

Ensuring Full Restitution for Crime Victims: Polyvictims as a Case Study in Overcoming Causation Challenges

I. Introduction

Restitution serves important purposes for the victim, the offender, and society.¹ Indeed, full restitution in the amount of a victim's losses has been recognized as a critical step in the victim's recovery.² A key part of the restitution analysis is court determination that an individual qualifies as a crime "victim" in that jurisdiction for purposes of asserting the right to restitution and that the defendant is legally responsible for the victim's losses. If the victim who sustained the injury or loss is a polyvictim, the analysis does not change. Polyvictims are entitled to be fully compensated for their losses, regardless of whether the losses are different in kind, amount or scope than those of victims who have not experienced earlier victimizations or traumas. Fully compensating all victims—including polyvictims—serves the penological purposes of, and policy rationales behind, restitution laws, and is of vital importance to victims seeking to recover in the aftermath of crime.

II. Restitution's Purposes and Policy Rationales Support Full Restitution for Victims

Restitution laws are sui generis. They emerged from a unique historical framework embodying compensatory and correctional aims, including rehabilitation and deterrence,³ and these rationales continue to support the restitution framework. One court has described the connection between historical examples of restitution and the current understanding of its purposes as follows:

The concept of restitution is not new to the criminal justice system. Indeed, in many ancient societies offenders were routinely required to reimburse their victims for the losses they caused

While long available as a sanction, restitution has recently drawn increased interest as an alternative to incarceration. Viewed from the perspective of punishing a defendant, restitution is recognized as an effective rehabilitative penalty because it forces defendants to confront concretely—and take responsibility for—the harm they have inflicted, and it appears to offer a greater potential for deterrence.⁴

In addition to acknowledging rehabilitational and deterrence aims,⁵ courts continue to recognize the importance of restitution in attempting to make victims "whole, to

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fully compensate these victims for their losses and to restore these victims to their original state of well-being”⁶

Accordingly, a number of federal statutes mandate full restitution for victims. The Mandatory Victim Restitution Act, 18 U.S.C. § 3663A (MVRA),⁷ provides for mandatory restitution to victims of a number of federal crimes, and requires that “[i]n each order of restitution, the court shall order restitution to each victim *in the full amount of each victim’s losses* as determined by the court and without consideration of the economic circumstances of the defendant.”⁸ Similarly, both the Mandatory Restitution for Victims of Sex Crimes Act, 18 U.S.C. § 2259, and The Trafficking Victims Protection Act, 18 U.S.C. § 1593, require that, for certain categories of losses, the order of restitution “shall direct the defendant to pay the victim (through the appropriate court mechanism) *the full amount of the victim’s losses* as determined by the court”⁹

Every state also provides for restitution to victims of crime.¹⁰ Some states explicitly mandate full restitution for victims,¹¹ although others do not explicitly require courts to order full restitution¹² or allow courts to order less than full restitution.¹³ Regardless of whether a jurisdiction’s laws clearly require that jurisdiction’s courts to order full restitution for victims, full restitution is the appropriate outcome as it is consistent with the aims of restitution.¹⁴

Only by requiring defendants to bear the full cost of the victims’ losses resulting from their criminal conduct are the compensatory, deterrent, and rehabilitative aims of restitution met. As one court noted, the purpose of restitution is “to insure, to the maximum extent possible, that victims will be made whole and offenders will be rehabilitated and deterred, by requiring *all* defendants to confront concretely, and take responsibility for, the *entire* harm resulting from their acts.”¹⁵ Defendants cannot be adequately rehabilitated or deterred if they are not required to face the full consequences of their actions, including making victims financially whole.¹⁶

III. To Recover in Restitution, A Victim’s Losses Must Be Caused By Defendant’s Criminal Conduct

Before restitution can be awarded, courts must determine that the individual seeking restitution is a victim for purposes of asserting the right to restitution and that the defendant caused the victim’s losses.

Generally, in determining whether an individual is a victim for purposes of asserting the right to restitution, the court considers whether the injury stems from the offense of conviction, or the conduct underlying that conviction.¹⁷ Importantly, the victim need not be named in the charging document in order to be considered a victim.¹⁸ Rather “a party may qualify as a victim, even though it may not have been the target of the crime, as long as it suffers harm as a result of the crime’s commission.”¹⁹

Once courts have determined that the individual is a victim, causation must then be established. There are generally two types of causation: “factual” cause (also referred to as “direct” or “but for” cause) and legal cause (also referred to as “proximate” cause).²⁰ Some statutes require both types of causation in order for a victim to be entitled to restitution, while others only require one.²¹ Under the factual cause test for causation, it must be proven that the harmful result would not have occurred but for the defendant’s conduct—in other words, it is the factual question of whether a particular event produced a particular result.²² Legal causation focuses on whether legal policy supports the defendant being held responsible for the injury caused by that conduct. The legal causation inquiry typically focuses on whether the result was reasonably foreseeable²³ or whether defendant’s conduct was a substantial factor in bringing about the result.²⁴

IV. Case Study: Polyvictims

A polyvictim is someone who has experienced multiple victimizations of different kinds at various points during a lifetime.²⁵ Research shows that polyvictims are more likely than the general public to have illness, accidents, mental illness, and high

levels of distress, including anger, depression, anxiety, and post-traumatic stress.²⁶ Nonetheless, polyvictims, like all victims, are entitled to full compensation for their harm—even if that harm is different in kind or amount from what would be experienced by victims who have not suffered earlier victimizations or traumas.

A. Harm to a polyvictim is “foreseeable” under the legal cause test.

When applying the causation standard in cases involving polyvictims’ losses, defendants may argue that their action was not the proximate cause of the harm because the harm was of a different kind or in a magnitude greater than the “average” person could be expected to sustain: in other words, the injury was not “foreseeable.”²⁷

Although not binding in criminal restitution cases, some aspects of civil law can be informative on the issue of legal causation: “Courts generally treat the issue of legal causation in the criminal context similarly to that in tort cases because the situations are closely analogous.”²⁸ In civil cases, defendants are generally required to “take their victims as they find them.”²⁹ For instance, the United States Court of Appeals for the Eighth Circuit reversed a decision in a sexual harassment case that resulted in reduction of damages because the plaintiff-victims had previously been victims of domestic abuse or other crimes, stating “foreseeability does not limit an award of money damages. This includes damages assessed against a tortfeasor for harm caused to a plaintiff who happens to have a fragile psyche.”³⁰ Similarly, the North Carolina Supreme Court determined that a victim of sexual harassment was entitled to recover the full extent of her damages when the harassment triggered posttraumatic stress disorder and flashbacks of prior childhood sexual abuse.³¹

Additionally, a reasonable person should understand that every individual is unique: what causes little harm to one individual may cause greater harm to another.³² Also, the harm that a polyvictim suffers often is foreseeable, even if the victim’s preexisting condition might be unusual or unexpected:

[E]ven when the preexisting condition

of the injured person is extraordinary and unforeseeable, often the harm that results is not. Thus, many thin-skull cases are ones in which the manner or mechanism by which the harm occurs is unusual, but the harm is still within the scope of the risk.³³

Finally, to remain true to the purposes behind, and strong policy rationales that support, restitution, courts should find that there is legal causation when a polyvictim suffers harm at the hand of a defendant. Again, civil law concepts can be instructive: “The primary policy reason for [allowing a victim with a preexisting condition to recover] is that as between the innocent victim and the negligent tortfeasor, the tortfeasor should answer for his or her negligent actions.”³⁴ Finding legal causation under such circumstances also serves a related and important purpose in protecting some of the most vulnerable members of society. As the United States Court of Appeals for the Fifth Circuit described in other circumstances, the failure to find legal causation would “immunize the exacerbation of a pre-existing condition, leaving the weakest and most vulnerable members of society with the least protection”³⁵

B. Assessing restitution for polyvictims.

Although a victim with a preexisting condition should recover restitution for aggravation of the prior condition—even if the resulting injury is beyond what one would expect from a victim without a prior condition—a victim generally is not entitled to recover for expenses that would have occurred even in the absence of defendant’s conduct.³⁶ In other words, ordering an amount greater than the total loss caused by the offense exceeds a court’s statutory jurisdiction and imposes an illegal sentence.³⁷ Thus, if it is proven that a defendant was the cause of the polyvictim’s harm, restitution should be awarded in the full amount of that harm.

At times, expert testimony may be beneficial in establishing causation. For instance, in cases in which a victim is seeking restitution for mental health treatment, a statement by an expert that the expenses were the result of defendant’s actions has

been found to be sufficient to establish the necessary probable cause.³⁸ Expert testimony is also likely to aid in the recovery of medical and other expenses that may be argued by defendant or viewed by the court to be unusual in amount or type.³⁹

V. Conclusion

Polyvictims are entitled to full restitution for their losses resulting from the defendants' criminal conduct, regardless of whether these losses were different than those that may have been suffered by someone who had not previously been a victim of crime. Holding defendants responsible for the full damage of their criminal activity serves the penological purposes of, and policy rationales behind, restitution laws; to do otherwise would improperly and unfairly place the financial burden on the victims to pay for harm caused by the defendants' criminal conduct, and incentivize targeting some of the most vulnerable members of our society.

¹ See generally *Fundamentals of Victims' Rights: A Victim's Right to Restitution*, NCVLI Victim Law Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), Nov. 2011, available at <https://law.lclark.edu/live/files/11821-fundamentals-of-victims-rights-a-victims-right-to>.

² Theodore R. Sangalis, *Elusive Empowerment: Compensating the Sex Trafficked Person under the Trafficking Victims Protection Act*, 80 Fordham L. Rev. 403, 438 (2011) (“[C]ompensation that seeks to make victims whole can be an important first step in their recovery.”); See also, generally, Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 Stan. L. Rev. 937, 1020 (1985) (“The secondary costs of victimization – pain and suffering, emotional distress, loss of status and security . . . are not ultimately expunged by money, although as the common wisdom would have it, money certainly helps.”); David B. Hershenov, *Restitution and Revenge*, 96 Journal of Philosophy 79, 88 (1999) (“When a debt has been fairly determined and properly paid, that is, the vengeance has been exacted but not in a way that is excessive, both the victim and the victimizer can be (somewhat) restored, though in different ways, to their pre-crime status as equals.”).

³ The historical origins of restitution have been described

as follows:

Far from being a novel approach to sentencing, restitution has been employed as a punitive sanction throughout history. In ancient societies, before the conceptual separation of civil and criminal law, it was standard practice to require an offender to reimburse the victim or his family for any loss caused by the offense. The primary purpose of such restitution was not to compensate the victim, but to protect the offender from violent retaliation by the victim or the community. It was a means by which the offender could buy back the peace he had broken. As the state gradually established a monopoly over the institution of punishment, and a division between civil and criminal law emerged, the victim's right to compensation was incorporated into civil law. Although this development led to a decline in the use of restitution as a form of punishment, restitution continued to be available on a limited basis in the Anglo-American criminal system. Many of the earliest penal codes in the United States included restitution provisions, and in 1913 the Supreme Court, in *Bradford v. United States*, sanctioned restitution as a condition on a pardon. By providing for restitution in the penal sections of state codes and authorizing it as a sentencing option in addition to fines or imprisonment or as a condition on parole or probation, today's legislatures have preserved restitution as a criminal penalty.

Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv. L. Rev. 931, 933-34 (1984) (footnotes omitted).

⁴ *People v. Hall-Wilson*, 505 N.E.2d 584, 585 (N.Y. 1987) (citations omitted).

⁵ See, e.g., *People v. Kim*, 694 N.E.2d 421, 423 (N.Y. 1998) (citations omitted) (noting that the goals of the restitution statute “are to insure, to the maximum extent possible, that victims will be made whole and offenders will be rehabilitated and deterred, by requiring *all* defendants to confront concretely, and take responsibility for, the *entire* harm resulting from their acts”); *Common-*

wealth v. Brown, 981 A.2d 893, 895-96 (Pa. 2009) (noting that one purpose of restitution is “rehabilitation of the offender by impressing upon him or her that his criminal conduct caused the victim’s loss or personal injury and that it is his responsibility to repair the loss or injury as far as possible,” and that, by imposing restitution, “the criminal will understand the egregiousness of his or her conduct, be deterred from repeating the conduct, and be encouraged to live in a responsible way”); *McCullough v. Commonwealth*, 568 S.E.2d 449, 450 & n.1 (Va. Ct. App. 2002) (explaining that the state’s restitution scheme serves the purpose of helping make the victim of a crime whole, but that restitution may also serve the other purposes of sentencing, including deterrence, rehabilitation and retribution).

⁶ *United States v. Gordon*, 393 F.3d 1044, 1053 (9th Cir. 2004) (emphasis, citations, and quotations marks omitted). See also *Hughey v. United States*, 495 U.S. 411, 416 (1990) (applying statutory interpretation principles to the Victim and Witness Protection Act of 1982, and noting that “the ordinary meaning of ‘restitution’ is restoring someone to a position he occupied before a particular event”); *United States v. Brock-Davis*, 504 F.3d 991, 998 (9th Cir. 2007) (citations and quotation marks omitted) (“Although restitution in a criminal case may only compensate a victim for actual losses caused by the defendant’s criminal conduct, [t]he primary and overarching goal of the federal [Mandatory Victim Restitution Act] is to make victims of crime whole.”); *United States v. Quillen*, 335 F.3d 219, 222 (3d Cir. 2003) (quotation marks omitted) (“The purpose of the [MVRA] is, to the extent possible, to make victims whole, to fully compensate victims for their losses, and to restore victims to their original state of well-being.”); *United States v. Siegel*, 153 F.3d 1256, 1258 (11th Cir. 1998) (“Under the MVRA, the district court must order the payment of restitution in the full amount of the victim’s loss without considering the defendant’s ability to pay.”); *Butler v. State*, 608 So. 2d 773, 775 (Ala. Crim. App. 1992) (citation omitted) (“The legislative purpose of the restitution act was to fully compensate victims for ‘any pecuniary loss, damage or injury’ suffered as a direct or indirect result of a criminal act.”); *State v. Williams*, 90 P.3d 785, 789 (Ariz. Ct. App. 2004) (“The purpose of the restitution statutes is to make victims whole.”); *Vereen v. State*, 703 So. 2d 1193, 1194 (Fla. Dist. Ct. App. 1997) (“One purpose of the [restitution] statute is to provide the victim full compensation.”); *People v. Fontana*, 622 NE.2d 893, 903 (Ill. App. Ct. 1993) (finding that the restitution statute should be “construed broadly to effect its remedial purpose” of making “victims whole for any injury re-

ceived at the hands of the defendant”).

⁷ The predecessor to the MVRA, the Victim Witness and Protection Act, 18 U.S.C. § 3663 (VWPA), is identical in all important respects to the MVRA with two exceptions: it requires courts to consider the economic circumstances of the defendant prior to ordering restitution and the ordering of restitution is discretionary.

⁸ 18 U.S.C.S. § 3664(f)(1)(A) (emphasis added). The Senate Report accompanying the MVRA affirms that Congress enacted the legislation with the intent of requiring full restitution to crime victims, noting the purpose of the MVRA is “to improve the administration of justice . . . by requiring Federal criminal defendants to pay full restitution to the identifiable victims of their crimes.” S. Rep. No. 104-179, at 12 (1995), reprinted in 1996 U.S.C.C.A.N. 924, 925.

⁹ 18 U.S.C. § 2259(b)(1); 18 U.S.C. § 1593(b)(1) (emphasis added). The Crime Victims’ Rights Act, 18 U.S.C. § 3771 (CVRA), also requires that victims be compensated fully by incorporating these restitution statutes. 18 U.S.C. § 3771(a)(6) (stating that victims have the right “to full and timely restitution as provided in law”).

¹⁰ See Nat’l Crime Victim Law Inst., *supra* note 1, at 4 n.2 (collecting statutes).

¹¹ See, e.g., Ariz. Rev. Stat. Ann. § 13-603(C) (“If a person is convicted of an offense, the court shall require the convicted person to make restitution to the person who is the victim of the crime or to the immediate family of the victim if the victim has died, in the full amount of the economic loss as determined by the court and in the manner as determined by the court or the court’s designee pursuant to chapter 8 of this title.”); Ga. Code Ann. § 17-14-3(a) (“[A] judge of any court of competent jurisdiction shall, in sentencing an offender, make a finding as to the amount of restitution due any victim, and order an offender to make full restitution to such victim.”).

¹² See, e.g., Ala. Code § 15-18-67 (“[T]he court shall order that the defendant make restitution or otherwise compensate [the] victim for any pecuniary damages.”); Me. Rev. Stat. Ann. tit. 17-A, § 1323(1) (“The court shall, whenever practicable, inquire of a prosecutor, law enforcement officer or victim with respect to the extent of the victim’s financial loss, and shall order restitution when appropriate.”).

¹³ See, e.g., Conn. Gen. Stat. § 53a-28(c) (“Restitution ordered by the court pursuant to this subsection shall be based on easily ascertainable damages for injury or loss of property, actual expenses incurred for treatment for

injury to persons and lost wages resulting from injury. . . .”); Haw. Rev. Stat. § 706-646(2) (“The court shall order the defendant to make restitution for reasonable and verified losses suffered by the victim or victims as a result of the defendant’s offense when requested by the victim.”); La. Code Crim. Proc. Ann. art. 895.1(A)(1) (“The court shall order restitution in a reasonable sum not to exceed the actual pecuniary loss to the victim in an amount certain.”).

¹⁴ NCVLI offers technical assistance to practitioners seeking to recover a victim’s losses through restitution. For more information or to submit a request for technical assistance regarding a specific jurisdiction’s restitution laws, please visit NCVLI’s website, www.ncvli.org.

¹⁵ *Kim*, 694 NE.2d at 423 (citations omitted).

¹⁶ See generally *People v. Horne*, 767 N.E.2d 132, 136 (N.Y. 2002) (citation and quotation marks omitted) (describing the legislative history of the state’s restitution statute as showing it was enacted to serve “the dual, salutary purposes of easing the victim’s financial burden while reinforcing the offender’s sense of responsibility for the offense and providing a constructive opportunity for the offender to pay his or her debt to society”); *State v. Dillon*, 637 P.2d 602, 606 (Or. 1981) (“[Restitution] is intended to serve rehabilitative and deterrent purposes by causing a defendant to appreciate the relationship between his criminal activity and the damage suffered by the victim.”); *Commonwealth v. Gerulis*, 616 A.2d 686, 697 (Pa. Super. Ct. 1992) (emphasis in original) (“Ordering a defendant to pay restitution serves two purposes. While the payments may compensate the victim, the sentence is also meant to rehabilitate the defendant by instilling in her mind *that it is her responsibility* to compensate the victim.”).

¹⁷ See, e.g., *In re McNulty*, 597 F.3d 344, 351 (6th Cir. 2010) (citation omitted) (“In making [the restitution determination] we must (1) look to the offense of conviction, based solely on facts reflected in the jury verdict or admitted by the defendant; and then (2) determine, based on those facts, whether any person or persons were ‘directly and proximately harmed as a result of the commission of [that] Federal offense.’”); *United States v. Atlantic States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453, 533 (D.N.J. 2009) (“The VWPA provides for a discretionary award of restitution to a statutory ‘victim’ if the offense of conviction is within its stated offenses, unless the MVRA specifies that the offense requires mandatory restitution.”); *People v. Borquez*, 814 P.2d 382, 383-384 (Colo. 1991) (holding that a restitution order may prop-

erly include losses to a victim resulting from a series of uncharged criminal actions of a defendant); *Polen v. State*, 578 N.E.2d 755, 758 (Ind. Ct. App. 1991) (finding that the trial court erred by ordering restitution in an amount greater than the sums involved in those crimes to which defendant actually pleaded guilty); *State v. Hunziker*, 56 P.3d 202, 204 (Kan. 2002) (finding that the court must order restitution for the offense of conviction).

¹⁸ See, e.g., *In re Stewart*, 552 F.3d 1285, 1289 (11th Cir. 2008) (“The CVRA, however, does not limit the class of crime victims to those whose identity constitutes an element of the offense or who happen to be identified in the charging document. The statute, rather, instructs the district court to look at the offense itself only to determine the harmful effects the offense has on parties. Under the plain language of the statute, a party may qualify as a victim, even though it may not have been the target of the crime, as long as it suffers harm as a result of the crime’s commission.”); *People v. Lunsford*, 43 P.3d 629, 631 (Colo. App. 2001) (allowing restitution to a victim not named in the charging document because he sustained injuries as a result of defendant’s conduct); *State v. Foley*, 417 N.W.2d 920, 926-27 (Wis. Ct. App. 1987) (finding restitution is not limited to victims named in the charging document).

¹⁹ *In re Stewart*, 552 F.3d at 1289. For a general discussion of the term “victim” as it is legally defined for victims’ rights purposes in the criminal law context, see *Fundamentals of Victims’ Rights: An Overview of the Legal Definition of Crime “Victim” in the United States*, NCVLI Victim Law Bulletin (Nat’l Crime Victim Law Inst., Portland, Or.), Nov. 2011, available at <https://law.lclark.edu/live/files/11824-fundamentals-of-victims-rights-an-overview-of-the>.

²⁰ See, e.g., *In re McNulty*, 597 F.3d at 350 (quotation marks omitted) (“The requirement that the victim be ‘directly and proximately harmed’ encompasses the traditional ‘but for’ and proximate cause analyses.”).

²¹ Compare 18 U.S.C. § 3663A(a)(2) (stating that for purposes of restitution, the victim must be directly and proximately harmed) with Or. Rev. Stat. § 137.103(4) (defining the victim as, *inter alia*, one who has suffered economic damages “as a result of” the offense or the defendant’s criminal activities, without employing the proximate causation terminology).

²² *Socorro v. State*, 901 So. 2d 940, 941 (Fla. Dist. Ct. App. 2005) (“[I]f ‘but for’ the criminal episode, damages would not have been incurred by the victim,

restitution is proper.”); *Gerulis*, 616 A.2d at 697 (“To determine the correct amount of restitution, a ‘but-for’ test is used—damages which occur as a direct result of the crime are those which should not have occurred but for the defendant’s criminal conduct.”); *State v. Tobin*, 166 P.3d 1167, 1171-72 (Wash. 2007) (noting that restitution should be awarded when, but for the crime, the damages would not have occurred—even if the damages were not foreseeable).

²³ “Reasonably foreseeable” is a somewhat amorphous, fact-specific inquiry. In assessing foreseeability, courts generally look to “whether the injury and manner of occurrence are so highly unusual that a reasonable person, making an inventory of the possibilities of harm which his conduct might produce, would not have reasonably expected the injury to occur.” *State v. Corbus*, 249 P.3d 398, 401 (Idaho 2011) (quotation marks omitted). The test is an objective one that considers the expectations of a “reasonable person”—not the subjective expectations of any particular defendant. Thus, it is of no legal consequence if the particular defendant did not foresee the harm that occurred in a particular case. *In re Theodorou*, 53 So. 3d 151, 156 (Ala. 2010) (quotation marks omitted) (foreseeability “does not mean, however, that the defendant must have actually foreseen the particular injury which resulted from his action. Rather, the injury sustained by the victim must have been of such a nature that a reasonable person could have foreseen or anticipated that the injury might occur as a natural consequence of the action”). Therefore, if a reasonable person could have reasonably expected the injury to occur, it is “reasonably foreseeable.” *See, e.g., In re Dylan T.*, No. F060507, 2011 WL 1272100, at *5 (Cal. Ct. App., Apr. 6, 2011) (affirming restitution order awarding, *inter alia*, moving expenses to victim who moved away due to safety concerns, finding the move to be foreseeable); *State v. Maxwell*, 802 N.W.2d 849, 853 (Minn. Ct. App. 2011) (finding that the trial court did not err in compensating the victim for his inability to refinance his home mortgage after defendant stole his identity, noting that these expenses were reasonably foreseeable). The interplay of notions of foreseeability and recoverable losses in restitution is discussed further in this Bulletin in the context of a case study regarding restitution for polyvictims’ losses, see *infra* Section IV.A.

²⁴ *State v. Shepherd*, 60 A.3d 213, 215 (Vt. 2012) (finding that relocation expenses were the natural and probable consequence of defendant’s abuse of the victim, and were therefore appropriate under the restitution award);

People v. Lassek, 122 P.3d 1029, 1036 (Colo. App. 2005) (upholding restitution award for parents for costs associated with attending a memorial service, finding that the parents’ attendance at the service was a natural and probable consequence that would not have occurred without defendant’s actions).

²⁵ David Finkelhor *et al.*, *Polyvictimization: Children’s Exposure to Multiple Types of Violence, Crime, and Abuse*, U.S. Dep’t of J., Office of Justice Programs, OJJDP Juv. Just. Bull. 1-4 (Oct. 2011), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/235504.pdf>. For more information about polyvictimization, see *Polyvictims: Victims’ Rights Enforcement as a Tool to Mitigate “Secondary Victimization” in the Criminal Justice System*, NCVLI Victim Law Bulletin (Nat’l Crime Victim Law Inst., Portland, Or.), Mar. 2013, at 3 n.2, available at <https://law.lclark.edu/live/files/13798-polyvictims-victims-rights-enforcement-as-a-tool>.

²⁶ *See* Nat’l Crime Victim Law Inst., *supra* note 25, at 5 n.16. *See also* Maxia Dong *et al.*, *The Interrelatedness of Multiple Forms of Childhood Abuse, Neglect, and Household Dysfunction*, 28 Child Abuse & Neglect 771, 779 (2004) (“The common co-occurrence of [adverse childhood experiences] is important clinically because the negative short- and long-term influence of [them] on behaviors, emotional and social well-being, and physical health has repeatedly been shown to be cumulative.”); Chiara Sabina & Murray A. Straus, *Polyvictimization by Dating Partners and Mental Health Among U.S. College Students*, 23 Violence and Victims 667, 679 (2008) (concluding that polyvictimization was a better predictor of posttraumatic stress and depressive symptoms than any of the individual types of victimization).

²⁷ It is important to note that foreseeability is but one test of legal causation. For instance, a number of courts have determined that victims with preexisting injuries are entitled to full restitution by concentrating on the substantial factor causation analysis. *See, e.g., United States v. Crandon*, 173 F.3d 122, 126 (3d Cir. 1999) (finding that the victim was entitled to restitution under 18 U.S.C. § 2259 despite preexisting untreated psychological problems because defendant’s actions were a substantial factor in the loss); *State v. Behnke*, 553 N.W.2d 265, 272-73 (Wis. 1996) (finding that defendant’s behavior was a substantial factor in the victim’s injury, despite the fact that she had received mental health treatment before the attack and that her preexisting condition left her with a vulnerable psyche). The importance of which test is employed by the court can

be seen in cases in which victims of child sexual abuse subsequently have images of the abuse circulated on the Internet. In such cases, courts have found that victims are entitled to anywhere from full restitution of millions of dollars, to partial restitution, to nominal restitution, to no restitution. “The difference in outcome seems to turn on the courts’ causation analyses – meaning what offer of proof the court deems necessary to establish a causal connection between the defendant’s specific offense and the victim’s losses.” *How Current Restitution Law is Failing Victims in Child Abuse Image Cases*, NCVLI Newsletter of Crime Victim Law, 12th Ed. (Nat’l Crime Victim Law Inst., Portland, Or.), 2010, at 5 (collecting cases), available at <http://www.lclark.edu/live/files/5653-ncvli-news-2010--12th-edition>. As discussed in this Bulletin, however, even if the foreseeability test is applied, courts should find that the injury to polyvictims is foreseeable.

²⁸ *State v. Smith*, No. 06CA2893, 2007 WL 1165822, at *5 (Ohio Ct. App. Apr. 17, 2007).

²⁹ *Reck v. Stevens*, 373 So. 2d 498, 502 (La. 1979). Perhaps because the concept of polyvictimization is still rather new, there is little case law analyzing causation in criminal restitution matters involving polyvictims. Accordingly, it may be instructive to consider case law arising under the thin skull plaintiff rule, which is well established in civil tort litigation. Under the thin skull doctrine:

When an actor’s tortious conduct causes harm to a person that, because of a preexisting physical or mental condition or other characteristics of the person, is of a greater magnitude or different type than might be expected, the actor is nevertheless subject to liability for all such harm to the person.

Restatement (Third) of Torts: Liab. for Physical and Emotional Harm § 31(2010). Every jurisdiction in the United States adheres to the thin skull rule. *Id.* at Reporters Note, cmt. b.

³⁰ *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1295 (8th Cir. 1997).

³¹ *Poole v. Copland, Inc.*, 498 S.E.2d 602, 605 (N.C. 1998). See also, generally, *Freeman v. Busch*, 349 F.3d 582, 590 (8th Cir. 2003) (finding it was not an abuse of discretion for the district court to issue an “eggshell plaintiff” jury instruction, which advised that defendant would be responsible for all damages as a result

of sexual battery, despite the victim’s prior history as a victim of child molestation, when she experienced greater damages than that of an “average” person); *Reck*, 373 So. 2d at 502 (“Unquestionably, the severity and persistence of the subject symptoms (headaches, dizziness, disorientation) in part resulted because of an underlying (but until-then controlled) emotional instability of the plaintiff, a non-specific schizophrenic process of long standing. Nevertheless, a tortfeasor takes his victim as he finds him, and he is responsible in damages for the consequences of his tort although the damages so caused are greater because of a prior condition of the victim which is aggravated by the tort.”); *Raino v. Goodyear Tire and Rubber Co.*, 422 S.E.2d 98, 100 (S.C. 1992) (employing the thin skull plaintiff rule to find that defendants were liable for plaintiff’s addiction to pain medication, although defendants argued plaintiff had a propensity to be addicted to substances because of her alcohol abuse problems).

³² See generally *Payne v. Tennessee*, 501 U.S. 808, 831-32 (1991) (O’Connor, J., concurring) (discussing the uniqueness of each individual).

³³ Restatement (Third) of Torts: Liab. for Physical and Emotional Harm § 31, cmt. b.

³⁴ *Rowe v. Munye*, 702 N.W.2d 729, 748 (Minn. 2005) (Meyer, J. dissenting) (citing Dan B. Dobbs, *The Law of Torts* § 124 at 425 (5th ed. 2000)). See also, generally, *Lancaster v. Norfolk and Western Ry. Co.*, 773 F.2d 807, 822 (7th Cir. 1985) (“If a tortfeasor never had to pay more than the average victim’s damages, victims as a class would be systematically undercompensated and tortfeasors as a class therefore systematically underdeterred, because victims with above-average injuries would get their damages cut down while victims with below-average injuries would not get an offsetting increase.”).

³⁵ *Dunn v. Denk*, 54 F.3d 248, 251 (5th Cir. 1995) (*rev’d on other grounds*, 79 F.3d 401 (5th Cir. 1996)) (discussing the thin skull rule in the context of a lawsuit against police for excessive use of force).

³⁶ This tension was explored in the case *United States v. Lewis*, 791 F. Supp. 2d 81 (D.D.C. 2011). In this case, defendant pleaded guilty to sex trafficking four juveniles. *Id.* at 82. All of the victims had experienced trauma before meeting the defendant, including suicidal impulses, psychosis, and sexual abuse. *Id.* at 86-88. Nonetheless, an expert testified that their experiences as sex trafficking victims created additional emotional trauma resulting in posttraumatic stress disorder. *Id.*

Defendant argued that he should not be required to pay more than nominal damages because each of the victims would have required psychological care as a result of conditions that pre-dated their experiences with defendant. *Id.* at 91. The court disagreed, finding that “the trauma personally inflicted on each victim by defendant is clear and undeniable,” and that the prosecution met its burden of demonstrating that the full amount of losses for all victims were attributable to defendant. *Id.* at 91, 92 (*aff’d*, *In re Sealed Case*, 702 F.3d 59 (D.C. Cir. 2012)). See also *Behnke*, 553 N.W.2d at 272-73 (emphasis in original) (citation omitted) (finding that “if the defendant’s actions were the precipitating cause of the injury complained of, and such injury was the natural consequence of the actions, the defendant is liable, although the victim’s preexisting condition might have aggravated the injury. The victim provided proof that she needed help from mental health professionals because of the attack. The attack precipitated her need and her need was the natural consequence of the attack. That she received similar mental health treatment before the attack and that her preexisting condition left her with a vulnerable psyche should not be a tool by which the defendant can escape liability for restitution”); *People v. Burton*, No. D060824, 2012 WL 3156515, at *3 (Cal. Ct. App. Aug. 6, 2012) (noting that defendant is liable for losses arising from his conduct even if the victim is more susceptible to injury due to a preexisting condition). However, in *Bellot v. State*, 964 So. 2d 857, 858 (Fla. Dist. Ct. App. 2007), the victim was hospitalized after a prolonged fight with someone who was trying to rob him. Once at the hospital, numerous tests were run and he was hospitalized for several days. *Id.* at 858-59. But the court found that the state failed to prove whether the tests and the stay were because the fight aggravated a preexisting condition (in which case the victim would have been able to recover the costs), or if the doctors simply uncovered a preexisting condition that was unrelated to the fight. *Id.* at 860.

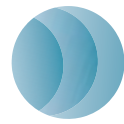
³⁷ *United States v. Hudson*, 483 F.3d 707, 710 (10th Cir. 2007) (quotation marks omitted) (the purpose of restitution “is not to punish defendants or to provide a windfall for crime victims but rather to ensure that victims, to the greatest extent possible, are made whole for their losses”).

³⁸ *People v. Cain*, 97 Cal. Rptr. 2d 836, 841 (Cal. Ct. App. 2000) (finding that a psychotherapist’s statement that the victim’s counseling expenses were a result of defendant’s actions was sufficient to establish the necessary probable cause); *In re Sealed Case*, 702 F.3d at 66

(finding that a psychologist’s statements that the victims’ counseling expenses were a result of defendant’s actions was sufficient to establish the necessary probable cause).

³⁹ *Bellot*, 964 So. 2d at 860 (opining that expert testimony was likely necessary to establish whether medical expenses were recoverable); *United States v. Serawop*, 505 F.3d 1112, 1125-26 (10th Cir. 2007) (relying on expert testimony in awarding future lost wages to the family of a victim of infanticide).

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