

A duty to repair damage (art. 46 of the P.C.) in accordance with the Polish Penal Code

by

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According to the Polish Penal Code, a duty to repair damage belongs to a category of punitive measures, which means that it is one of fundamental forms of reactions of the State to the fact of crime commitment and resulting damage. The basic purpose of the measure is the direct consideration of the interest of the victim. Thus, the repair of damage resulting from crime, one of the postulated purposes of punishment in contemporary penal law, is fulfilled².

Penal law enables an individual the repair of damage caused to a victim as a result of crime, provides mechanisms which enable the pronouncement of a duty to repair damage as a punitive measure (art. 46 § 1 and 2 of the P.C.³), as well as a so called probation clause (art. 67 § 3, art. 72 § 2 the P.C.), or may be pronounced in the event of a custodial sentence (art. 36 § 2 of the P.C.). The diversity of measures and forms, which assume a legally substantive, as well as trial nature, proves that the position of damage repair is significant in the area of penal law application.

The essence of a punitive measure in the form of a duty to repair damage or compensation for damage suffered is based on an assumption that one of the purposes of a penal process is solving the conflict between the perpetrator and victim, and the solution or settlement of the conflict is, for instance, the repair of damage caused by crime (**compensating function of criminal law**); Buchała (in:) Buchała, Zoll, p. 358-359. In the verdict as of 23 June 2009 (V KK 124/09, LEX no. 519632) the Supreme Court pronounced as follows: *"From the very essence of the punitive measure provided for in art. 39 item 5 of the P.C. and art. 46 § 1 the P.C. points to its penal, coercive character whose secondary function is compensation."*

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² M. Cieślak, O węzłowych pojęciach związanych z sensem kary, Nowe Prawo 1969, nr 2, s. 211

³ Art. 46 k.k. § 1. W razie skazania sąd może orzec, a na wniosek pokrzywdzonego lub innej osoby uprawnionej orzeka, obowiązek naprawienia wyrządzonej przestępstwem szkody w całości albo w części lub zadośćuczynienia za doznaną krzywdę; przepisów prawa cywilnego o przedawnieniu roszczenia oraz możliwości zasądzenia renty nie stosuje się.

§ 2. Zamiast obowiązku określonego w § 1 sąd może orzec nawiązkę na rzecz pokrzywdzonego

a) The premises of adjudication of a duty to repair damage

The adjudication of a duty to repair damage under art. 46 § 1 of P.C. depends on conviction of the perpetrator, in other words, on the statement of guilt of the perpetrator and arising of damage caused to a specific victim. *“According to art. 46 § 1 the P.C., to adjudicate a duty to repair damage, it is not enough to sentence for any crime referred to in this rule, but it must be a crime committed to the detriment of a person who claims for the repair of damage resulting from the crime, in other words, is a victim of the crime the perpetrator was sentenced for” (the verdict of the Supreme Court as of 4 March 2003, III KK 127/02, KZS 2003, p. 7–8, item 18).*

There is no limited catalogue of crimes whose commitment may justify the duty to repair damage.

In case of a conditional dismissal of proceedings, the possibility to pronounce this measure will depend on whether the conditional dismissal will be treated as a sentence or not. One should accept the position which explicitly supports the impossibility of pronouncement of a duty to repair damage in the event of a conditional dismissal of proceedings, claiming that the conditional dismissal is not a sentence by virtue of art. 46 of the P.C.⁴ In the event of a conditional dismissal, imposing the duty to repair damage is obligatory as a probation condition (with all consequences of a failure to observe the probation conditions).

b) The existence of damage and scope of its compensation as a duty to repair damage

The fundamental condition to pronounce the duty to repair damage is the necessity to determine the victim of the crime, and the existence of damage which was not compensated due to actions taken in the course of criminal proceedings. The essence of the duty to repair damage is not a form of punishment, but, in particular, its purpose is to compensate for the damage the victim suffered because of the crime.

In conditions referred to in art. 46 § 1 the P.C., the Court is obliged to pronounce the duty to repair damage, if the damage resulting from a crime was determined and proved (the Supreme Court verdict as of 21 November 2002, III KKN 269/00, LEX no. 74459). *“Damage to the repair of which the perpetrator is obliged by the court, is the equivalence of the real damage*

⁴ Z. Gostyński, *Obowiązek Naprawienia szkody w prawie karnym*, Wydawnictwo prawnicze 1999, p. 88).

resulting directly from the crime, and shall not be permissible in the process of determination of the scope of its components and elements resulting from the effects of the deed, e.g. interest. The verdict of the Supreme Court as of 4 February 2002, II KKN 385/01, LEX no. 53028. Similarly, the *“Punitive measure in the form of a duty to repair damage imposed by virtue of art. 46 § 1 the P.C. is only limited to the extent of the real damage resulting directly from the crime and excluding interest which constitute an element of damage resulting from the effect of the deed committed by the perpetrator.”* The verdict of the Supreme Court as of 1 February 2011 III KK 243/10

In case of any doubt concerning the extent of the damage, the Court cannot send the case to undergo separate civil proceedings, but it settles it within the frames of available evidence. Nevertheless, if the whole damage is impossible to determine, the Court pronounces the duty to repair damage in part. The duty to repair damage in part should also be pronounced if the damage was repaired in part by the perpetrator before the verdict.⁵

“The repair of the damage referred to in art. 46 § 1 of the P.C. means, in particular, the compensation of damage suffered by the victim. At the moment of verdict, the criminal court must provide for the extent of the damage already repaired, mainly the value of property which was previously recovered in non-deteriorated condition. The repair of damage referred to in 46 § 1 of the P.C. is, in particular, the compensation of damage suffered by the victim.” The verdict of the Supreme Court as of 29 March 2011 III KK 392/10

Article 46 § 2 of the P.C. says that compensatory damages may be pronounced in favour of the victim (only), which leads to the conclusion that it is excluded in case of a sentence for a crime of manslaughter. *The verdict of the Supreme Court as of 1 October 2010 IV KK 46/10*

The pronouncement of the measure in question is possible in case of a sentence for any crime which leads to damage or causes harm to the victim. The pronouncement of the measure **shall not be limited by the type of crime committed**. The concept of damage and harm is to be defined in accordance with their civil law understanding, i.e. damage as property (material) damage, and harm as nominal (non-material) damage, and thus the “compensation” of the

⁵ A. Marek , LEX 2010, Komentarz do art.46 Kodeksu karnego, Stan prawny: 2010.03.01

other damage is to be referred to as "compensation", however the damages cover the repair of damage as property damage.⁶

If the guilt of the perpetrator was proven, the Court may refuse to repair the damage referring, for instance, to the inability or difficulty as far as the scope of damage is concerned. In such event, the Court must conduct an evidentiary hearing in order to determine the value of damage caused as a result of the crime, or adjudge the duty to repair damage in the part already proven. The pecuniary measure does not have to cover full insurance. The criminal court may restrict itself to a particular manner of damage repair (e.g. restitution) or its repair in part only. In such event, full damages may be claimed by civil action.

Damage subject to repair due to the pronouncement of the measure covers *damnum emergens (real damage) and lucrum cessans (lost benefits)*⁷

"Damage the repair of which the perpetrator is obliged to by the Court is equal to the real damage resulting directly from the crime, and to determine its value it is not permissible to consider the components and elements of damage resulting from the deed effects, such as interest" The verdict of the SC as of 4 February 2002, II KKN 385/01, V KK 149/09, LEX no. 53028).

Article 46 of p.c. says that "the Court may pronounce "a duty to repair the damage caused as a result of a crime in whole or in part, or compensate for the harm suffered". As results from the aforementioned, the duty of damage repair is pronounced as a punitive measure. It must be connected with a material, as well as non-material damage (harm).

The punitive measure in question may be also pronounced in the event of another entity obliged to repair damage (e.g. the insurance carrier).

"The use of automotive liability insurance by the perpetrator of a crime against the safety of communication in case of damage resulting from the traffic of the vehicles does not exclude the order to pronounce the duty to repair damage (art. 46 § 1 of the P.C.), or the possibility to adjudicate compensatory damages, instead of the foregoing duty, in art. 46 § 2 of the P.C.)"; The verdict of the SC as of 20 June 2000, I KZP 5/00, OSNKW 2000, no. 7-8, item 55.

⁶ Budyn-Kulik Magdalena, Kozłowska-Kalisz Patrycja, Kulik Marek, Mozgawa Marek, Komentarz do art.46 Kodeksu karnego, Stan prawny: 2010.09.08

⁷ Por.Z. Gostyński, Obowiązek Naprawienia szkody w prawie karnym, Wydawnictwo prawnicze 1999,s. 78-83.

For the Court to pronounce the duty to repair damage, the damage must exist at the moment of pronouncement. Therefore, one must assume that the existence of damage at the moment of pronouncement constitutes a premise to pronounce a punitive measure in question (cf. the verdict as of 4 February 2002 (II KKN 385/01, LEX no. 53028))

The nature of the duty to repair a damage or compensation for harm by virtue of art. 46 of the P.C. is criminal, hence no rules of the civil law are applied to the statute of limitations on claims or possibility to adjudge allowance; the foregoing means that only the statute of limitations to prosecute crimes referred to in art. 101 of the P.C. et seq are final here.

Instead of the foregoing duty, the code allows the possibility to pronounce **compensatory damages** by the court, which is optional, though. The purpose of the compensatory damages is to compensate the damage suffered as a result of a crime; the amount of compensatory damages is defined in art. 48 of the Penal Code. The pronouncement of a duty to repair damage excludes the possibility to adjudge compensatory damages to the victim for the same crime, the verdict of the Arbitration Court in Krakow as of 27 February 2007, II AKa 25/07, Judicial Decisions 2007, no. 10, item 25.

c) A motion of the victim as an evidence pointing to the obligatory adjudication of repair of the damage

The adjudication of a duty to repair damage or compensate for a harm suffered shall be obligatory in case a motion is filed for the adjudication of the measure by the victim, cf. art. 49 of the Code of Criminal Procedure (C.C.P.), or another authorised person (cf. art. 49a of C.C.P., 51 of C.C.P. and 52 of C.C.P.).

In case civil action was not instituted, the entities entitled to file a motion are **the victim, as well as the prosecutor**. Until the end of the interrogation of the victim in the course of the main hearing, the prosecutor may file a motion for the adjudication of the duty to repair damage referred to in 46 of the P.C. (art. 49a of the C.C.P.).

In the verdict as of 17 June 2009, II AKa 93/09, KZS 2009/10/37, LEX no. 552034 the Court of Appeals in Krakow pronounced that *"the provision of art. 46 § 2 of the P.C. authorises to adjudge the compensatory damages from the in favour of the victim in the strict sense, in other words, in favour of the person referred to in art. 49 of the C.C.P., and not in favour of*

so called alternative parties, in other words persons who only exercise the rights of the victim after his or her death".

The adjudication of the compensatory damages by the Court by virtue of art. 46 § 2 shall not depend on an additional motion of the victim, however, it may take place if the victim or the prosecutor filed a motion referred to in art. 46 § 1 (see the verdict of the Arbitration Court in Gdańsk as of 7 March 2002, I AKa 579/01, KZS 2002, c. 10, item 93).

An alternative to the motion for the adjudication of a duty to repair damage is for the victim the institution of a **civil action**, art. 62 et seq of the C.C.P. Until the beginning of the court proceedings in the course of the main hearing, the victim may institute a civil action against the defendant with a view of claiming property damages resulting directly from the crime (adhesion claim) in a criminal prosecution. The adhesion claim may be directed only against the defendant.

Regarding the enforcement of claims the Court which adjudicated on property claims upon demand of an authorised person appends the enforcement clause to a verdict subject to be executed. The adjudication on property claims imposes a duty to repair damage or compensate for harm, as well as compensatory damages adjudicated in favour of the victim, if they may be executed by virtue of the roles of the Code of Civil Procedure (art. 107 of the C.C.P).

The duty to repair damage is determined among other factors by whether one or more persons (complicity) are responsible for the damage. Therefore, a doubt arises whether in the event of responsibility for a crime under conditions referred to in art. 46 § 1 the Court should adjudicate on the duty to repair damage, in consideration of the structure: joint liability, the liability of any of the accomplices to repair the damage in full, without the determination of their liability as joint, or making the liability of each of the accomplices equal or *pro rata parte*.⁸

In its verdict as of 26 October 2000 II Aka 133/2000, Judicial Decisions 2002, c. 1, item 18, the Court of Appeals in Lublin explained that *"The duty to repair damage provided for in art. 46 § 1 of the P.C. constitutes a pecuniary measure, in the adjudication of which one must follow the rules of the civil law which concern the determination of the scope of the property damage or harm suffered. However, a pecuniary measure may be adjudicated jointly, as it results from the essence of the pecuniary measure which either exists apart from the*

⁸ Szewczyk Maria, , Zoll Andrzej, Zakamycze 2004, Komentarz do art.46 Kodeksu karnego

fundamental penalty, or, in some cases, may be adjudged intrinsically. Judicial Decisions 2002/1/18, KZS 2002/2/47, Judicial Decisions 2002/6/9". One may thoroughly concur with the foregoing position of the Court.

The opinion of the Supreme Court expressed under the P. C. as of 1969 in the justification of the resolution of seven judges as of 15 July 1971 (OSNKW 1971, c. 10, item 144), in which the Supreme Court indicated the individual nature of the duty to repair damage, as well as the subsequent unacceptability of its adjudication in the form of joint liability, remains valid.

However, note another resolution of the Supreme Court as of 13 December 2000, which assumes the possibility of joint liability of accomplices by virtue of art. 46 § 1 of the P. C. *"The adjudication of the pecuniary measure provided for in art. 46 § 1 of the P.C. is also permissible in the form of joint obligation of the accomplices to repair the damage in whole or in parts"* SN I KZP 40/00, OSNKW 2001, no. 1-2, item 2. Theoretically, the different resolution is contrary to the guaranteed rule of penal liability individualisation and individualisation of application of penalties and pecuniary measures (cf. M. Szewczyk, A comment to art. 46 of the Penal Code)

"By virtue of art. 415 § 5 c. 2 of the C.P.P., compensatory damages in favour of the victim, the duty to repair the damage or compensation for the suffered harm shall not be adjudicated on if the claim resulting from the crime is the subject of another proceeding or if the claim was lawfully adjudicated on. Moreover, the foregoing ban refers to each case of the criminal duty to repair damage, referred to in the statute, art. 36 § 2, art. 46-47, art. 63 § 3, art. 72 § 2, art. 212 § 3, art. 216 § 4, art. 290 § 2 of the P.C., namely also to the obligation to repair damage with the conditional suspension of the penalty" (The verdict of the Supreme Court as of 3 September 2009, V KK 149/09, Biul. PK 2009, no. 8, p. 17).

In accordance with art. 46 § 2, instead of the duty to repair damage, the Court may adjudicate compensatory damages in favour of the victim.

In accordance with the foregoing deliberations, the duty to repair damage, referred to in art. 46 § 1 of the P.C. constitutes a pecuniary measure. The rules of civil law shall apply to the duty to repair damage. Furthermore, the execution of this measure does not take place ex officio, but in the civil law mode, whereby, on demand of the victim or another authorised person, the Court appends the enforcement clause to the adjudication by virtue of art. 107 of the C.C.P.

Note that the basis for the adjudication of the duty to repair damage shall not be the rules of the Code of Criminal Procedure, but the rules of the Substantive Criminal Law.