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## **Lori S. Welsh v State of Alaska, 2013**

### **Brief**

Lori Welsh was convicted of Theft 3 for stealing pain medication from her place of employment, a veterinary clinic. The District Court ordered Welsh to pay restitution to the clinic for the retail value of the pills – the amount for which the pills would have sold to a paying customer. The rationale of the District Court for restitution based on retail value vs wholesale value was that the defendant “should not obtain a better result” by stealing the pills than if she had purchased the pills.

On appeal, Welsh argued the District Court should have ordered restitution to the victim for the wholesale value of pills – the amount the clinic paid for the pills. The Appellate Court reversed the District Court reasoning that the ruling was inconsistent with Alaska restitution statutes which can be imposed in two (2) different ways – 1) under AS 12.55.045 as a direct provision of a defendant’s sentence, or 2) under 12.55.100 as a condition of a defendant’s probation.

AS 12.55.045 does not explicitly declare restitution should be for actual damages or loss but paid “to the victim or other person injured by the offense”.

AS 12.55.100 specifies restitution should be for “actual damages or loss caused by the crime for which the conviction was had.”

The court determined legislative intent was to limit restitution orders to the amount of *actual damages or loss* under the 12.55.100 condition of probation standard, rather than ordering a defendant to pay the greater amount including *loss of income*, as allowed under the AS 12.55.045 condition of sentence standard, saying “it would be anomalous to construe the two statutes differently”.

The Appellate court stated that while the lower court’s intention was to negate any unjust enrichment for Welsh, *there remains an element of unjust enrichment in the district court’s decision to award restitution to the veterinary clinic based on the retail value of the pills (76 cents apiece) rather than the wholesale value (3 cents apiece). By ordering Welsh to pay the clinic 76 cents for every stolen pill, the district court has essentially ordered Welsh to fund the clinic’s future purchase of twenty-five times as many pills as were stolen.*

The court held that restitution under either statute should be assessed according to the damages or loss arising from the defendant’s crime, and not the amount of the defendant’s unjust gain.

### Commentary

In *Welsh*, the Court's reasoning seems to show either disapproval of our free market system, or a lack of understanding of what it takes to operate a small business. Profit margins pay the overhead- to include labor, healthcare premiums, taxes, insurance, supplies and many other operating costs.

In the Court's ruling in *Welsh*, it could have interpreted the word "loss" to include the lost opportunity to sell the item to the defendant who stole it under the principles of a free market system.

The court seems to have ignored AS 12.55.045(d) language which states –

In any case, including a case in which the defendant is convicted of a violation of AS 11.46.120-11.46.150 and the property is commercial fishing gear as defined in AS 16.43.990, the court shall consider the victim's loss, and the order of restitution may include compensation for loss of income (emphasis added).

Two examples of restitution problems the Appellate Court has created in *Welsh*-

1. Guy steals a Happy Meal. Retail value of Happy Meal is \$4.99. Previous to this decision, the Court would order \$4.99 restitution to McDonalds. Now under the *Welsh* decision the Courts may determine loss in a different way. How much did the ingredients cost McDonald's? The Court is also permitted to consider other factors such as labor to assemble the Happy Meal and, possibly, the utility costs to refrigerate it and to heat it back up again and the like. So problem #1 will be that the hearings to establish these values will, in many cases, not be worth the trouble to do. McDonald's will just forego getting restitution rather than have someone figure up and testify about all of this.

2. Guy steals an iPhone 6 from Walmart. Previously the Court would order restitution to Walmart for the retail price of the phone. Under *Welsh*, profit to Walmart based on the retail price is not "loss" but rather "unjust enrichment". So to order any restitution the court would need to determine what that iPhone cost Walmart. Unfortunately, Apple considers all sales agreements with each vendor confidential, they don't want anyone to know what their deal is with Walmart. There is a clause in the contract between Apple and Walmart that forbids disclosure of the terms of the sale of iPhones. Under this scenario Walmart will have to forego receiving ANY restitution because it cannot reveal what they paid for the phone. Clearly, the retail value is the accurate loss to the crime victim, and the restitution amount they are due.

In conclusion, our Appellate Court states that a defendant cannot be ordered to pay restitution on the amount *of the defendant's unjust gain*. The Court acknowledges that the gain is unjust, but denies reparation to the victim. SB 5 is about restoring crime victims to a pre-offense condition, and protecting the property interests of all Alaskans.

This legislation is strongly supported by Alaskans and small business entities.