

# Rethinking the legal nature of an obligation to remedy damage

KATARZYNA ŁUCARZ

ORCID: 0000-0003-3130-2389

Zakład Prawa o Wykroczeniach, Karnego Skarbowego i Gospodarczego  
Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego

It would seem that the revised regulation of an obligation to remedy damage, introduced by the amending Act of 20 February 2015,<sup>1</sup> will finally solve the problem of its legal nature. In fact, such an intention was expressed in an explanatory statement to the amending Act, where it has been stressed that the obligation to remedy damage assumes a civil-law character.<sup>2</sup> After all, the main aim of this obligation is to compensate for the damage suffered as a result of an offence. Hence, its criminal-law nature should be based on relevant civil-law regulations.<sup>3</sup> The question remains, however, whether the amendments to art. 46 of the Criminal Code proposed by the legislator truly have such a character. Declarations of this type usually require powerful interference in the legal structure of a given measure. Thus, the sole intention to shape an obligation to remedy damage according to the rules of civil law may prove insufficient to

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<sup>1</sup> The Act on Amendment of the Criminal Code and on Amendments to Certain Other Acts of 20 February 2015 (Dz.U. [Journal of Laws] of 2015, item 396).

<sup>2</sup> This means that previously — according to the view taken by the vast majority of legal scholars — the obligation to remedy damage did not have such a character and was in fact criminal-law, or at least criminal-civil in nature (see more: A. Muszyńska, *Naprawienie szkody wyrządzonej przestępstwem*, Warszawa 2010, pp. 131–139).

<sup>3</sup> M. Królikowski, R. Zawłocki, *Prawo karne*, Warszawa 2015, pp. 364–365.

accept that as a result of the introduced amendments, the measure has become a pure civil act in the criminal proceedings and ceased to have its criminal-law nature.

“Removing” the obligation to remedy damage from the catalogue of penal measures and placing it in a new chapter 5a entitled “Forfeiture and compensatory measures” surely does not give grounds for drawing such conclusions. In particular, because the legal nature of this measure is established on the basis of its normative properties, especially the purposes which are to be achieved and not the mere fact of placing it in one chapter of the Criminal Code or another. The said purposes have not changed. An obligation to remedy damage still serves mainly a compensatory function, which embodies its core content, irrespective of legislators’ preferences. Consequently, the transfer of this penal-law measure from one category to another only reinforces the message on what has already been obvious to anyone dealing with criminal law.

The same applies to the stipulation that the court imposes an obligation to remedy damage “applying the provisions of civil law.” Contrary to what one might expect, the express articulation of this necessity does not bring much new to the issue of the legal nature of the obligation to remedy damage. Insufficient criminal-law regulations concerning the practical application of this obligation (e.g. the extent of liability or the method of redressing the damage) meant that also in the previous legislative framework applying civil-law provisions, wherein damages liability was more comprehensively regulated, used to be a rule.<sup>4</sup> Obviously, the absence of harmonised good practices in this respect favoured certain abuses and resulted in differences in interpretation. Nevertheless, the use of civil-law provisions was compatible with the legislators’ intention. The lawmaker assumed from the outset that civil-law provisions will apply to the obligation to remedy damage as a penal measure and deliberately omitted only those provisions which could not be reconciled with its criminal-law nature (namely, provisions on the statute of limitations of claims and annuity awards). Currently, the main difference lies in that the provisions of the civil law are to be applied directly and not, as before, by analogy.

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<sup>4</sup> Z. Gostyński, *Obowiązek naprawienia szkody w nowym ustawodawstwie karnym*, Kraków 1999, p. 31.

Furthermore, the said provisions should be applied in their entirety and not arbitrarily — selecting only those which are not inconsistent with the nature of criminal law (obviously apart from the provisions on the possibility of awarding annuity). In this context, it is legitimate to wonder whether such a reference to the provisions of civil law, i.e. without their further specification, is compatible with the *nulla poena sine lege* principle. The form of criminal sanction is shaped here by a blanket reference and, in consequence, the core of this penal-law measure is vague and underdetermined.<sup>5</sup> This, in turn, heavily burdens the new regulation of the obligation to remedy damage.

Likewise, the addition of § 3 to art. 46 of the Criminal Code, providing for the possibility to pursue the unsatisfied part of the claim in civil action, did not change the legal nature of the obligation to remedy damage. One could even say that this addition proved to be completely redundant, due to the provisions of art. 415 § 2 of the Code of Criminal Procedure (previously, compare art. 415 § 6 of the Code of Criminal Procedure), since it unnecessarily duplicates the content of the procedural provisions.

For this reason, legislators' assertions that the obligation to remedy damage assumed a civil-law character do not seem to be completely reliable. The reforms which were introduced resulted solely in broadening the scope of application of the civil-law provisions in order to eliminate problems arising in judicial practice. After all, the grounds for application of this obligation have not changed significantly. An obligation to remedy damage is still a response to an offence, and its imposition is based on a provision of substantive criminal law.<sup>6</sup> The form of this measure remains unchanged. However, to meet current needs, its content became much more civil-law related. At the same time, the standpoint adopted herein is not undermined by the omission of relevant application of general directives of sentencing (art. 56 of the Criminal Code). Also in the previous legislative framework, due to the compensatory purpose of

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<sup>5</sup> T. Dukiet-Nagórska, "O kompensacji uwag kilka," [in:] *Kary i inne środki reakcji karnej na czyn zabroniony w świetle noweli do Kodeksu karnego z 20 lutego 2015 r.*, ed. J. Majewski, Warszawa 2016, p. 48.

<sup>6</sup> R. Giętkowski, "Obowiązek naprawienia szkody lub zadośćuczynienia za doznaną krzywdę," [in:] *Środki karne, przepadek i środki kompensacyjne w znowelizowanym kodeksie karnym*, ed. P. Daniluk, Warszawa 2017, p. 399.

the obligation to remedy damage, general directives of sentencing influenced its content only to a small extent, and in the case of some of these directives (the so-called justice directive or general prevention directive) it was impossible to exert any influence whatsoever. Moreover, general directives of sentencing exerted only a marginal impact on the decision to impose an obligation to remedy damage as a penal measure. If a proper motion was filed, the court was obliged to impose this obligation regardless of the directives, and when it was imposed *ex officio*, compensatory needs came strongly to the fore anyway. Other functions of the obligation were of secondary importance.<sup>7</sup> And yet, this state of affairs was not inconsistent with the instruction to apply the above-mentioned directives *mutatis mutandis* to the obligation to remedy damage, since, as it has been rightly pointed out, one of the forms of relevant application of the provisions can also be their non-application due to their irrelevance.<sup>8</sup> Once again, it should be reiterated that the introduced amendment does not indicate a change in the legal nature of the obligation to remedy damage as a criminal response measure. In the current legislative framework, instead of applying general directives of sentencing to a limited extent, it has been decided not to apply them at all.<sup>9</sup>

The same holds true for the repeal of ancillary proceedings and *ex officio* compensation. In the explanatory statement to the draft of the amending Act it has been noted that an obligation to remedy damage as a penal measure had already competed with ancillary proceedings and *ex officio* compensation, which justified the repeal of these two institutions long before compensatory measures were introduced into Polish criminal law.

It would, therefore, appear that also the foregoing reasoning does not indicate any qualitative change in the regulation of the obligation to remedy damage. The new form of the obligation does not necessarily detach

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<sup>7</sup> A. Liszewska, W. Robaczyński, "Prawnokarny obowiązek naprawienia szkody," [in:] *Aktualne problemy prawa karnego, kryminologii i penitencjarystyki. Księga ofiarowana Profesorowi Stanisławowi Lelentalowi w 45. roku pracy naukowej i dydaktycznej*, ed. K. Indeck, Łódź 2004, pp. 400–406.

<sup>8</sup> J. Raglewski, "Przepadek i środki kompensacyjne w projektowanej nowelizacji Kodeksu karnego," *Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury* 2014, no. 13, p. 133.

<sup>9</sup> R. Giętkowski, op. cit., p. 397.

it from its criminal-law foundations. On the contrary, there are numerous arguments to support the view that this obligation, as a compensatory measure, still contains a distinctive penal element.

First of all, the obligation to remedy damage as a compensatory measure is imposed based on the provision of substantive criminal law, i.e. the law which governs criminal, and not civil, liability. Thus, it is not a civil-law measure imposed in criminal proceedings.<sup>10</sup> Such a view would only be justified, if the grounds for imposing the analysed compensatory measure were regulated by the Code of Criminal Procedure, as it had been the case previously, with *ex officio* compensation and ancillary proceedings. Moreover, this obligation is imposed as a result of a conviction for an offence, which is a purely criminal matter. In contrast, civil-law obligation to remedy damage caused by an act displaying features of an offence can be imposed irrespective of whether the perpetrator has been convicted. Since the obligation to remedy damage as a compensatory measure constitutes a measure of criminal response to an offence, a ruling imposing it forms an integral part of a judgement of conviction, just as the ruling on penalty, penal measures or forfeiture (art. 413 § 2 (2) of the Code of Criminal Procedure).<sup>11</sup> Consequently, an individual act of pardon can apply thereto, whereas the same is not true about the civil-law obligation.<sup>12</sup>

As a typical criminal response measure, the obligation to remedy damage can be imposed *ex officio*; however, it should be noted that it is not the only mode of its imposition. What is more, when the court decides to grant an absolute discharge on the grounds of art. 59, 60 § 7 or art. 61 of the Criminal Code (the first two expressly provide for an absolute discharge and simultaneous imposition of, among others, compensatory measures) the above-mentioned obligation will be the only response to the commitment of an offence. In view of the foregoing, the obligation to remedy damage cannot be solely civil-law in nature. After all, it would be a gross oversimplification to assume that the only response to an offence offered

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<sup>10</sup> Ibid., p. 399.

<sup>11</sup> K. Witkowska-Moździerz, “Środki kompensacyjne w projekcie nowelizacji Kodeksu karnego,” [in:] *Reforma prawa karnego*, ed. I. Sepiolo-Jankowska, Warszawa 2014, pp. 201–202.

<sup>12</sup> Z. Gostyński, op. cit., p. 31.

in the course of criminal proceedings is a civil-law measure.<sup>13</sup> While on the subject of art. 59 of the Criminal Code, it should be stressed that in the cases specified in this provision, the court may decide to grant absolute discharge if at the same time e.g. a compensatory measure is imposed “and the aims of the penalty are fulfilled by that measure.” It follows that a compensatory measure in the form of an obligation to remedy damage can be used instead of a penalty. Accordingly, the aim of the penalty can be fulfilled by this measure, unlike in the case of a civil-law measure. This brings us to the problem of fulfilment of the aims of the penalty by the obligation to remedy damage (irrespective of the provisions of art. 59 of the Criminal Code, which additionally confirm that). Legal scholars stress that the obligation to remedy damage serves not only an obvious compensatory function, but also other functions traditionally assigned to the penalty.<sup>14</sup> Compensation for the damage/harm resulting from an offence brings a sense of justice. By highlighting the need to compensate for the damage, it also reminds the offenders that crime does not pay. Therefore, the obligation to remedy damage has a deterrent effect, both specific, on the offender, and general,

<sup>13</sup> M. Łukasiewicz, A. Ostapa, “Obowiązek naprawienia szkody — wybrane zagadnienia,” *Prokuratura i Prawo* 2001, no. 9, pp. 55–56.

<sup>14</sup> See *inter alia*: Z. Sienkiewicz, “Kilka uwag o funkcjach obowiązku naprawienia szkody w projekcie kodeksu karnego,” *Przegląd Sądowy* 1994, no. 1, p. 80 ff.; Z. Sienkiewicz, *Obowiązek naprawienia szkody w systemie środków karnych projektu kodeksu karnego. Współczesne problemy nauk penalnych*, Wrocław 1994, p. 6 ff.; Z. Sienkiewicz, “Środki karne o charakterze majątkowym w projekcie kodeksu karnego,” [in:] *Problemy nauk penalnych. Prace ofiarowane Pani Profesor Oktawii Górniok*, ed. L. Tyszkiewicz, Katowice 1996, p. 147; R.A. Stefański, “Kompensacyjna rola środka karnego obowiązku naprawienia szkody,” *Czasopismo Prawa Karnego i Nauk Penalnych* 2002, no. 2, pp. 133–135; R. Giętkowski, “Hierarchia funkcji karnoprawnego obowiązku naprawienia szkody i jej znaczenie w praktyce,” *Palestra* 2003, no. 11–12, pp. 128–138; R. Giętkowski, “Czy naprawienie szkody mogłoby się stać jedną z kar w przyszłym polskim prawie karnym,” *Przegląd Sądowy* 2004, no. 9, pp. 112–114; M. Szewczyk, “Kilka uwag dotyczących odszkodowania jako środka karnego w projekcie kodeksu karnego,” *Palestra* 1995, no. 1–2, p. 71; P. Hofmański, “W sprawie tzw. kompleksu cywilnoprawnego w procesie karnym. Nowe propozycje,” [in:] *Współczesne problemy procesu karnego i wymiaru sprawiedliwości. Księga ku czci Profesora Kazimierza Marszala*, eds. P. Hofmański, K. Zgryzek, Katowice 2003, p. 136; E. Hryniewicz, M. Reszko, “Odszkodowanie i zadośćuczynienie w świetle art. 46 Kodeksu karnego — uwagi krytyczne i propozycje zmian,” *Monitor Prawniczy* 2007, no. 6, p. 288; Z. Gostyński, op. cit., pp. 52–56; A. Muszyńska, op. cit., p. 135.

on the whole society. Finally, it is very valuable in educational terms, since it reminds the offenders of the consequences of their actions. At the same time, the burdensome obligation to remedy the damage imposed on the offender is of real benefit to the aggrieved party and the whole society. This only shows that the compensatory function, which represents the essence of this penal-law measure, does not *se ipse* hinder fulfilment of the other, traditional functions of penalty.

The civil-law approach to the obligation to remedy damage is also undermined by the differences as to when the criminal-law and civil-law obligation arises. Given that an obligation to remedy damage as a compensatory measure imposed on the basis of a criminal law provision does not arise until it has been imposed by a final and binding decision, it should be concluded that an imposition of such a measure is constitutive in nature.<sup>15</sup> An obligation to remedy damage caused by a wrongful act, governed by civil law, arises by operation of law (and not by virtue of a court order) and at a different time (i.e. when the damage is caused — compare art. 415 of the Civil Code). An order of the civil court imposing an obligation to remedy damage acknowledges the existence of an obligation and entitles the aggrieved party to seek state assistance in enforcing performance of the obligation. Therefore, an obligation to remedy damage imposed in the form of a compensatory measure cannot be deemed a civil-law obligation.

Although art. 46 § 1 of the Criminal Code sets out that civil law provisions shall be used when imposing an obligation to remedy damage, it is clear that not all of these provisions can be applied in their full scope. It is not only a matter of excluding the application of the provisions on awarding annuity, as its uncertain duration and amount is not compatible with the criminal-law *nulla poena sine lege* principle. It is also a matter of limited application of one of the fundamental principles of civil law — the principle of full compensation for the damage caused (art. 361 § 2 of the Civil Code) — by allowing the courts to impose an obligation to remedy damage only in part, especially when evidence presented in the criminal case is insufficient to establish the full extent of the damage. Similar considerations apply to the requirement of direct causal relation-

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<sup>15</sup> Z. Gostyński, op. cit., p. 29.

ship between the offence and the damage, as well as the requirement to establish a link between the damage and the features of an offence, which are not set out in civil law. Under the latter requirement, also damage which has only an indirect causal relationship with an offence and is separate from its features shall be redressed. The scope of redress in this case is broader than provided for by criminal law. The form of compensating for harm done is also different in criminal law, as it always takes the form of monetary performance (damage/harm). On the other hand, in civil law, pursuant to art. 24 § 1 of the Civil Code, non-financial damage may be redressed, among others, by performing the actions necessary to remove the effects of the infringement of a personal interest, in particular by making a relevant statement or by paying an appropriate amount of money to a specific public cause. In addition, the issue of interest is also regulated differently. In criminal law, the interest can be awarded *pro futuro*, in case the delay occurs after the date of the judgement (the final and binding judgement in criminal proceedings is the ultimate limit here), whereas, in civil law, interest shall be awarded from the time the debtor was requested to repay the debt (render a performance), or even from the time the damage was caused (alternatively, from the date of the service of the claim). Even these purely illustrative examples show that the scope of application of provisions of the civil law is contingent upon the needs of criminal law, which once again proves that the obligation to remedy damages is criminal-law in nature.<sup>16</sup>

Continuing with the analysis of that last issue, it should be taken into account that judgements imposing an obligation to remedy damage or compensate the aggrieved party for a harm done, pursuant to art. 107 § 2 of the Code of Criminal Procedure, are deemed judgements on property claims if they are enforceable in accordance with the provisions of the Code of Civil Procedure. The use of the term “are deemed” in this provision indicates that these judgements are not in their essence judgements on property claims; however, the statute requires that they are treated as such.<sup>17</sup> As a matter of fact, when a compensatory measure in the form of an obligation to remedy damage is imposed by the court, criminal liability is also decided. To some extent, incidentally, by applying civil-law

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<sup>16</sup> See more: T. Dukiet-Nagórska, op. cit., pp. 39–53.

<sup>17</sup> Z. Gostyński, op. cit., p. 30.

provisions to this obligation, civil liability (concerning property claims) is being decided as well, and, therefore, the court's decision on criminal liability can serve as a ground for civil law enforcement.<sup>18</sup>

Civil-law regulations do not cover the period of limitation for enforcement of the obligation to remedy damage as a compensatory measure, which is regulated by the provisions of criminal, and not civil law. In accordance with the Criminal Code, civil-law provisions shall be applied only when the court imposes an obligation to remedy damage. However, with regard to other aspects of this obligation, no reference to civil law was made.<sup>19</sup> It follows from the above that the period of limitation for enforcement of compensatory measures was addressed in an autonomous way in art. 103 § 2 in conjunction with § 1 (3) of the Criminal Code, and civil law does not apply to this institution.<sup>20</sup> Under the above-mentioned provision, this compensatory measure may not be enforced if 10 years have passed from the time when the judgement of conviction became final and binding. According to the Civil Code, a claim upheld by a final and binding decision of a court also becomes barred by the statute of limitations after 10 years (art. 125 § 1 of the Civil Code). However, due to the provisions of art. 123 and 124 of the Civil Code, which provide for an interruption of the running of the limitations period, the limitations period in this case is shaped differently than in criminal law. The running of the limitations period is interrupted by any action before a body authorised to enforce claims, undertaken directly to satisfy or secure a claim, and after each interruption the limitations period starts running anew (however, if the running of the limitations period is interrupted by the above-mentioned action, the limitations period does not run anew until the proceedings before a competent body are concluded). This solution has no counterpart in criminal law.<sup>21</sup> Based on the comparison of these two institutions, it is clear that performance of an obligation to remedy damage as a com-

<sup>18</sup> R. Giętkowski, "Obowiązek...", p. 402.

<sup>19</sup> S. Tarapata, "Przedawnienie i zatarcie skazania," [in:] *Nowelizacja prawa karnego 2015. Komentarz*, ed. W. Wróbel, Kraków 2015, p. 781 ff.

<sup>20</sup> P. Gensikowski, "Charakter prawny obowiązku naprawienia szkody lub zadośćuczynienia za doznaną krzywdę w świetle projektów nowelizacji kodeksu karnego," [in:] *Reforma prawa karnego materialnego i procesowego z 2015 roku. Wybrane zagadnienia*, eds. D. Kala, I. Zgoliński, Warszawa 2015, pp. 74–75.

<sup>21</sup> R. Giętkowski, "Obowiązek...", p. 403.

pensatory measure always becomes barred by the statute of limitations in a fixed term, i.e. after 10 years have passed from the time when the judgment of conviction became final and binding.<sup>22</sup> On the other hand, the limitations period for a civil claim upheld by a final and binding decision of a court depends upon the actions of the creditor and the effectiveness of the enforcement proceedings. If the creditor repeatedly, at intervals of less than 10 years, files with a court enforcement officer an application to commence enforcement proceedings which is each time ineffective, the civil claim may never become barred by the statute of limitations. For this reason, an obligation to remedy damage imposed as a compensatory measure cannot be deemed a civil-law obligation.

This brings us to the final issue, namely, the possibility to impose an obligation to remedy damage as a probationary condition. Since an obligation to remedy damage as a probationary condition has its “own autonomous substantive legal basis,” the observations concerning its criminal-law nature and detachment from civil-law basis of the aggrieved party’s claims, do not lose their relevance.<sup>23</sup> As a result, civil-law provisions cannot constitute the basis for redressing the damage in this case. They can be applied only in an ancillary manner, where no separate criminal law regulations exist, in particular in relation to the extent and manner of redressing the damage. Nevertheless, even in such cases, the application of provisions of the civil law cannot be contrary to the core of the criminal-law obligation to remedy damage as a probationary condition. By contrast, in the case of a compensatory measure, the said provisions are to be applied directly, as they stand. Also the functions of the obligation to remedy damage as a probationary measure were shaped differently than in the case of an obligation imposed as a compensatory measure. In the first case, the rehabilitative function comes to the fore, whereas in the second, the compensatory function prevails. The provisions of the Criminal Code impose an obligation to remedy damage on the offender mainly to educate him. Hence, the offender and educational objectives set for him are placed in the spotlight, whereas the aggrieved party and their civil rights protection takes second place. Penal-law functions are espe-

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<sup>22</sup> Ibid.

<sup>23</sup> See more: A. Muszyńska, *op. cit.*, pp. 170–180.

cially visible when the court orders that the suspended sentence shall take effect or that conditionally discontinued proceedings shall be resumed due to the non-performance of the obligation to remedy damage.<sup>24</sup> Accordingly, the obligation to remedy damage imposed in connection with probationary measures not only places heavy emphasis on the penal-law function, but also bears distinct civil-law consequences relating to the fact that the court can determine the time of execution of the imposed obligation (art. 74 of the Criminal Code). These differences provide yet another reason why the obligation to remedy damage cannot be equated with the award of civil claim.

To sum up, it is important to stress that the amendments introduced by the amending Act to the obligation to remedy damage or compensate for harm done, as provided for in art. 46 of the Criminal Code, are difficult to evaluate. There is no doubt that broadening the scope of application of the civil-law provisions in relation to this obligation enhances its compensatory abilities and allows us to avoid most of the problems that judicial practitioners were confronted with in the previous legislative framework. Furthermore, it helps to unify legal regulations concerning redressing the damage in the Polish legal system. Nevertheless, changing the name tag is not sufficient to recognise that the legislators' assertions are entirely certain and to accept that the obligation to remedy damage has been transformed into a pure civil action within the criminal proceedings. Given the above arguments, it follows that the essence and the form of the obligation to remedy damage are still criminal-law in nature, although its content, by the operation of criminal law, is highly influenced

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<sup>24</sup> If the obligation to remedy damage is imposed in connection with the conditionally suspended sentence of imprisonment, persistent non-performance of this obligation as a compensatory measure is a ground for discretionary execution of the sentence (art. 75 § 2 of the Criminal Code). Alternatively, it can be a ground for converting a conditionally suspended sentence to the penalty of restriction of liberty or fine (art. 75a § 1 of the Criminal Code). If the offender, after this conversion, still fails to perform the imposed compensatory measure, the court reverses the conversion and applies a mandatory execution of the sentence of imprisonment (art. 75a § 5 of the Criminal Code). The penal-law nature of this measure is also emphasised when the penalty of restriction of liberty is imposed together with an obligation to remedy damage as a compensatory measure. An offender cannot be released from the remainder of the sentence, as prescribed by art. 83 of the Criminal Code, if he has not performed this obligation.

by civil law. Taking all of the above into consideration, it seems safer to conclude that in the current state of affairs there is a criminal-law obligation to remedy damage shaped in accordance with the provisions of the civil law.<sup>25</sup>

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<sup>25</sup> See: R. Giętkowski, “Obowiązek...,” p. 404; T. Dukiet-Nagórska, op. cit., p. 53.

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### Summary

In this paper the authors analyse the legal nature of an obligation to remedy damage following the changes introduced by the so-called February amendment. The authors prove, in numerous ways, that despite lawmakers' declarations, the legal nature of this measure has not changed significantly. Its compensatory abilities were enhanced; nevertheless, the change of the name tag is insufficient to assume that the obligation to remedy damage has become a pure civil act in criminal proceedings. The essence and structure of an obligation to remedy damage are still criminal-law, although its content, by the operation of criminal law, is highly influenced by civil law. As a result, in the case of this measure we are dealing with a criminal-law obligation to remedy damage shaped in accordance with the provisions of civil law.

**Keywords:** obligation to remedy damage, compensation, criminal law.