

REPORTER'S NOTES

MASSACHUSETTS RULES OF CRIMINAL PROCEDURE

Rule 49 Restitution

Reporter's Notes—2025

This rule codifies procedures for the ordering of restitution as a condition of probation and for the method of calculating and scheduling the payment of restitution.

Restitution. In Massachusetts, the court's "power to order restitution in criminal cases derives from the judge's power to order conditions of probation under G. L. c. 276, §§ 87, 87A, and G. L. c. 279, § 1." *Commonwealth v. Denehy*, 466 Mass. 723, 737 (2014) (internal quotations omitted) (citing *Commonwealth v. McIntyre*, 436 Mass. 829, 833 (2002)). With the exception of certain theft, fraud, and vandalism offenses that mandate restitution by statute, restitution is "an entirely judicially determined penalty" that is distinct from "punishments such as imprisonment and fines that are accompanied by statutory prescription." *Denehy*, 466 Mass. at 737 (Because restitution is not subject to statutory prescriptions but is instead within a judge's discretion to order, there is no Sixth Amendment right to jury determination of restitution amount); *Commonwealth v. Nawn*, 394 Mass. 1, 8-9 (1985) (No right to a jury trial on order for restitution). As a judicial function, the judge may not delegate to the probation office the determination of restitution, the determination of the defendant's ability to pay, or the setting of the payment schedule. *Commonwealth v. Henry*, 475 Mass. 117, 120-121, 125 (2016).

For statutes providing for mandatory restitution pursuant to G. L. c. 276, § 92, see G. L. c. 266, § 27 (theft of tools), G. L. c. 266, § 28 (theft or vandalism of a motor vehicle), G. L. c. 266, § 111B (motor vehicle insurance fraud), and G. L. c. 266, § 139 (VIN defacement). For other theft and fraud related statutes providing for mandatory restitution, see G. L. c. 152, § 14 (workers compensation fraud), G. L. c. 175H, §§ 2 and 7 (false health care claims), G. L. c. 175H, §§ 3 and 7 (health care kickbacks), G. L. c. 266, § 27A (concealment of a vehicle to defraud insurer), G. L. c. 266, § 37E (identity fraud), G. L. c. 266, § 87 (larceny of leased or rental property), and G. L. c. 266, § 99A (theft of library materials). For other vandalism related statutes providing for mandatory restitution, see G. L. c. 160, § 225 (malicious injury to a railroad), G. L. c. 266, § 100 (vandalism of library materials), G. L. c. 266, § 108 (destruction of a vessel), G. L. c. 266, § 126A (vandalism of personal property), and G. L. c. 266, § 126B (tagging public or private property by paint or stickers).

Restitution is also mandated to the government for conviction of certain offenses involving damage to public property, see G. L. c. 266, § 94 (malicious destruction of traffic signs and markers), G. L. c. 266, § 95 (vandalism of historical markers), G. L. c. 266, § 96 (vandalism of state buildings), and G. L. c. 266, § 97 (vandalism of county buildings), and for offenses involving threats to public safety or infrastructure the response to which may impose particular costs, see G. L. c. 266, § 102D (possession of incendiary or hoax devices), G. L. c. 266, § 123A

(willful trespass upon public water supply), G. L. c. 269, § 14 (threats of weapons, explosives, hijacking, or disruption of public facilities), and G. L. c. 269, § 14B (false or silent 911 calls).

Victims have a statutory right to seek that restitution be ordered as part of the disposition of a case, as well as to the assistance of the prosecutor in documenting their economic losses and to receive a payment schedule if restitution is ordered. G. L. c. 258B, §§ 1, 3(o).

In addition to advancing the general goals of sentencing, restitution compensates victims for their economic losses caused by the defendant's actions. *McIntyre*, 436 Mass. at 833 n 2. Restitution may not be used, however, as a reward or incentive for dismissal of a case. *Commonwealth v. Rotonda*, 434 Mass. 211, 220 (2011). Restitution is thus distinct from an order that the defendant pay to the Commonwealth the costs of the prosecution. G. L. c. 280, § 6 (While costs may not be imposed as a penalty, a judge may order as condition of dismissal, placing on file a complaint or indictment, or as a term of probation, that the defendant pay "the reasonable and actual expenses of the prosecution."). Restitution is also distinct from accord and satisfaction. See G. L. c. 276, § 55; *Commonwealth v. Guzman*, 446 Mass. 344, 349 (2006).

Requirements for restitution. The Supreme Judicial Court has recognized several restrictions on the determination and ordering of restitution. *Denehy*, 466 Mass. at 737 n 20. First, any restitution award must be connected to the crime. *McIntyre*, 436 Mass. at 835 ("Restitution is limited to loss or damage that is causally connected to the offense and bears a significant relationship to the offense."). Second, restitution is limited to the victim's economic losses. *Rotonda*, 434 Mass. at 220-221 (Reversing restitution order that defendant make \$5000 payment to victim as a condition of unsupervised probation because it was unsupported by any statute). Third, a restitution order requires evidentiary support. *Id.* at 221-222; *Nawn*, 394 Mass. at 7. Fourth, the procedure for determining restitution must be fair and reasonable, with a hearing and an opportunity to cross-examine witnesses and to present evidence. *Nawn*, 394 Mass. at 6-7. Fifth, any restitution amount ordered may not exceed a defendant's ability to pay. *Henry*, 475 Mass. at 120-121. Finally, any period of probation may not be extended where a defendant violates an order of restitution solely because of an inability to pay. *Henry*, 475 Mass. at 124.

Sequence of determinations and burdens. While the question of restitution may be decided at the time of the disposition hearing, the sequence of determinations the judge must make is critical to ensure that any restitution order complies with requirements the Supreme Judicial Court has established. This sequence is reflected in Mass. R. Crim. P. 49(b)(ii)-(iii).

The judge must first determine the actual economic loss suffered by the victim or victims causally connected to the defendant's crime. *Henry*, 475 Mass. at 121. The Commonwealth bears the burden of proof on the amount of loss by a preponderance of the evidence. The maximum restitution may not exceed this amount, and the judge has the discretion to set a lesser amount if the interests of justice so indicate. *Id.* See Mass. R. Crim. P. 49(b)(ii). Codefendants may be held jointly and severally liable for an amount of restitution, again in the judge's discretion. See, e.g., *Commonwealth v. Amaral*, 78 Mass. App. Ct. 557, 559 (2011); *Commonwealth v. Caparella*, 70 Mass. App. Ct. 506, 517 (2007).

After determining the economic loss, the judge shall determine the defendant's ability to pay, and set a schedule for restitution payments that does not exceed the defendant's ability to pay. *Henry*, 475 Mass. at 121. If the defendant claims that the maximum restitution amount exceeds the defendant's ability to pay, the defendant bears the burden of proving this proposition. *Id.* The judge must then set a schedule of restitution payments consistent with the defendant's ability to pay that does not exceed the period of probation. *Henry*, 475 Mass. at 123 ("A judge may not ignore a defendant's ability to pay in determining restitution under the rationale that, if the defendant were to violate the probation condition of payment of restitution because of an inability to pay, the judge would not revoke probation but would instead extend the period of probation to allow the defendant more time to pay."). See Mass. R. Crim. P. 49(b)(iii). When an order of restitution is made in cases involving codefendants, the judge must make individual determinations concerning each defendant's ability to pay and set a payment schedule appropriate for each defendant.

The schedule of restitution payments should not affect the duration of probation. *Henry*, 475 Mass. at 124 ("[T]he length of probation supervision imposed at the time of sentence should not be affected by the financial means of the defendant or the ability of the defendant to pay restitution"). To reduce the risk that the ability to pay determination affects the length of any period of probation, "the ability to pay determination should be made only *after* the judge has determined the appropriate length of the probationary period based on the amount of time necessary to serve the twin goals of rehabilitating the defendant and protecting the public." *Id.*, at 125 (*italics in original*). When the judge determines that probation is not appropriate for any reason other than to collect restitution, the judge may – but is not required to – impose a brief period of probation. Even for restitution ordered as a condition of such a brief period of probation, the judge must still make the determinations of economic loss and ability to pay during this period. *Id.* at 125 n 8. Any time before the termination of probation the judge may, upon motion of either party or the probation service, hold a hearing to redetermine the defendant's ability to pay. *Commonwealth v. Brown*, 102 Mass. App. Ct. 233, 235 (2023). The defendant bears the burden of proving current ability to pay in a redetermination hearing. See Mass. R. Crim. P. 49(c). Except at the request of the defendant, the period of probation may not be extended because of unpaid restitution absent a willful violation of the conditions of probation. *Henry*, 475 Mass. at 124 n 5. See Mass. R. Crim. P. 49(d). Even with the defendant's assent, the parties must show good cause for the requested extension.

(a) Request for Restitution.

The Commonwealth may request an order of restitution as part of the disposition in a case. The time for this request depends upon the resolution of the case.

(i) After trial.

For a conviction after a trial, the Commonwealth may request an order of restitution at any time before completion of the sentencing hearing or, with the permission of the judge for good cause shown, within sixty days of the disposition.

(ii) After Plea or admission.

For a case resolved by guilty plea or admission to sufficient facts, the Commonwealth may request an order of restitution as part of its disposition recommendation during the plea colloquy. See Mass. R. Crim. P. 12(c)(4). The Commonwealth would not be allowed to request an order of restitution after the colloquy.

For a case in District Court in which a defendant tenders a guilty plea pursuant to G. L. c. 278, § 18 in which there is no agreement as to a recommended disposition, the defendant may address restitution as part of any request for a specific disposition. The defendant may, as part of any request for a specific disposition, agree to accept restitution as determined by the judge, agree to accept a specific maximum restitution amount, agree to accept a restitution amount determined by a judge but not to exceed a specific amount, or not agree to accept restitution as part of the disposition.

Restitution may be requested for cases adjudicated in juvenile court. *Commonwealth v. Avram A.*, 83 Mass. App. Ct. 208, 211 (2013); G. L. c. 119, § 62. See also G. L. c. 119, § 58B (restitution for juvenile adjudicated delinquent of motor vehicle offenses).

(b) Restitution hearing.

Unless the defendant stipulates to the victim's loss and the restitution amount, the judge may not enter an order of restitution without conducting a restitution hearing. *Commonwealth v. Molina*, 476 Mass. 388, 408 (2017) ("A hearing on the request for restitution is necessary if the basis for the request or the amount of restitution to be ordered is in dispute."); *Henry*, 475 Mass. at 120 ("Where the defendant does not stipulate to the amount, the judge should conduct an evidentiary hearing" to determine the victim's losses.). If the Commonwealth will seek restitution, it should disclose the amount of restitution it will seek prior to the restitution hearing. *Henry*, 475 Mass. at 120.

"A restitution hearing need not be elaborate but must be reasonable and fair." *Molina*, 476 Mass. at 408 (citing *Nawn*, 394 Mass. at 6). The evidentiary rules at a restitution hearing, like those at a probation violation hearing, are flexible enough to consider evidence that would not be admissible at trial. *Commonwealth v. Casanova*, 65 Mass. App. Ct. 750, 756 (2006).

"[H]earsay, if reliable, is admissible to carry the Commonwealth's burden at a restitution hearing." *Commonwealth v. Amaral*, 78 Mass. App. Ct. at 560 (Uncertified dental bill for restoration of victim's teeth damaged in defendant's assault properly supported restitution order despite lack of compliance with G. L. c. 233, § 79G for exception to rule against hearsay).

At a restitution hearing, the defendant must have a meaningful opportunity to be heard and to cross examine witnesses. *McIntyre*, 436 Mass. at 834. If the victim testifies to the losses, the defendant should have an opportunity to "cross-examine the victim, with such cross-examination limited to the issue of restitution. The defendant may rebut the victim's estimate of loss with expert testimony or other evidence." *Henry*, 475 Mass. at 120 (internal citations omitted).

(i) Timing.

The judge may, in the exercise of discretion, decide the question of restitution at the disposition hearing or at a separate hearing conducted later.

(ii) Determination of victim's loss.

The judge must first determine the victim's loss. The restitution amount is limited to the victim's "economic losses caused by defendant's conduct and documented by the victim." *Rotonda*, 434 Mass. at 221. This might include "such items as medical expenses, court-related travel expenses, property loss and damage, lost pay, or even lost paid vacation days required to be used to attend court proceedings." *Id.*

The Commonwealth bears the burden of showing, by a preponderance of the evidence, that the victim's loss "is causally connected to the offense and bears a significant relationship to the offense." *McIntyre*, 436 Mass. at 835 (Restitution ordered for defendant convicted of assault and battery with a dangerous weapon could include property damage incurred by victim that bore significant causal relationship to the assault and battery); *Denehy*, 466 Mass. at 739-740 (Restitution order could include cost of officer's eyeglasses broken in scuffle with defendant convicted of disorderly conduct and assault and battery by means of a dangerous weapon notwithstanding defendant's acquittal for assault and battery on a police officer.). Compare *Commonwealth v. Palmer P.*, 61 Mass. App. Ct. 230, 232 (2004) (Restitution order for juvenile convicted of breaking and entering with intent to commit larceny but acquitted of larceny could properly include value of property taken where judge could conclude breaking and entering facilitated taking of property by allowing others to enter), with *Casanova*, 65 Mass. App. Ct. 750, 756-757 (2006) (Restitution order for defendant convicted of assault and battery was unsupported where there was no evidence of causal nexus between assault and victim's withdrawal from school and resulting forfeiture of tuition.).

The victim's loss may be documented by third parties as well as by the victim, and there is no requirement that the victim have submitted an insurance claim for the loss. *Commonwealth v. Yeshulas*, 51 Mass. App. Ct. 486, 492 (2001) (Arson defendant's restitution properly based on testimony by fire department personnel estimating damage by fire and smoke); *Commonwealth v. Williams*, 57 Mass. App. Ct. 917, 917 (2003) (Judge could rely in part on repair cost estimates rather than actual costs, and there is "no requirement that a victim must submit a claim under any insurance policy that might cover the loss before an order of restitution can be made."). Restitution may be awarded based on a third party's repair estimate, even if the victim made the repairs without using a third party. *Avram A.*, 83 Mass. App. Ct. at 215.

After the judge has determined the amount of the victim's loss, the judge sets a maximum restitution amount that must not exceed the amount of the victim's loss. Mass. R. Crim. P. 49(b)(ii). The judge may exercise discretion to set the maximum restitution amount at less than the amount of the victim's loss if the defendant's rehabilitative needs or other interests of justice would be served thereby. The judge may also exercise discretion to order restitution to a third party if that person suffered economic loss causally connected to the defendant's actions and ordering restitution is primarily designed to meet the goals of sentencing and probation. *Commonwealth v. McGann*, 484 Mass. 312, 327-328 (2020) (Judge properly exercised discretion to order restitution to victim's mother for her payments of victim's medical expenses arising from assault by defendant).

(iii) Determination of ability to pay.

After the judge has determined the restitution amount, the judge must determine the defendant's ability to pay. *Henry*, 475 Mass. at 120-121; *Nawn*, 394 Mass. at 7, 8-9. Because restitution in a criminal case may be ordered only as a condition of probation, imposing restitution that a defendant will be unable to pay – and for which the defendant will thus inevitably risk a probation violation – “violates the fundamental principle that a criminal defendant should not face additional punishment solely because of his or her poverty.” *Henry*, 475 Mass. at 122; *Bearden v. Georgia*, 461 U.S. 660, 669 n 10 (1983) (basic fairness forbids revocation of probation when the probationer is without fault in failing to make required payments). When a defendant is incarcerated or sentenced to incarceration, the judge may defer determination of the defendant's ability to pay until the defendant's release from incarceration or a reasonable time thereafter. Mass. R. Crim. P. 49(b)(iii).

In considering the defendant's ability to pay, “the judge must consider the defendant's financial resources, including income and net assets, and the defendant's financial obligations, including the amount necessary to meet minimum basic human needs such as food, shelter, and clothing for the defendant and [the defendant's] dependents.” *Henry*, 475 Mass. at 126. Potential income may be attributed to a defendant only after a specific finding that the defendant is earning less than could be earned through the defendant's reasonable effort. *Id.* at 127. *Cf. Commonwealth v. Vallejo*, 480 Mass. 1001 (2018) (Restitution order of \$140 inadequately considered defendant's ability to pay without substantial financial hardship where defendant, who lived in low income housing, testified she was not working due to a back injury and had no income.).

Restitution cannot be ordered that would cause substantial financial hardship to the defendant or the defendant's dependents. *Henry*, 475 Mass. at 127; *Cf. S.J.C. Rule 3:10, § 10(a)*, 475 Mass. (2016) (waiver of indigent counsel fee where defendant is unable to pay without substantial financial hardship within 180 days). Restitution payments that would deprive a defendant or a defendant's dependents of minimum basic human needs necessarily cause substantial financial hardship and would be impermissible. *Henry*, 475 Mass. at 127.

When the defendant claims that the economic loss exceeds the defendant's ability to pay, the defendant bears the burden of proving this by a preponderance of the evidence. *Id.* at 121. If the defendant has already been found indigent, the Supreme Judicial Court has cautioned that “a judge should carefully consider whether restitution can be ordered without causing substantial financial hardship.” *Id.* at 127.

“Once the judge has determined the appropriate length of the probationary period, restitution may be a condition of probation for the length of that period at the maximum monthly amount that the defendant is able to pay, provided the total amount does not exceed the actual loss.” *Id.* at 125. This payment schedule must be set by the judge; its determination may not be delegated to the probation service. *Id.* The judge does not set a figure for the total restitution to be paid, except to the extent that the total restitution paid will not exceed the maximum restitution amount set.

It is possible, and permissible, that the payment schedule will not result in the payment of the full maximum restitution amount set. If, on the other hand, the defendant has the ability to pay the entire maximum restitution amount, the judge may divide the payment of restitution over the course of the probationary term, but need not do so if a different division would be preferable. The judge may order payments be made to the probation officer, who can keep an accounting of payments, make payments to the victim, provide receipts, and notify the clerk of the court when full payment has been made. G. L. c. 276, § 92.

(c) Redetermination of ability to pay.

A defendant's ability to pay may change over time, and any time before the termination of probation either party or the probation service may file a written motion seeking a redetermination of the defendant's ability to pay. *Brown*, 102 Mass. App. Ct. at 236. (The judge may also require that the defendant report any change in ability to pay to the probation officer, who may petition the judge for a modification in the payment schedule due to a material change in the defendant's financial circumstances. *Commonwealth v. Goodwin*, 458 Mass. 11, 18 (2010)).

Unless the motion for redetermination lacks a reasonable basis, the judge shall promptly hold a redetermination hearing. The court shall direct the probation service to notify the victim or victims of the redetermination hearing. G. L. c. 258B, § 3(o) (Crime victims have a right to notification by probation officer if the defendant seeks a modification of the restitution order and to be heard at a modification hearing). The defendant bears the burden of showing by a preponderance of the evidence the current amount that the defendant is able to pay without creating a substantial financial hardship for the defendant or the defendant's dependents. The judge shall then determine the defendant's ability to pay and set a restitution payment schedule that does not exceed the defendant's ability to pay or the maximum restitution amount previously determined.

(d) Conclusion of probation.

Except at the request of the defendant, a judge may not extend a period of probation because of unpaid restitution absent a willful violation of the conditions of probation. *Henry*, 475 Mass. at 123-124 and n 5. Extending probation due to a defendant's inability to pay would subject the defendant to additional punishment because of poverty, which contradicts basic fairness. *Commonwealth v. Canadyan*, 458 Mass. 574, 578-579 (2010) (Absent willful noncompliance, homeless defendant could not be found in violation of GPS monitoring condition where homeless shelters could not accommodate the technological demands of the GPS equipment supplied by the probation department). Compare *Commonwealth v. Bruno-O'Leary*, 94 Mass. App. Ct. 44 (2018) (Probationer's partial payments in some months and no payments in others was insufficient basis to conclude noncompliance was willful when uncontested evidence showed probationer was unemployed, had two children, and her only sources of income were Social Security disability benefits and food stamps), with *Commonwealth v. Pereira*, 93 Mass. App. Ct. 146, 150-152 (2018) (Judge's implicit finding of willful noncompliance supported by absence of evidence from the probationer concerning inability to pay after she initially agreed to restitution schedule).

