. Non-Victims

Certain parties other than the victim may receive restitution. The court may order restitution to a person, organization, corporation, or association that provided assistance to the victim and is subrogated to the rights of the victim.<sup>10</sup>

---

1. N.C. CONST., art. XI, § 1.

2. Chapter 15A, Section 1340.34 of the North Carolina General Statutes (hereinafter G.S.).

3. N.C. CONST., art. I, § 37.

4. G.S. 15A-1340.34(b).

5. G.S. 15A-1340.34(c).

6. *State v. Murphy*, 261 N.C. App. 78 (2018).

7. *State v. Moore*, 209 N.C. App. 551 (2011).

8. *See* G.S. 15A-830(a)(7) (defining “victim” as “[a] person against whom there is probable cause to believe an offense against the person or a felony property crime has been committed”).

9. G.S. 15A-1340.34(b).

10. G.S. 15A-1340.37(b).

### III. Determining the Restitution Amount

#### A. Bodily Injury

For offenses resulting in bodily injury to a victim, the court must consider

- the cost of necessary medical and related professional services;
- the cost of devices or equipment relating to physical, psychiatric, and psychological care;
- the cost of necessary physical and occupational therapy and rehabilitation;
- lost income; and
- when injury results in a victim's death, the cost of the victim's funeral and related services.<sup>11</sup>

#### B. Injury to Property

For offenses resulting in the damage, loss, or destruction of property, the court must consider requiring the defendant to return the property to its owner or to the owner's designee. If returning the property is impossible, impracticable, or inadequate, the court should determine the value of the property (a) on the date of its damage, loss, or destruction *or* (b) as of the date of sentencing (less any part of the property that is returned).<sup>12</sup>

#### C. Special Statutory Restitution Provisions

The statute governing a particular offense may contain specific restitution requirements.

Examples include:

- worthless checks under G.S. 14-107 (restitution in the amount of the check, bank service charges, and processing fees imposed by the payee);
- identity fraud under G.S. 14-113.22 (attorneys' fees and costs incurred in correcting credit history);
- assaulting a law enforcement agency animal, an assistance animal, or a search and rescue animal under G.S. 14-163.1 (veterinary care and boarding expenses for the animal, replacement of the animal, training of any replacement animal, and salary of the law enforcement agency animal handler, among other expenses); and
- replacement costs to the Department of Environmental Quality for marine, estuarine, or wildlife resources taken, injured, removed, altered, damaged, or destroyed as the result of a criminal offense, plus investigation and reward expenditures.<sup>13</sup> Replacement costs for certain species are set out in the North Carolina Administrative Code.<sup>14</sup>

#### D. Future Damages

A trial court did not err by ordering the defendant to pay restitution of "up to \$2000 for future treatment" when there was testimony to show that the victims had already accumulated \$680 in medical bills and were still undergoing treatment as a result of the defendant's actions.<sup>15</sup>

---

11. G.S. 15A-1340.35(a).

12. *Id.*

13. G.S. 15A-1343(b1)(5).

14. Title 15A, Chapter 10B, Section .0017 of the N.C. Administrative Code (e.g., crow, \$4; black bear, \$2,232; fox, \$88).

15. *State v. Canady*, 153 N.C. App. 455 (2002).

## IV. Restitution Procedure

### A. Determination of the Restitution Amount

The court should determine a discrete restitution amount. It was improper, for example, to order a defendant to pay a percentage of his salary as restitution.<sup>16</sup>

### B. Delegation to Probation Officer—Collection Schedule Only

Except as part of a pre-sentence investigation, the court should not order a probation officer to determine the amount of restitution owed. The court may, however, delegate to a probation officer the responsibility to determine a collection *schedule*.<sup>17</sup>

### C. Proof of the Restitution Amount

The quantum of proof needed to support a restitution award is not high,<sup>18</sup> but a prosecutor's statement, standing alone, is insufficient to support an award of restitution.<sup>19</sup> Likewise, a restitution worksheet, unsupported by testimony or documentation, is insufficient to support a restitution amount.<sup>20</sup> There must either be a stipulation to the amount or evidence adduced at trial or at the sentencing hearing to support the restitution amount.<sup>21</sup> The restitution amount may not be based on mere "guess or conjecture."<sup>22</sup>

The appellate courts have not required the restitution amount to be calculated according to a universal formula.

- A homeowner's testimony that a repair person had estimated that repairs to her house would cost "thirty-something thousand dollars" was "some evidence" to support an award of restitution but was not specific enough to support the precise amount ordered (\$39,332).<sup>23</sup>
- The State offered sufficient evidence of the restitution amount related to the robbery of a car when the prosecutor introduced documentation showing the title and registration of the car as well as a copy of the purchase receipt of the car.<sup>24</sup>
- The trial court did not err when it ordered restitution in an amount that was an average of two values proposed as the proper measure of damage to a victim's property—one value stemming from a comparison to a similar plot of land, another stemming from a forestry agent's report. Both values were supported by evidence.<sup>25</sup>
- A restitution award of \$180 was not disturbed when the victim testified that the money stolen from her pocketbook was between \$120 and \$150 in cash and another witness involved in the robbery testified that the pocketbook contained \$240.<sup>26</sup>

16. *State v. Simpson*, 61 N.C. App. 151 (1983).

17. G.S. 15A-1343(g).

18. *State v. Hunt*, 250 N.C. App. 238 (2016).

19. *State v. Wilson*, 340 N.C. 720 (1995).

20. *State v. Mauer*, 202 N.C. App. 546 (2010).

21. *State v. Dallas*, 205 N.C. App. 216 (2010).

22. *State v. Daye*, 78 N.C. App. 753 (1986).

23. *State v. Moore*, 365 N.C. 283 (2011).

24. *State v. Watkins*, 218 N.C. App. 94 (2012).

25. *State v. Freeman*, 164 N.C. App. 673 (2004).

26. *State v. Davis*, 167 N.C. App. 770 (2005).

#### D. Burden of Proof

The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense is on the State. The standard of proof is a preponderance of the evidence.<sup>27</sup>

#### E. Stipulation

A defendant may validly stipulate to the amount of restitution owed. There is a check-box on the transcript of plea form available from the North Carolina Administrative Office of the Courts (AOC-CR-300, page two) where the court can note that as part of a plea arrangement the defendant stipulates to restitution in the amount set out on the restitution worksheet.

#### F. Consideration of the Defendant's Ability to Pay

In determining the restitution amount, the court must consider the resources of the defendant and his or her ability to pay restitution, although the court is not required to make findings of fact or conclusions of law on those matters.<sup>28</sup> The court must consider

- the resources of the defendant, including all real and personal property and the income derived from the property;
- the defendant's ability to earn;
- the defendant's obligation to support dependents; and
- any other matters that pertain to the defendant's ability to make restitution.

The burden of demonstrating the defendant's inability to pay restitution is on the defendant.<sup>29</sup>

- A defendant's ability to pay was established through evidence that he had recently offered to buy land for \$37,500 and had recently been employed, as well as by the lack of any testimony indicating that he was unable to work.<sup>30</sup>
- In cases involving very large restitution orders—where “common sense dictates that only a person of substantial means could comply”—the trial court should be especially careful to document its consideration of the defendant's ability to pay.<sup>31</sup>

The court may order partial restitution if it appears that the damage caused is more than the defendant will be able to pay. If the court orders partial restitution, it must state on the record its reasons for doing so.<sup>32</sup>

- The requirement to consider the defendant's ability to pay does not necessarily require the court to order partial restitution. The court did not err, for example, by ordering an indigent defendant to pay \$40,588 in restitution when there was substantial information in the record that the court reviewed the defendant's employment status, expenses, liabilities, and living situation.<sup>33</sup>

---

27. *State v. Tate*, 187 N.C. App. 593 (2007).

28. G.S. 15A-1340.36(a).

29. *Tate*, 187 N.C. App. 593.

30. *State v. Minton*, 223 N.C. App. 319 (2012).

31. *State v. Smith*, 90 N.C. App. 161 (1988) (\$500,000); *State v. Hayes*, 113 N.C. App. 172 (1993) (\$208,000).

32. G.S. 15A-1340.36(a).

33. *Tate*, 187 N.C. App. 593; *see also State v. Riley*, 167 N.C. App. 346 (2004).

### **G. Time to Pay**

The court may require the defendant make full restitution no later than a certain date and may allow the defendant to make restitution in installments.

### **H. Restitution and Plea Bargains**

Under G.S. 15A-1021(c), a “proposed plea arrangement may include a provision for the defendant to make restitution or reparation to an aggrieved party or parties for the damage or loss caused by the offense or offenses committed by the defendant.” Restitution should, however, be limited to the crimes for which the defendant is convicted and should not include victims of other charges.<sup>34</sup>

When restitution is entered as part of a plea arrangement that results in an active sentence, the sentencing court shall enter as part of the commitment that restitution is recommended.<sup>35</sup>

When a defendant’s offense is one in which there is evidence of physical, mental, or sexual abuse of a minor, the court should encourage the minor and the minor’s parents or custodians to participate in rehabilitative treatment, and the plea agreement may include a provision that the defendant will be ordered to pay for such treatment.<sup>36</sup>

### **I. Insurance and Insurance Companies**

Though not governed by statute, a common practice within the court’s discretion is to limit a victim’s restitution award to harm not otherwise covered by insurance (such as the victim’s copayment or deductible). Before 2016, courts were barred from ordering restitution directly to an insurer,<sup>37</sup> but that law was repealed, effective December 1, 2016.<sup>38</sup>

### **J. Restitution in Active Punishment Cases**

Subsequent to amendments made to the law in 1998, restitution may be ordered in cases where a defendant is sentenced to active punishment.<sup>39</sup> In Crime Victims’ Rights Act (CVRA) cases, the restitution order may be docketed as a civil judgment, as discussed below. In non-CVRA cases, restitution may be ordered as part of a sentence to active punishment, but the order may be difficult to enforce and unlikely to have effect as a practical matter. In all cases when a defendant is sentenced to active punishment, the court must consider whether to recommend to the Secretary of Public Safety or the Post-Release Supervision and Parole Commission, as appropriate, that the defendant pay restitution out of work release earnings or as a condition of post-release supervision or parole.<sup>40</sup>

### **K. Restitution and Civil Judgments**

Restitution is not a legal obligation equivalent to a civil judgment,<sup>41</sup> and imposition of restitution does not affect, and is not affected by, the victim’s right to institute a civil action against the defendant based on the same conduct.<sup>42</sup> Likewise, a civil settlement agreement releasing a party

34. *State v. Murphy*, 261 N.C. App. 78 (2018).

35. G.S. 15A-1021(d).

36. *Id.*

37. G.S. 15A-1340.37(d).

38. S.L. 2016-78.

39. *State v. Hughes*, 136 N.C. App. 92 (1999) (discussing the fact that in earlier cases, a judge lacked authority to require restitution from a defendant who received active punishment).

40. G.S. 15A-1340.36(c); 148-33.2; 148-57.1.

41. *State v. Freeman*, 164 N.C. App. 673 (2004).

42. G.S. 15A-1340.37(a); *Shew v. S. Fire & Cas. Co.*, 307 N.C. 438 (1983).

from all future claims, causes of action, and damages does not bar the State from pursuing criminal restitution for harm caused by the behavior giving rise to the settlement.<sup>43</sup>

Amounts paid by the defendant as restitution must be credited against any judgment rendered in a civil action arising out of the criminal offense.<sup>44</sup>

When a defendant is ordered to pay criminal restitution, all applicable statutes of limitation and statutes of repose are tolled for purposes of any civil action brought by the victim against the defendant for damages arising out of the offense for which the defendant was convicted.<sup>45</sup> The statute of limitations applicable to a comparable civil action does not bar restitution in a criminal case.<sup>46</sup>

In CVRA cases, restitution orders exceeding \$250 may be “enforced in the same manner as a civil judgment.” If, however, the restitution is ordered as a condition of probation, the judgment may not be executed upon the defendant’s property until the clerk is notified that probation has been terminated or revoked and the judge has made a finding that restitution in a sum certain remains owed.<sup>47</sup> The finding that a restitution balance is due should be made on form AOC-CR-612. Payment satisfying a civil judgment ordered in a CVRA case must be credited against the order of restitution.<sup>48</sup>

In non-CVRA cases, a court has no statutory authority to order the defendant to pay money to the victim as a civil judgment. The authority to treat restitution orders in the same manner as a civil judgment set out in G.S. 15A-1340.38 applies only to restitution orders imposed under G.S. 15A-1340.34(b). That subsection, in turn, applies only to defendants sentenced under G.S. Chapter 15A, Article 46—the CVRA.<sup>49</sup>

A defendant convicted of an offense involving impaired driving must be ordered to pay as restitution the cost owing for the towing, storage, and sale of any motor vehicle forfeited and sold under G.S. 20-28.3, to the extent that those costs are not covered by the proceeds from the sale of the vehicle itself.<sup>50</sup> A restitution order under that provision must be made a civil judgment in favor of the party to whom the restitution is owed, which must be docketed by the clerk.<sup>51</sup>

## L. Bankruptcy

In general, criminal restitution is non-dischargeable in a bankruptcy proceeding.<sup>52</sup>

---

43. *State v. Williams*, \_\_\_ N.C. App. \_\_\_, 829 S.E.2d 518 (2019).

44. G.S. 15A-1340.37(a); 1-15.1(b).

45. G.S. 1-15.1(a); *Whitley v. Kennerly*, 132 N.C. App. 390 (1999).

46. *State v. Smith*, 99 N.C. App. 184 (1990) (rejecting defendant’s argument that the two-year statute of limitations for a wrongful death action under G.S. 1-53 barred the court from ordering restitution at a death-by-vehicle resentencing held more than two years after the victim’s death).

47. G.S. 15A-1340.38.

48. G.S. 15A-1340.38(c).

49. *See State v. Hudgins*, 215 N.C. App. 599 (2011) (unpublished) (noting the distinction between CRVA and non-CVRA cases and vacating a civil judgment in a non-CVRA case).

50. G.S. 20-28.3(l).

51. *Id.*

52. 11 U.S.C. § 523(a)(19)(B)(iii); *Kelly v. Robinson*, 479 U.S. 36 (1986); *In re Thompson*, 16 F.3d 576 (4th Cir. 1994).

### **M. Crime Victims Compensation Fund**

A court may require a defendant to pay restitution regardless of whether the victim receives compensation from the Crime Victims Compensation Fund described in G.S. Chapter 15B. Receipt of compensation shall not discourage a court from ordering restitution.<sup>53</sup> The Crime Victims Compensation Fund itself is an eligible recipient for restitution.<sup>54</sup>

## **V. Limits on Restitution**

### **A. Pain and Suffering**

Restitution may *not* be ordered for a victim's pain and suffering.<sup>55</sup>

### **B. Punitive Damages**

Restitution may *not* be ordered for punitive damages.<sup>56</sup>

### **C. Victims of Dismissed, Acquitted, or Uncharged Conduct**

Generally, restitution should only be ordered to victims directly and proximately harmed by the crimes for which the defendant is convicted. The court should not order restitution to victims of dismissed charges as part of the sentence for a conviction with a different victim, even as part of a plea agreement.<sup>57</sup>

When the same person is the victim of multiple offenses, the judge has some flexibility in determining to which sentence a restitution order will attach.

- It was proper to order a defendant, convicted of felonious larceny for stealing silver, to repay the loans he obtained from pawnbrokers using the stolen silver as collateral.<sup>58</sup>
- It was proper to order a defendant, convicted of breaking or entering but acquitted of larceny, to pay restitution for stereo equipment stolen during the breaking or entering.<sup>59</sup>

Similarly, when there are multiple victims of the same behavior that leads to a conviction, the court may order restitution to each victim.

- A defendant crashed into a crowd of people, injuring several of them. He was convicted of several crimes related to the incident, but the jury was unable to reach a verdict on an assault charge related to one of the injured bystanders. Nevertheless, the trial court did not err by awarding restitution to that victim as a part of the sentence for the crimes for which he was convicted when the indictment for one of those charges listed her as a victim and the defendant stipulated that he caused her injuries.<sup>60</sup>

---

53. G.S. 15B-24.

54. G.S. 15B-18(b); *State v. Wright*, 212 N.C. App. 640 (2011).

55. *State v. Wilson*, 158 N.C. App. 235 (2003).

56. *State v. Burkhead*, 85 N.C. App. 535 (1987).

57. *State v. Murphy*, 261 N.C. App. 78 (2018).

58. *State v. Froneberger*, 81 N.C. App. 398 (1986).

59. *State v. Dula*, 67 N.C. App. 748 (1984).

60. *State v. Valladares*, 182 N.C. App. 525 (2007).



However, a defendant should not be required to make restitution for losses that are neither related to the criminal act for which the defendant was convicted nor supported by the evidence in the record.

- It was improper to order a defendant, convicted of possession of stolen goods, to pay restitution in an amount based on all of the tools missing from a victim's truck when only some of the items were found in the defendant's possession and no other evidence was presented regarding the other tools.<sup>61</sup>

#### **D. Accomplice Liability for Restitution**

For restitution to be appropriate there must be a direct and proximate link between a defendant's actions and the damage caused to a victim. It was improper to order a defendant, convicted of accessory-after-the-fact to first-degree murder, to pay restitution to the victims' families when his involvement was limited to obstructing the investigation of the crimes.<sup>62</sup>

#### **E. Restitution to Government Agencies**

Government agencies may only receive restitution for particular damage to them over and above "normal operating costs."<sup>63</sup>

- It was improper for the court to order a defendant, who pled guilty to possession and sale of non-tax-paid liquor, to pay restitution to the High Point Police Department for "continued enforcement."<sup>64</sup>

#### **F. Restitution for Costs of Investigation and Prosecution**

In general, a court may not order restitution "to the state for its general overhead attributable to prosecution," as this "violates the principle of separation of powers in that the judge is assuming the legislative function of allocating the resources of the state."<sup>65</sup>

- A court may not order a defendant to pay restitution for a prosecuting witness's mileage, long distance calls, parking fees, and meals during a trial. These are costs and may only be paid as provided in G.S. 7A-314.<sup>66</sup>
- It was improper for a court to order convicted defendants, as a condition of parole eligibility, to pay \$2,500 to the North Carolina State Bureau of Investigation (SBI) as restitution for "estimated investigative expenses." The Bureau was not a "victim of crime," and the investigation expenses were among its "normal operating costs."<sup>67</sup>

#### **G. Drug-Buy Money**

G.S. 90-95.3 provides that the court may order a convicted defendant to "make restitution to any law-enforcement agency for reasonable expenditures made in purchasing controlled substances from him or his agent as part of an investigation leading to his conviction."

---

61. *State v. Southards*, 189 N.C. App. 152 (2008).

62. *State v. Best*, 196 N.C. App. 220 (2009).

63. G.S. 15A-1340.37.

64. *Shore v. Edmisten*, 290 N.C. 628 (1976).

65. *Id.*

66. *State v. Tedder*, 62 N.C. App. 12 (1983).

67. *Evans v. Garrison*, 657 F.2d 64 (4th Cir. 1981).

- It was acceptable for the court to order a defendant to pay \$30 restitution to the Reidsville Police Department Drug Fund for an undercover drug sale that took place in September, even though the defendant was ultimately convicted based on a sale that took place in November. The September sale was part of an “ongoing investigation” that led to the defendant’s conviction, and was thus a loss arising out of the defendant’s offense.<sup>68</sup>

## H. Laboratory Fees

The \$600 payments for the services of the SBI laboratory, a local government crime laboratory, or a private hospital described in G.S. 7A-304(a)(7)–(8a) are costs, not restitution. Those provisions do not authorize restitution payments to an unlicensed private laboratory not run by the SBI or a local government.<sup>69</sup>

## VI. Unpaid Restitution

### A. Failure to Pay Restitution as a Violation of Probation

In a probation revocation proceeding based upon a defendant’s failure to pay a fine or restitution, the burden is upon the defendant to offer evidence of his or her inability to pay.<sup>70</sup> When a defendant puts on evidence of his or her inability to pay, the evidence must be considered and evaluated by the court,<sup>71</sup> and the court should make findings that the evidence was considered.<sup>72</sup> A court cannot revoke a defendant’s probation for a failure to pay restitution without first considering whether the nonpayment was willful or due instead to the defendant’s financial circumstances.<sup>73</sup>

### B. Remitting Restitution

A court may not remit all or part of a restitution order without first providing notice and an opportunity to be heard to the district attorney, the victim, the victim’s estate, and any other entity to which restitution is due. The court must give the notice by first-class mail at least fifteen days prior to the hearing. The court may remit restitution if it finds that remission is warranted and serves the interests of justice. Remission of restitution does not abridge the right of a victim or the victim’s estate to bring a civil action against the defendant for damages arising out of the defendant’s offense.<sup>74</sup>

68. *State v. Reynolds*, 161 N.C. App. 144 (2003).

69. *State v. Jones*, 216 N.C. App. 519 (2011) (disallowing “restitution” to the sheriff’s office for lab fees paid to NarTest).

70. *See State v. Jones*, 78 N.C. App. 507 (1985) (holding that the defendant’s comment, “I’ve just been out of work, sir,” was insufficient to meet that burden).

71. *State v. Smith*, 43 N.C. App. 727 (1979).

72. *State v. Williamson*, 61 N.C. App. 531 (1983).

73. *Bearden v. Georgia*, 461 U.S. 660 (1983).

74. G.S. 15A-1340.39.