

The essence and character of an expert opinion as evidence in Polish civil trial

Istota oraz charakter dowodu z opinii biegłego w polskich procesach cywilnych



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Abstract

In the Polish civil litigation procedure, the cases concerning medical errors always require an expert opinion for the court to assess doctor's due diligence. The court does not have specialist knowledge, thus their decision, if not taken based on a specialist opinion, is procedurally incorrect. Expert's opinion can be effectively questioned by each of the parties of the dispute, which may lead to either complementary or further opinion. Every specialist opinion of an expert in civil law disputes concerning medical errors has to meet the requirements of integrity, logic and be comprehensive enough.

Key words: medical error, civil trial, expert's opinion

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Following Article 278 [1] of the Polish Code of Civil Procedure (hereinafter the 'CCP'), in cases requiring specialist knowledge, the court — having heard the parties' motions as to the number and selection of expert witnesses — can appoint one or more experts to seek their opinion. If the case cannot be resolved without specialist knowledge, expert opinion evidence is a necessity [1]. Hence, if the case requires an expert opinion, such evidence cannot be substituted with any other evidence [2].

An expert opinion, just as any other evidence, shall be subject to free evaluation by the court, both concerning formal requirements and the evidentiary value. If an expert opinion fails to provide a professionally grounded rationale in support of its conclusions, this will prevent the appropriate evaluation of its evidentiary value, with the result being that any judgment based on such an opinion would exceed the limits of free evaluation of evidence [3]. The subject-matter of an expert opinion is not the presentation of the facts but their evaluation based on expert knowledge (specialist knowledge) and, therefore, an expert opinion is

not subject to the same true-or-false verification as a piece of evidence used to establish the facts [4].

In a civil case, unlike a criminal trial, the lawmakers have not specified the constituent elements of an opinion allowing it to be accepted as correct; hence, the only statutory requirement is for the opinion to contain a rationale [5]. In principle, however, the court, when analysing such evidence in the case, cannot base their conviction concerning the existence or non-existence of circumstances the examination of which require specialist knowledge solely on the basis of the conclusions of the expert's opinion.

The body of court decisions points out that the court ought to verify that the various elements contributing to the accuracy of the conclusions are correct, emphasizing the established criteria for the evaluation of such type of evidence in civil proceedings — the principles of logic and the level of the expert's knowledge, uniformity and universality of the method used, the certainty of scientific research results, professionalism, reliability, sound logic, exhaustiveness and completeness of the opinion, and its firmness [6].

In matters concerning medical errors, it is not the court's role to evaluate the expert's opinion for consistency with medical records and treatment provided, but to evaluate the opinion based on the specified criteria [7]. The opinion should also be exhaustive, for it serves as evidence to evaluate factual circumstances from the perspective of the expert's specialist knowledge [8]. On the other hand, the role of an expert is not to make independent findings of fact relevant to the application of a specific legal norm but only to cast light on the circumstances being explained from the perspective of specialist knowledge, having regard to the material gathered at trial [9].

The purpose of the expert's opinion as a piece of evidence is to enable the court to make a proper evaluation of the evidence material gathered in the case, without, however, being in itself capable of serving as a source of the factual material in the case, let alone as a basis for determining the existence of the facts being the subject matter of the evaluation itself [10]. In the evaluation of an expert opinion in the context of its utility in arriving at the judgment, it is of significant importance whether the opinion gives a reliable and unambiguous answer to the questions posed by the court [11]. For it is of the essence that the conclusions of the expert's opinion be firm and unequivocal [12]. The expert's task is not to determine the facts of the case [13]. The expert's duties and powers do not include resolving points of law. The application and interpretation of legal provisions belong to the court, not to the expert [14].

The expert's opinion is subject to evaluation by the adjudicating court both as to its exhaustiveness and consistency with formal requirements and as to its persuasive value [15]; the court, however, is not under a duty to strive to reach the situation where the parties to the proceedings are persuaded by the expert's opinion – it is enough that the court has been persuaded by the expert opinion [16]. The methodology of accepting evidence derived from an expert opinion is such that it should not be limited to filing the opinion with the case record; the expert should be summoned to the hearing so that the parties could pose their questions [17]. If a party raises objections as to the expert's written opinion and consequently moves to summon the expert to a hearing so that they give oral explanations as to the objections raised, then failure to grant such a motion is a procedural error justifying an appeal [18].

If needed, the court is obliged to admit evidence from additional experts or the opinion of an institute, which happens when the opinion initially admitted contains significant gaps, is incomplete so that it does not respond to the challenges posed by the evidence, or when it is unclear, i.e. not properly reasoned, or unverifiable [19]. If the expert has responded to the objections to the opinion, then there is no need to admit evidence from an opinion of further

experts, since the need to appoint an additional expert should arise from the circumstances of the case and not from the party's dissatisfaction alone [20].

The existence of a procedural need in the specific case determines the necessity of requesting an additional opinion from the same or other experts [21]. From Article 286 CCP it follows that the court may demand an oral explanation of an opinion submitted in writing, and it may demand an additional opinion from the same or other experts if needed [22].

The Court must admit evidence stemming from an additional expert opinion if it has been found that the expert opinions already available to the court are not sufficient to explain the case [23]. The Court, however, does not enjoy arbitrary freedom to appoint additional experts, and it is up to the parties to demonstrate circumstances justifying the appointment of another expert [24]. A party to the trial, when demanding the opinion of a different expert, must show that the prior opinion is incomplete, unclear or contains an inconsistency. As noted, a party dissatisfied with the expert's opinion cannot insist on demanding additional experts until one of them submits an opinion 'demonstrating' what the party 'intends to prove' [25].

If two opinions are issued in the case by experts in the same speciality field, then the need to appoint another expert arises when the existing expert opinions come with equally persuasive reasoning but differ only in the expert conclusions arising from such opinions [26]. Hence, the courts note that, as a consequence of the principle of adversarial trial, the party should show the necessary activity and demonstrate such errors, inconsistencies or other defects in expert opinions as may disqualify such an opinion or justify the appointment of additional experts; however, the decision whether to appoint new experts, belongs to the court and depends on the merits of the evidentiary motions [27].

The opinion of a scientific or research institute is not a separate type of evidentiary measure, but a type of evidence based on an expert opinion, used in complicated cases requiring broader consultation [28]. The institute's opinion is not 'super evidence' binding on the court adjudicating the case; it is subject to the court's evaluation the same as all other evidence [29]. However, such an opinion, being the collective work of a scientific institute, enjoys that institute's scientific authority and therefore a higher rank than the evidence derived from an individual expert opinion [30]. The institute's opinion extends only to views uniformly or predominately represented in it; hence, the personal views of one of the co-authors cannot form the basis for the court's findings [31]. Admitting evidence from the opinion of a scientific or research institute will be expedient and justified when the problem the court has to evaluate requires, due to its complexity, explanation by

specialists with a particularly high degree of theoretical preparation and when it is necessary to include the findings of the most recent research, and when contradictions in opinions already available cannot be eliminated otherwise [32].

The institute's opinion given at the court's request should be adopted collectively, after jointly conducting the research, and should reflect the position not of any individual persons but the institute as a body [33]. The opinion should list not only the full names of those who conducted the research and issued the opinion but also their academic degrees and professional positions, specifying the field in which they specialize [34]. Irrespective of the knowledge and experience of those selected by the institute to issue the opinion, they can consult within a broader circle of specialists at the relevant unit, which guarantees a more thorough examination of the case [35]. In principle, the private opinion of a court expert or institute

does not constitute the evidence of special knowledge. In a civil trial, such type of evidence is regarded as evidence stemming from a private document and is subject to evaluation within the perception framework of the party relying on it. Evidence from an expert opinion admitted by the court and meeting the criteria developed based on the body of court decisions and output of legal scholars, or evaluation of such type of evidence from the perspective of its utility for resolving the case is of significantly greater evidentiary value.

Unquestionably, in civil proceedings evidence from an expert opinion cannot be substituted either by witness testimony or documentary evidence, for such types of evidence refer primarily to factual circumstances, while their evaluation from the perspective of specialist knowledge is possible only based on the evidence stemming from the opinion of an expert, whose role in the civil trial thus remains invariably significant [36].

Streszczenie

W polskim postępowaniu cywilnym sprawy dotyczące błędów medycznych zawsze wymagają opinii biegłego, aby sąd mógł ocenić należytą staranność lekarzy. Sąd nie posiada specjalistycznej wiedzy, dlatego jego orzeczenie, o ile nie zostało podjęte na podstawie opinii specjalisty, o tyle jest błędne proceduralnie. Opinia biegłego może być skutecznie zakwestionowana przez każdą ze stron sporu, co może prowadzić do opinii uzupełniającej lub dalszej. Każda specjalistyczna opinia eksperta w sporach cywilnoprawnych dotyczących błędów medycznych musi spełniać wymogi rzetelności, logiki i być dostatecznie wyczerpująca.

Słowa kluczowe: błąd medyczny, postępowanie cywilne, opinia biegłego

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