



The Poet Lawyereate and restitution orders

A somewhat lyrical look at restitution orders and their intersection with civil judgments

BY W. DAVID CORRICK

The problem with technical manuals is that they are written by technicians. While technical manuals provide useful information, they are no fun to read because they are singularly goal-directed and are devoid of any attention to process. When I was in law school, our property professor often urged us to eschew operating as mere “technicians” in the practice of law. I think I am finally beginning to understand what he was talking about, but at the time I could not see how to apply “artistry” to an analysis of the rule against perpetuities.

In the United States, the *Poet Laureate Consultant in Poetry to the Library of Congress* is appointed to oversee ongoing readings of poetry and lectures at the Library of Congress and to advance poetry creation and appreciation. Our current Poet Laureate is Natasha Trethewey, who won the Pulitzer Prize in Poetry in 2007, and is a professor of English and creative writing at Emory University in Atlanta, Georgia. This is not a trivial position, as the Poet Laureate plays a key role in shaping and forming our cultural zeitgeist through the artistry of written expression.

The poet laureate may also be called upon when the nation is in need of healing and renewed vision. Consider the efforts of former Poet Laureate Billy Collins who penned, “The Names” in the wake of the 9/11 tragedy. “The Names” is a powerful and ennobling work of prose that speaks to deep places within the heart, and should be

considered required reading.¹ The antithesis of imaginative and creative *prose* is writing that is *prosaic* in nature. Prosaic writing is defined as dull, ordinary, and unimaginative.²

In the May 2013 issue of *Plaintiff* magazine, an article by Jeffrey Krivis beautifully discusses the concept of adding artistry and imagination to the practice of law by contrasting “cowboy chords” and jazz musicianship. Mr. Krivis’s point can be analogized in many different ways. For example, by simply adding a colorful pocket square to an otherwise drab and ordinary gray suit, one can transform the suit from mere clothing into a fashion statement. Similarly, anyone can “correctly” pound out a tune on a keyboard by merely using the right hand. But, it takes application of the left hand and significant practice to truly create a melody.

Not too long ago, I was asked to assist a lawyer who had settled a case on behalf of his client in a personal injury case. The underlying conduct which led to the settlement was also prosecuted against the settling defendant criminally, and the court had issued a restitution order³ in favor of his client. When the attorney settled the civil case, he had failed to consider the impact the settlement might have on the restitution order. Now the attorney was in semi-panic mode because the settling defendant was trying to use the civil settlement as a means to obviate the restitution order. “Can he do that?,” was the anxious threshold inquiry. It seemed a little late to be asking the question, but I agreed to research the issue and let the attorney know what I could find.

Restitution Orders: Constitutionally mandated right for crime victims

In 1982, California voters approved Proposition 8 (1982) as part of the “Victims’ Bill of Rights.” Pursuant to the mandate effectuated by the passage of Proposition 8, “all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer.” (Cal. Const., art. I, § 28(b)(13(A)).) California Penal Code (“Penal Code”) section 1202.4(b) reflects this constitutional mandate as follows:

It is the intent of the Legislature that a victim of crime who incurs *any* economic loss as a result of the commission of a crime shall receive restitution *directly* from any defendant convicted of that crime.⁴

[Emphasis added].

Restitution Orders: Scope and propitiation

An order of restitution pursuant to Penal Code section 1202.4(b) does not preclude a crime victim from initiating a separate civil action based on the same conduct from which the criminal conviction arose. (*Vigilant Ins. Co. v. Chiu* (2009) 175 Cal.App.4th 438, 442-443.) At the same time, a restitution order may only issue to reimburse a crime victim for economic losses. The victim’s recourse to obtain recovery for noneconomic losses is limited to a civil action. (Pen.Code, § 1202.4(f)(3); *People v. Fulton* (2003) 109 Cal.App.4th 876, 879, 884-885.)



Because of the separate interests and purposes served by restitution orders and civil proceedings, the settlement of a civil action and consequent release of the defendant's civil *liability* does not discharge the defendant's *responsibility* to satisfy the restitution order "any more than it could terminate [the defendant's] prison sentence." (*People v. Bernal* (2002) 101 Cal.App.4th 155, 162.) Indeed, while restitution orders are designed to compensate victims of crime, they are also designed to rehabilitate the criminal and deter crime. (*People v. Crow* (1993) 6 Cal.4th 952, 957.)

Payments received by a *crime victim* from his or her *own* insurance company or from an independent third party for economic losses sustained secondary to the defendant's criminal conduct *do not* serve to reduce the balance of a restitution order. (*In re Brittany L.* (2002) 99 Cal.App.4th 1381, 1389.) Conversely, to the extent the *defendant's own* insurance company has compensated the crime victim for losses included in the restitution order, the defendant *is* entitled to an offset for the sums paid. (*Bernal, supra*, at 168.⁵) The distinction is based on the fact that the defendant has a contractual right to have the payments made by his or her insurance carrier on his or her behalf, and the defendant's insurance company is not entitled to indemnity or subrogation against the defendant. Thus, payments by the defendant's insurer to the victim are deemed to be "directly from" the defendant. (*Ibid.*)

In *People v. Short* (2008) 160 Cal.App.4th 899 the defendant seriously injured the victim while driving his employer's vehicle within the course and scope of his employment. At the time of the accident, the defendant was under the influence of alcohol which is a felony conviction. In addition to a 52-month prison sentence, the defendant was ordered to pay restitution in the amount of \$450,042.65 to compensate the victim for medical costs incurred as a result of the injuries he sustained in the accident. To settle the lawsuit, the *employer's* insurance

paid the policy limit of \$3 million and, in return, received a waiver of claims by the victim and his wife against both the defendant *and* the employer. The defendant employee then moved the court for a satisfaction of restitution order. In reversing the lower court's ruling, the appellate court found the employee defendant *was* entitled to an offset for that portion of the civil settlement properly allocated to the victim's medical costs included in the restitution order. Even though the defendant did not *personally* procure the insurance policy, the court found the insurance company was contractually obligated to compensate the victim on behalf of the employee defendant as well as on behalf of his employer. Consequently, based on that contractual obligation, the court deemed the settlement payment as having been "directly from" the employee defendant. (*Short, supra*, at 905.)

Restitution Orders: *People v. Vasquez*

After telephone conversations with several criminal law attorneys failed to yield any definitive information, my research led me to an interesting case, *People v. Vasquez* (1999) 190 Cal.App.4th 1126. In that case, Vasquez was prosecuted criminally and sued civilly when his pit bull mauled and seriously injured a young girl. In the criminal proceeding, Vasquez entered a plea of no contest to the charge of failing to control a "mischievous animal" under Penal Code section 399(b). He was ordered to serve 180 days in the Los Angeles County jail, and at the restitution hearing, he stipulated to paying the victim \$168,633.20 for medical expenses sustained by the victim "so far". The court made it clear that to the extent the victim incurred additional medical expenses, the restitution order would be increased accordingly. The court took note of the fact that the victim had retained a civil attorney to pursue a personal injury claim against Vasquez. And, in a comment that did not even arise to the level of "technician," the judge inartfully stated, "Defendant is

ordered to pay a civil judgment if one results in this case for the amount of that, and this does not supersede that. That supersedes this." The minute order following the proceeding read:

Counsel and defendant stipulate to a restitution amount of \$168,633.20 to date. The victim is still receiving medical treatment and any amount over the \$168,633.20 will be pursuant to civil judgment.

In addition to Vasquez, there were several other defendants named in the subsequent civil action, including Antonio Mora, who owned the property where Vasquez lived at the time of the attack. The parties agreed to globally settle the case for \$300,000, with the proceeds to be paid by Mora's homeowner's insurance carrier under which Vasquez was designated as an additional insured. The civil court granted the parties' request to approve the settlement pursuant to a minor's compromise petition. The court-approved distribution of the settlement monies was: (1) \$75,000 for attorney for legal fees; (2) \$22,335 for reimbursement of medical expenses and litigation costs; and, (3) \$202,665 to fund a structured settlement annuity for the victim.

Shortly after the settlement was judicially approved, Vasquez moved the criminal court for a satisfaction of restitution order, contending that under *People v. Short* (2008) 160 Cal.App.4th 899 the settlement constituted restitution to the victim made *directly* by Vasquez,⁶ and served to fully offset the \$168,633.20 restitution award. In support of the motion, Vasquez submitted a declaration from the adjuster who handled the claim confirming that the available policy limits were \$300,000, and averring the insurance company agreed to pay that amount in exchange for a release of "any further claims" against Vasquez for injuries the victim sustained "as a result of the alleged dog bite." The adjuster's declaration further stated that the insurance company would not have paid the policy limits had the victim not given up her right to seek any additional recovery from Vasquez.



The court denied Vasquez's motion, explaining that regardless of whether the settlement proceeds could be properly deemed as having been made *directly* by Vasquez, the restitution order expressly stated the victim was still receiving medical treatment and that any *additionally sustained* medical expenses could be recovered in a civil action. In another display of non-poetic dialogue, the court stated, "That 168 was up to that point in time for all the expenses incurred by the victim for her serious surgeries. ... [I]t was understood that there would be ongoing matters."

Not surprisingly, Vasquez appealed the criminal court's ruling. In advancing his appeal, Vasquez argued that pursuant to *Short* he was entitled to a restitution order credit for the *full amount* paid through his landlord's homeowner's policy. The court disagreed, stating that, at most, Vasquez had the right to an offset for the portion of the settlement payment that was: (1) made on behalf of Vasquez; and, (2) allocable to medical expenses included within the restitution order. (*Vasquez, supra*, at 1137.) The court correctly pointed out that even under a *Short* analysis Vasquez could not be credited with any more than the \$22,335 indicated to have been paid toward the victim's medical expenses. (*Ibid.*)

The court noted that as the party seeking the offset, Vasquez shouldered the burden of proving precisely what monies had been paid on his behalf and the elements of damages to which the funds were applied. (*Ibid.*) The court reasoned that based on the evidence presented, the trial court reasonably inferred that the portion of the civil settlement attributable to medical expenses did *not include* those expenses included in the court's restitution order. Rather, "as contemplated at the time the restitution order was entered, [the victim] recovered in her civil action sums for additional losses (both economic and noneconomic) she had sustained." (*Id.* at 1138.) Consequently, the appellate court held the lower court's ruling that Vasquez had

failed to establish his entitlement to an offset was supported by substantial evidence and fell "well within the court's ample discretion in this matter." (*Ibid.*)

People v. Vasquez: The woe upon mere technicians of law

As my family members in Texas are prone to say, the *Vasquez* case was a "hot mess." It is perspicuously evident from the appellate court's analysis what steps the attorneys should have taken to more artfully serve their clients' interests, which would have possibly obviated the appeal. The lower court judge did not exactly advance poetry in practice either with his confusing and convoluted statements on the record.

Had a poet lawyreare appeared for Vasquez, she⁷ could have maximized his credit toward the restitution order. Query whether the amount of the restitution order was even appropriate from the outset. A victim of a crime is only allowed to collect medical specials *actually paid*. The restitution order seems to have been based on amounts *billed*, with no apparent indication that the amounts actually paid were ever addressed. Had a poet lawyreare appeared for the victim, he could have ensured preservation of the full criminal restitution order without compromising his client's civil recovery, particularly since defense counsel appears to have been asleep at the switch on the issue.

As it turned out, the attorneys for both Vasquez and the victim were so focused on the immediate goal of resolving the civil case, they lost perspective of the whole, and simply "pounded out a tune." That loss of vision resulted in a disservice to their clients, and added stress and expense to themselves.

The artist's path

After I provided my research results to the attorney, which included an analysis and a decision tree derived from *Vasquez*, I lost contact with him. So, I do not know if there was a happy ending for

him and his client, or if there was an unfavorable outcome. Regardless, I *do* know the attorney created unnecessary angst for himself and his client by "pounding out the tune" of obtaining a civil settlement without simultaneously "incorporating the melody" of protecting his client's interests vis-à-vis the restitution order. I suspect that is a mistake he will not make again in the future. Hopefully, he will incorporate the lesson learned into other aspects of his practice.

The lyrical practice of law will better serve our clients' needs, and will lead to more enrichment and satisfaction in our own lives, both professionally and personally. It is impossible to practice law poetically without honesty. During my 15 years as a civil defense attorney, the plaintiffs' attorneys I could count on to tell the *whole* truth⁸ with integrity were always much more effective than those I could not trust. As an example, Eric Ratinoff in Sacramento is a plaintiffs' attorney with whom I have had a number of cases over the years. In my dealings with him, he has unfailingly exemplified artistry in practice through verity of expression. Of course, in order to diligently protect my clients' interests, I always had to verify the facts as presented by Mr. Ratinoff. But, during the course of confirmation I never once encountered even a hint of dishonesty on his part. Attorneys I could not trust were much less effective, and their clients suffered because of their mendacity.

I truly believe that at heart we are all poets, artists, and geniuses in our own wonderfully unique and individual ways. We just have to embrace that reality and then act accordingly. It is basic Psychology 101 that people will generally believe about us what we believe about ourselves. If we present ourselves as technicians, technicians we will be. Conversely, if we present ourselves as artists and poets, then artists and poets we are. Not to worry, though. There will always be an abundance of "Masters of the Prosaic" who will carry on the venerated tradition of plodding along in prescriptive



journeyman style. May they all be defense counsel!



Corrick

W. David Corrick has been practicing medical-legal law for over 18 years and is actively involved with the Physicians Organizing Committee in San Francisco. He has represented defendants and plaintiffs in malpractice and elder abuse cases. He has defended individual practitioners and entities, including Sutter Health, Catholic Healthcare West, the University of California-Davis Medical Center, and The Permanente Medical Group. He is also a former California State Deputy Attorney General where he worked in the Health Quality Enforcement section, which is charged with pursuing professional discipline against

health-care providers who have engaged in actionable misconduct. He now works on behalf of health-care professionals charged with practice act violations. The author especially thanks his friends at the Pan Theater in Oakland, California, for their loving example of poetry and artistry in elocution and locomotion.

Endnotes

¹ As a further example of the beauty and artistry of verbal expression, and its power to elevate and provoke elegant thinking, consider the following quote taken from the works of the 13th century poet, Rumi.

And still, after all this time, the Sun has never said to the Earth,
"You owe me."
Look what happens with love like that.
It lights up the sky.

² One can only imagine how sick to death court personnel must get of reading the same old safe, paint-by-the-numbers legal briefs day in and day out. It was said of the famous James brothers, Henry and William, that Henry wrote novels

like a psychologist, while William wrote psychology texts like a novelist. What of a lawyer who would dare write legal briefs like a poet, seeking grace in every word and phrase?

³ "Criminal' Torts-Maximizing Your Client's Recovery Through Effective Use of Victim Restitution" (*Plaintiff*, August 2011) provides a useful general overview on how to use a criminal restitution order to enhance a plaintiff's recovery in a civil matter.

⁴ California Penal Code section 1202.4(f) provides: "[I]n every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court ..."

⁵ However, a crime victim who receives compensation for the same economic losses by both the defendant and his or her own insurer may be subject to a separate claim for reimbursement by the insurance company. Penal Code section 1202(f)(2).

⁶ 190 Cal.App.4th 1126

⁷ Unlike many other languages, including Farsi, English does not have a gender-neutral pronoun. Perhaps our Poet Laureate will someday champion such a word. If "text" may be properly used as a verb secondary to popular usage, why not?

⁸ Indeed, a half-truth is really nothing less than an entire lie. ☹