

# The judicial assessment of expert evidence in Polish criminal procedure

*A valoração judicial da prova pericial no processo penal polonês*

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**ABSTRACT:** In the article, the author addresses the issue of the judicial assessment of expert evidence in Polish criminal proceedings. Over the years, the reliance of the criminal justice system on experts increased dramatically. Nowadays, expert evidence plays a pivotal role in court disputes, directly influencing the outcome of judicial proceedings. Experience, however, shows that erroneous expert reports and flawed testimonies may lead to erroneous judicial decisions inflicting irreparable personal and social harm. Unfortunately, the existing model of forensic expert services in Poland is not prone to manipulations and in its current shape cannot guarantee the reliability of expert evidence. Several procedural and structural solutions have been proposed to enhance the credibility of court-appointed experts over recent years. The author examines their advantages and limitations to identify the ones that are realistic and workable.

**KEYWORDS:** criminal proceedings; evidence admissibility; expert evidence assessment; expert report and testimony; meta-expert; court scientific advisers.

**RESUMO:** Neste artigo, aborda-se a questão da valoração judicial da prova pericial no processo penal polonês. Ao longo dos anos, a confiança do sistema de

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*justiça criminal em especialistas aumentou dramaticamente. Atualmente, a prova pericial desempenha um papel fundamental nos processos judiciais, influenciando diretamente o resultado dos casos. A experiência, no entanto, mostra que laudos periciais e depoimentos errôneos podem levar a decisões judiciais equivocadas, causando danos pessoais e sociais irreparáveis. Infelizmente, o modelo existente de serviços periciais forenses na Polônia não é isento a manipulações e, em sua forma atual, não pode garantir a confiabilidade das provas periciais. Diante disso, propõe-se várias soluções processuais e estruturais para aumentar a credibilidade dos peritos nomeados pelo tribunal. Assim, são examinadas as suas vantagens e limitações para identificar aquelas que são realistas e viáveis.*

**PALAVRAS-CHAVE:** processo penal; admissibilidade da prova; valoração de prova pericial; laudo pericial e depoimento; meta-especialista; peritos do tribunal.

## 1. INTRODUCTION

Expert evidence plays a pivotal role in modern criminal proceedings, often directly influencing the judicial outcome of the case. As an exclusive product of specialist knowledge, expert evidence is impossible to replace with other means of evidence which makes it an indispensable source of the otherwise unavailable information<sup>2</sup>.

The evidential value of the expert's findings directly depends on their accuracy and reliability. Therefore, it is essential to ensure that the findings are based on sound methodology and adhere to established scientific standards. The substantive assessment of the expert's report can be, however, a challenging task for a criminal court trying to reach a decision on highly specialised scientific or technical issues.

It has been proven that erroneous expert reports and flawed testimonies may lead to erroneous judicial decisions inflicting irreparable

<sup>2</sup> D'ÉIRDRE, Dwyer. *The judicial assessment of expert evidence*. UK, Cambridge: Cambridge University Press, 2008. p. 75; SÁNCHEZ, Juan Sebastián Vera. Exclusión de la prueba pericial científica (de baja calidad epistémica) en fase de admisibilidad en procesos penales de tradición románica-continental: Diálogo entre dos culturas jurídicas, *Revista Brasileira de Direito Processual Penal*, vol. 7, no. 1, p. 376-377, 2021.

personal and social harm. Unfortunately, the existing model of court experts in Poland does not offer sufficient safeguards against unreliable and flawed expert evidence. There are no effective control mechanisms in place to govern private experts and forensic service providers. The lack of proper oversight creates a risk of errors and abuses, which in turn undermines the reliability and credibility of expert evidence presented in court. Over recent years, several solutions have been proposed to mitigate the situation, including the legalisation (formalisation) of the so-called meta-experts in criminal proceedings, the introduction of the institution of scientific advisors, obligatory certification, as well as the modification of the experts' enlistment procedure. The motivation for the study stems from the debate over the draft law on court experts that was submitted by the Polish Minister of Justice in 2019, and the practical challenges that its provisions might create in case the draft is approved by the Polish legislature.

The aim of the article is to highlight practical challenges related to the judicial assessment of expert evidence in general and, in particular, in Polish criminal proceedings, and examine the pros and cons of the proposed solutions. The author hypothesizes that in order to minimize the risk of expert-related judicial errors, a system of effective structural and procedural guarantees should be established and properly implemented. The author also theorizes that the abovementioned draft law provides only structural solutions, which by themselves can be insufficient. To effectively address the underlying issues, it is necessary to implement a comprehensive approach that includes both structural and procedural safeguards.

It should be mentioned that the issue of judicial evaluation of expert evidence has been addressed in numerous publications so far. Nonetheless, there is no doubt that the discussion is far from over. The study primarily focuses on Polish legal doctrine and case law. The author believes that the Polish experience could be valuable to the scientific community dealing with such a complex and important topic.

The article starts with a short historical introduction to the issue. Then the author describes the legal status of expert witnesses in the Polish criminal procedure and the current state of the forensic science service in the country. The next section is devoted to the evaluation criteria used by Polish courts in the judicial assessment

of expert evidence. In the discussion section, the author analyzes the merits and demerits of the proposed solutions.

## 2. EVOLUTION OF THE JUDICIAL APPROACH TO EXPERT EVIDENCE

The unique qualities of expert evidence have placed it at the centre of a long-run scientific debate. An influential German XIX century scholar K. J. Mittermeier wrote that experts should be treated as *judices facti* since the addressees of their reports, i.e., lawyers, generally lack the knowledge and experiences to properly assess the reliability of presented conclusions as well as scientific soundness of the methodology applied by the expert. Expert reports and their testimony should be treated as a special type of evidence that falls outside the court's assessment<sup>3</sup>. Following this view, a pre-revolution Russian scholar L. E. Vladimirov argued that judges should follow court experts like a blind man following his guide. According to him, lawyers are condemned to be incapable of critical understanding of expert evidence. Their skills, knowledge and experience are insufficient to conclude whether the presented conclusions are scientifically accurate and, therefore, trustworthy<sup>4</sup>. This theory seems to be rooted in the contemporary fascination with the promising new developments in natural sciences and in particular the rise of criminalistics. With time, practising lawyers recognised the complexity of the science behind new types of forensic analysis and became aware of the gap between common and expert knowledge. This gap became even more apparent with the rise of science-based forensic psychiatry – the interface of psychiatry and the law. On one hand, the forensic psychiatrists' opinion regarding the defendant's sanity was directly linked to one of the constitutive elements of the crime – historically, criminal liability required both

<sup>3</sup> MITTERMAIER, Carl Josef Anton. *Die öffentliche mündliche Strafrechtspflege und das Geschworenengericht in Vergleichung mit dem deutschen Strafverfahren*. Landshud, 1819, p. 57-58; SOLODOV, Denis. *Ocena dowodu naukowego w systemie kryminalistyki rosyjskiej*. Olsztyn-Szczecin: Volumina.pl, 2012, p. 56-57.

<sup>4</sup> VLADIMIROV, Leonid Evstafyevich. *Uchenie ob ugovolnyh dokazatelstvah*. Tula: Autograf, 2000, p. 224-227.

‘harm and fault’<sup>5</sup>. On the other hand, it was extremely difficult for the judges to assess this type of expert evidence due to the extensive use of specialized hermetic language, the existence of conflicting theories inside the discipline, and the general lack of precision. Nevertheless, in Europe, forensic psychiatrists were increasingly called upon to testify, and judicial judgements were gradually more tuned to their reports. In practice, the reliability of psychiatric assessments was established based on the experts’ public reputation and their ability to persuade laypeople of their diagnosis and prognosis<sup>6</sup>. The concept of court experts being *judices facti* offered an elegant solution to the problem allowing lawyers to overcome inevitable hurdles of the judicial assessment.

Over time, it became evident that court-appointed and especially party-hired experts could make false statements and were not prone to mistakes and biases. It was recognized that science itself was not static, free of conflicting theories and pseudoscientific methodology. In doctrine, increased the awareness that lawyers as the ones responsible for the outcome of the case should give expert evidence careful and comprehensive assessment. E. Locard, one of the pioneers of French “*criminalistique*”, wrote that “the ultimate goal of evidence examination is to produce the inner conviction of the judge, therefore all those who interact with criminal justice and above all judges, should have a suitable technical education that enables a clear and complete assessment of the value of the [expert] evidence”. “The judge has to acquire the ability to understand the technical methods used [by the experts] and evaluate the results, without which his internal belief could only be established based on blind faith”<sup>7</sup>. An Austrian professor of criminal law H. Gross considered expert reports to be the subject of the assessment, emphasizing the necessity of

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<sup>5</sup> VAN DER WOLF, Michiel; VAN MARLE, Hjalmar. Legal Approaches to Criminal Responsibility of Mentally Disordered Offenders in Europe. In: GOETHALS, Kris (ed.). *Forensic Psychiatry and Psychology in Europe. A Cross-Border Study Guide*. Cham, Switzerland: Springer, 2018. p. 35.

<sup>6</sup> OOSTERHUIS, Harry; LOUGHNAN, Arlie. Madness and Crime: Historical Perspectives on Forensic Psychiatry. *International Journal of Law and Psychiatry*, vol. 37, no. 1, p. 9, 2014.

<sup>7</sup> LOCARD, Edmond. *Dochodzenie przestępstw według metod naukowych*. Łódź: Sgł. Księgarnia Powszechna, 1937, p. 265.

maintaining a critical attitude towards this type of evidence<sup>8</sup>. Years later, P. Horoszowski, a famous Polish forensic scientist, argued that an expert opinion should be evaluated in the light of all the evidence collected in the case and is not in any form exempt from judicial assessment<sup>9</sup>. Over time, the concept of court experts being *judices facti* came to be seen as a relic of a past era, rather than an indicator of an unsolved practical dilemma.

The so-called Daubert revolution triggered a re-evaluation of many traditional forensic science techniques both in the United States and beyond<sup>10</sup>. One of the objectives concerned the role of a judge as a gatekeeper “charged with the responsibility of screening unreliable scientific evidence”<sup>11</sup> – an expectation that for lawyers as laypersons was and still is hard to match. The Daubert revolution and the following discussion in European legal doctrine can be seen as a new round in the discussion considering the ways lawyers should assess complex expert evidence.

Privatisation of the forensic science industry in Eastern European countries and the consequent development of an open forensic service

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<sup>8</sup> GROSS, Hans. *Podręcznik dla sędziego śledczego jako system kryminalistyki*. Warszawa: Difin, 2021, p. 187.

<sup>9</sup> HOROSZOWSKI, Paweł. *Kryminalistyka*. Warszawa: Wydawnictwo PWN, 1958, p. 596.

<sup>10</sup> LOURENCO, Aline A.; SILVA, Erick S. C. Considerações sobre as condenações injustas fundamentadas em provas periciais: análise do innocence Project, do national registry of Exoneration e mecanismos para redução de erros periciais. *Revista Brasileira de Direito Processual Penal*, vol. 7, n. 1, p. 593, 2001. In Poland, publications on Daubert standard and its implementations in the United States led to the re-evaluation of traditional forensic techniques such as osmological identification (DZIERZANOWSKA, Jolanta; STUDZIŃSKA, Joanna. Kryteria oceny dowodu z opinii biegłego w orzecznictwie sądów powszechnych i Sądu Najwyższego. *Roczniki nauk prawnych*, Tom XXV, 2, p. 36, 2015; BEDNAREK, Tomasz. *Dowód osmologiczny: aspekty kryminalistyczne i procesowe*. Warszawa: CLK KGP, 2008, p. 294), dactyloscopy (MOSZCZYŃSKI, Jarosław. Identyfikacja genetyczna – złoty standard czy złoty wyjątek? *Problemy współczesnej kryminalistyki*, Tom XVIII, p. 62-65, 2014), forensic odontology (KASPRZAK, Jerzy. *Odontoscopia kryminalistyczna*. Olsztyn-Szczecin: Volumina.pl, 2011, p. 165-168).

<sup>11</sup> GOLAN, Tal. *Laws of Men and Laws of Nature. The history of scientific expert testimony in England and America*. UK: Harvard University Press, 2004, p. 263-264.

market provoked a certain turn in the discussion. Some scholars argued that in practice, the judicial assessment of expert evidence rests on a presumption that this type of evidence is more reliable which puts it in a privileged position. Thus, instead of criticizing the concept of court experts as *judices facti* lawyers need to accept the truth and concentrate on developing effective (legal) mechanisms to prevent and timely expose expert mistakes and false opinions<sup>12</sup>. According to J. Kasprzak, judges do not have the competence to question the scientific concepts behind the presented expert report. If the court has doubts regarding the scientific soundness of the expert opinion, it should appoint another expert to re-examine the evidence<sup>13</sup>. An international survey conducted among law enforcement practitioners and forensic scientists led to the conclusion that “minimal burden should be placed on the judiciary to assess the validity of forensic evidence as they do not have the knowledge and should not be responsible for the quality of an expert witness”<sup>14</sup>.

Other researchers point to the negative consequences of the exemption of expert evidence from judicial assessment. B. Hołyst, one of the prominent Polish criminologists, concludes that the tendency to see expert reports as a simple and complete solution to the problem regarding the establishment of the constituent elements of a crime is reprehensible<sup>15</sup>. According to V. Krajnik, “the uncritical attitude towards expert opinions, the boundless trust of law enforcement authorities, often combined with an effort to pass on a solution to an ever-widening

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<sup>12</sup> ROSSINSKIY, Sergey Borisovitch. Expert as a scientific judge: we return to the discussion of a forgotten problem. *Vestnik Sank-Peterburskogo universiteta MVD Rossii*, vol. 202, no. 4(88), p. 137, 2017; KOŁECKI, Hubert. O ograniczonej możliwości sądowej merytorycznej oceny dowodu z techniczno-kryminalistycznej opinii biegłego. In: GERECKA-ŻOŁYŃSKA, Anna; GÓRECKI, Paweł; PALUSZKIEWICZ, Hubert; WILIŃSKI, Piotr (eds.). *Skargowy model procesu karnego*. Księga ofiarowana Profesorowi Stanisławowi Stachowiakowi. Warszawa: Wolters Kluwer, 2008. p. 181–197.

<sup>13</sup> KASPRZAK, Jerzy. Dowód naukowy – dzieje i współczesność. In: HOŁYST, Brunon (ed.). *Do prawdy litość to zbrodnia*. Księga jubileuszowa z okazji 70. Urodzin Profesora Bogusława Sygita. Łódź: Uniwersytet Łódzki, 2018. p. 144.

<sup>14</sup> AIRLIE, Melissa; ROBERTSON, James; KROSCH, Matt N.; BROOKS, Elizabeth. Contemporary issues in forensic science—Worldwide survey results. *Forensic Science International*, 320, 110704, p. 9, 2021.

<sup>15</sup> HOŁYST, Brunon. *Kryminalistyka*. Warszawa: LexisNexis, 2010, p. 432.

range of issues, even those of a legal nature or those for which “common sense” is sufficient, lead to delimitation power function and “an expert process” is created instead of a judicial trial”<sup>16</sup>.

The question remains: should lawyers make decisions about expert topics and is it possible for lawyers as laypersons to make a substantive evaluation of expert opinions? It appears that the ever-increasing gap between lawyers’ professional knowledge and expert knowledge might leave no doubts as to the answer. On the other hand, the exemption of expert evidence from judicial assessment poses a danger that erroneous, pseudoscientific expert reports will not be recognized in time to prevent irreparable personal and social harm. The task is to enhance the credibility of court experts in criminal proceedings and establish rational trust in their findings. It can be achieved through a set of procedural and structural measures.

### 3. EXPERT WITNESSES IN POLISH CRIMINAL PROCEDURE

In Polish criminal procedure, there is a clear distinction between lay witnesses and expert witnesses (experts). The latter is subject to a separate set of legal provisions. Their reports (opinions) and testimonies constitute a separate type of evidence. There is no indication in the law of its superiority over other types of evidence. Nonetheless, in case law, there is an informal ranking of expert evidence based on certain criteria. For example, the opinions of scientific institutions (the so-called institutional experts) over-weights the opinions of individual experts based on an assumption that institutional experts usually have better and more reliable equipment as well as more qualified personnel<sup>17</sup>.

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<sup>16</sup> KRAJNIK, Vaclav. Criticism of the practice of obtaining and usage of expert evidence. In: MALEWSKI, Henryk; MATULIENĖ, Snieguole; JUOD-KAITĖ-GRANSKIENĖ, Gabriele (eds.). *Kriminalistikos teorijos plėtra ir teismo ekspertologijos ateitis: kolektyvinė monografija*. Liber Amicorum Profesorium Vidmantui Egėdijui Kurapkai. Vilnius: Lietuvos kriminalistų draugija, Mykolo Romerio universitetas, 2022. p. 334.

<sup>17</sup> JUDGEMENT of the Supreme Court of 13 January 2022, case number: II USK 374/21, LEX nr 3359122.

According to Article 193 of the Polish Code of Criminal Procedure of 1997<sup>18</sup> (CCP), an expert witness (expert) is a person appointed by a court<sup>19</sup> to conduct an examination which requires specialized knowledge and experience in a given field of science, art or craft. The necessity of such an examination born out of the circumstances of the case in question transforms the court's right to appoint an expert to the court's direct obligation to do so. The non-meeting of such an obligation may lead to a partial or full annulment of the court's final decision<sup>20</sup>. In certain situations, courts are considered to be bound by the experts' findings<sup>21</sup>.

There are two types of court experts in Poland: enlisted experts and *ad hoc* experts. Enlisted experts can be found on the lists of court experts compiled by the presidents of the district courts<sup>22</sup>. These lists contain the experts' names alongside their addresses and respective (declared) specialities. Non-listed, *ad hoc* experts are usually appointed in cases where there is a need to conduct a relatively rare type of examination and (or) there are no available enlisted experts with the required set of skills and knowledge. If looking for an expert in a given field, the court may also contact a scientific or other specialized institution. Such institutions include the Police Central Forensic Laboratory and its regional affiliates as well as the Cracow Institute of Forensic Research and the forensic departments of Polish high schools and universities.

It should be mentioned that the case party cannot review the court's decision on the appointment of the expert without appealing the whole judgement. The parties may though seek to recuse the appointed expert, but only for certain narrow reasons such as the candidate's

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<sup>18</sup> Consolidated text has been published in the *Polish Journal of Law*, position 1375, 2022.

<sup>19</sup> The same rule applies to the stage of preliminary investigation. During that stage, experts can be appointed exclusively by the criminal investigators handling the case.

<sup>20</sup> JUDGEMENT of the Supreme Court of 9 September 2021, case number: II USK 255/21, LEX nr 3404187.

<sup>21</sup> JUDGEMENT of the district court in Łódź of 18 November 2022, case number: VIII U 1494/21, LEX nr 3440672.

<sup>22</sup> There are 45 district courts in Poland maintaining 45 separate lists of court experts.

connection to the case undermining his objectivity. The parties may propose their candidates though the court is not in any form obliged to accept such propositions or even provide written justification for the decision to deny them.

Regardless of whether the expert report has been prepared by an enlisted expert or an unlisted *ad hoc* expert, it should be assessed in the same way without prioritising one type of expert over another<sup>23</sup>. This rule, however, does not apply to the private experts hired by one of the parties even if such an expert has been enlisted or participated as a court-appointed expert in other criminal cases.

It is worth noting that the law on criminal procedure does not explicitly exclude party-hired experts' reports and testimony from possible evidence sources. For example, the defence can obtain the opinion drafted by a private expert and request its submission to the case materials. Nonetheless, the case law and legal doctrine prevail that such a report or testimony cannot be treated as a self-sufficient form of evidence. Instead, it provides information about a possible source of evidence<sup>24</sup>. The reason is formal and has nothing to do with the competence or skills of party-hired experts. Since such experts are not being appointed by the court, they are not regarded as experts in light of Article 193 CCP. In addition, it is often argued that privately hired experts are financially dependent on the hiring party which will inevitably interfere with their objectivity undermining the reliability of their reports and testimonies<sup>25</sup>.

It is worth mentioning that the 2014-2015 reform of the Polish criminal procedure aimed at introducing several elements of the adversarial model, which includes facilitating the use of the opinions of privately hired experts. Following the 2015 parliamentary elections, the political situation in the country changed, and the reform was largely reversed. However, some of the changes remain. The amended Article 393 par. 3 CCP allows

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<sup>23</sup> WITKOWSKA, Krystyna. Biegły w postępowaniu karnym. *Prokuratura i Prawo*, no. 1, p. 79-81, 2013.

<sup>24</sup> KMIECIK, Romuald. „Dowód prywatny” i tzw. zasada swobody dowodzenia w postępowaniu karnym. *Prokuratura i Prawo*, 2, p. 43, 2013.

<sup>25</sup> LIDÉN, Moa, & DROR, Itiel. Expert Reliability in Legal Proceedings: “Eeny, Meeny, Miny, Moe, With Which Expert Should We Go?” *Science & Justice*, 61(1), p. 37, 2001.

for the introduction into the proceedings of private documents collected directly for the purposes of criminal procedure. This means that formally, the defence can present an opinion of a privately hired expert during a court trial, which was problematic before. However, considering Article 193 CCP, the legal status of such an opinion is unclear. In legal doctrine, it is argued that opinions from privately hired experts are not equal to the opinions of court-appointed experts covered by Article 193 of the Code of Criminal Procedure and other relevant provisions. This makes privately hired experts problematic as sources of evidence<sup>26</sup>. Although a private expert's report can be read during the court proceedings, due to the lack of clear legal status, it cannot be recognized as a part of the case materials and the subject of judicial assessment similar to the opinions of the court-appointed experts<sup>27</sup>.

The main form of expert evidence is an oral or written report (an opinion). Written expert reports are subject to a set of dedicated legal provisions. According to Art. 200 CCP, such a report should contain:

1. expert's name and surname, scientific degree, speciality and current professional position;
2. data of other persons who participated in the expert examination as well as the form of their participation;
3. in the case of institutional opinion – the full name of the institution;
4. date and duration of the expert examination;

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<sup>26</sup> BŁOŃSKI, Michał. Znaczenie opinii prywatnej w realizacji prawa do obrony. In: GRZEGORCZYK, Tomasz; IZYDORCZYK, Jacek; OLSZEWSKI, Radosław (eds.). *Z problematyki funkcji procesu karnego*. Warszawa: Wolters Kluwer, 2013. p. 359; BOJAŃCZYK, Antoni. *Dowód prywatny w postępowaniu karnym w perspektywie prawnoporównawczej*. Warszawa: Wolters Kluwer, 2011. p. 475; KMIECIK, Romuald. Kontrowersyjne unormowania w znowelizowanym kodeksie postępowania karnego. *Prokuratura i Prawo*, 1-2, p. 11-12, 2015.

<sup>27</sup> KARAŻNIEWICZ, Justyna. Opinia prywatna jako kategoria dowodu prywatnego i jej znaczenie w postępowaniu karnym – uwagi na tle ostatnich nowelizacji Kodeksu postępowania karnego. In: MOSZCZYŃSKI, Jarosław; SOLODOV, Denis; SOŁTYSZEWSKI, Ireneusz (eds.). *Przestępczość. Dowody. Prawo*. Księga Jubileuszowa Prof. Bronisława Młodziejewskiego. Olsztyn: Wydawnictwo UWM w Olsztynie, 2016. p. 516-517; KUSAK, Michał. 8.4. „Opinia prywatna”. In: HOFMAŃSKI, Piotr (ed.). *System prawa karnego procesowego*. Tom VIII, Part 4. Dowody. Warszawa: LexisNexis, 2019. p. 5079-5080.

5. the description of the conducted expert examination, observations and findings;
6. signatures of all the experts who participated in the examination.

For comparison, reports drafted by privately hired experts are not in any way formalised. Usually, they are modelled upon the reports of court experts though it will not change their undefined legal status.

An important moment is the fact that court-appointed experts are provided with access to all case materials as well as the reports and testimonies of previously appointed court experts (possibly with the court's special permission). On the other hand, party-hired experts do not have legal access to the case materials which may significantly limit their capabilities. Many types of forensic examinations, such as forensic drug examination, handwriting examination, firearms forensics, digital forensics etc., may require direct access to physical evidence. The defence is allowed to acquaint itself with the indictment and supporting evidence at the end of the preliminary investigation as well as at any moment during court hearings. Nonetheless, it does not apply to physical evidence which the defence may see only in photographs or as a description in procedural documents.

The law allows for interviewing the court-appointed expert but only in the context of the delivered report or previous testimony. During the hearings, parties have a right to ask questions. Nonetheless, the law does not provide for the participation of private experts as assistance during the interview. They could neither ask questions themselves nor they could assist in formulating the questions – a fact which significantly limits the capabilities of the defence considering the use of scientific evidence.

If the opinion of the court-appointed expert is incomplete or unclear, contains contradictions in itself, or there is a contradictory opinion on the same matter, the court may appoint the same or other experts to conduct new examinations. As an alternative, some researchers suggest the so-called procedural confrontation – a synchronic court interview of the experts who have formed contradictory opinions. During the hearings, the experts can formulate questions for each other although it is not clear whether the subject of the confrontation should be the contradictory

opinions or the experts themselves<sup>28</sup>. Plus, the confrontation is possible only between court-appointed experts, automatically eliminating private experts. The lack of precise legal provisions and the problems related to the judicial assessment of the results of such confrontations explain why not so many of them are conducted.

#### 4. FORENSIC SCIENCE SERVICE INDUSTRY IN POLAND

Formally, court-appointed experts should be treated in the same way without prioritising any of them based on the fact of their enlistment or affiliation. In practice, however, Polish courts tend to put more trust in the opinions and testimonies of enlisted court experts.

The enlistment procedure is based upon the decree of the Ministry of Justice of 2005 on court experts<sup>29</sup>. The lists of court experts are maintained by the presidents of the district courts – there are 45 of them in Poland. Candidates should be Polish citizens of at least 25 years old and possess relevant knowledge and experience. The enlistment is based solely on the documentation provided by a candidate. There is no obligatory test of professional competence in any form. It is not even required to document the possession of specialized equipment providing information on its location, calibration, or quality assurance.

The lists of court experts should be revised every 5 years, but once enlisted experts are not required to confirm their competence and readiness to serve as court experts. It means that enlisted experts could remain on the lists practically for an indefinite time. The decree provides for the termination and the exclusion of enlisted experts, among others in the case of malpractice or inability to carry on expert duties. In practice, however, such cases are extremely rare due to the lack of effective controlling mechanisms.

In 2015, the national revision body – *Najwyższa Izba Kontroli* - published a report on the state of the forensic science service industry in

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<sup>28</sup> GRUZA, Ewa. Kilka refleksji ta temat konfrontacji biegłych. *Problemy współczesnej kryminalistyki*, Tom XII, p. 139, 2008.

<sup>29</sup> *Journal of Law*, 15, 2005, positions 132-133.

the country<sup>30</sup>. In the document, a few major defects of the current system were highlighted. It was found that there were several dead experts on the lists. Some of the enlisted experts stopped working long ago because of age or illnesses. On the lists, there were “experts” who had obtained professional diplomas years ago and since then did not receive additional training. Some candidates didn’t even have specialized equipment to conduct declared types of forensic analysis. It was found that enlisted experts often “transfer” the entrusted examinations to private entities and then sign the findings without conducting the analysis themselves. Some specialized institutions appointed by the courts as institutional experts were routinely subletting the examinations to unlisted specialists who were paid only a part of the received fees. The controlling body noted that expert malpractice did not necessarily lead to exclusion from the list or immediate termination. Organizational chaos and lack of information exchange between district courts allowed some of the excluded experts to successfully re-submit their documents to another district court, thus re-establishing their professional status. The controlling body found that courts and law enforcement authorities preferred experts who promised speedy examinations for a lower price, which led to the situation where unqualified, unequipped and inexperienced “experts” were prioritised over more experienced and knowledgeable specialists. Some of the “experts” were able to conduct hundreds of examinations in inadequately short periods and were suspected of falsifying their reports (an unlawful practice known as *dry-labbing*<sup>31</sup>).

On the other hand, the controlling body noted the lack of relevant legal provisions concerning unlisted experts which is still relevant today. The private forensic market in Poland was and still is self-regulated. There is a large number of self-declared “experts” and expert service institutions offering compatible prices and promising speedy examinations. Their clients – courts and criminal investigators – are often deterred by the prices and the queues in governmental forensic laboratories.

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<sup>30</sup> NAJWYŻSZA IZBA KONTROLI. *Informacja o wynikach kontroli. Funkcjonowanie biegłych w wymiarze sprawiedliwości*, 2015. Available at: <<https://www.nik.gov.pl/plik/id,9608,vp,11856.pdf>>. Access on: December 22, 2022.

<sup>31</sup> SOLODOV, Ilia. *Etyka biegłego w procesie karnym*. Łomża: Stopka, 2017, p. 176-177.

Regularly, such individuals and institutions do not have specialized equipment or permanently employed qualified personnel. Many of them are subletting the entrusted examinations which creates a situation where case materials and collected physical evidence end up in the possession of people unknown to the court or criminal investigators. It is oftentimes the case with digital forensics and forensic genetics where the costs of the equipment and dedicated software can easily outweigh the profits from court appointments.

Another issue is the lack of proper organization within the expert community. There are only a few non-profit organizations connecting experts from different fields of study which have codes of professional ethics. In other countries, such associations play an essential role in maintaining a diligent level of professionalism and professional responsibility among court experts, but not in Poland. As a result, the information about potential ethical violations committed by the court-appointed experts often does not reach the light triggering an appropriate response from the respective authorities. The lack of proper professional organization may be also responsible for the lack of unified and standardized expert methodology in the case of a private forensic service market. The existing professional associations do not usually publish internal best practices, overviews of equipment or descriptions of the methods applied. So far, there have been several cases where court-appointed private experts applied questionable or unreliable examination techniques<sup>32</sup>.

To summarise, the existing system is not prone to unethical or even unlawful practices. The abovementioned shortcomings seriously undermine its reliability in terms of providing any reassurances as to the trustworthiness of both enlisted and unlisted court experts. To address the issue, a draft law on court experts published in 2019 introduces a few structural changes, among others:

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<sup>32</sup> FUNDACJA EUROPEJSKIE CENTRUM INICJATYW W NAUKACH SĄDOWYCH. *Błędy w opiniach biegłych a pomyłki sądowe. Możliwości i sposoby naprawy*. Available at: <<http://www.forensicwatch.pl/web/pliki/baza-wiedzy/Opracowania/B%20e%20A8dy%20w%20opiniach%20bieg%20ych%20a%20pomy%20ki%20sa%20CC%A8dowe.pdf>>. Access on: December 22, 2022.

1. the introduction of a national unified database of court experts maintained by the chief of the Cracow Institute of Forensic Research (the Institute);
2. the introduction of the rule that only the experts included in the database could be appointed as court experts;
3. obligatory certification of enlisted court experts with the 5-year paid certificates of competence granted, suspended or withdrawn by the chief of the Institute;
4. changes concerning the requirements that the candidates for the experts should meet – at least 5-year relevant professional experience and age restrictions (the candidate shall be at least 25 years old and no older than 70 years, shall not be previously prosecuted or sentenced for criminal offences);
5. the possibility of certificate termination in the case of the enlisted expert committing a criminal offence, violating the conditions of the certificate or delivering a false report or testimony<sup>33</sup>.

The draft law has been strongly criticized by the Polish scientific community and practitioners. It is argued that the Institute is one of the many existing forensic service providers in the country. Some of them have even longer scientific traditions and established reputations. There have been also concerns that the Institute could misuse its authority to eliminate or significantly limit the competition in the national forensic service market. In addition, it is unclear how the institute will get on with the task of certifying thousands of experts including the active ones without creating a national shortage and paralysing the system of justice<sup>34</sup>. Currently, there is no information on further legislative work on the draft law.

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<sup>33</sup> MINISTER SPRAWIEDLIWOŚCI. *Projekt ustawy o biegłych*. Available at: <[https://kryminalistyka.pl/wp-content/uploads/2015/11/ustawa\\_o\\_bieglych\\_11\\_2014.pdf](https://kryminalistyka.pl/wp-content/uploads/2015/11/ustawa_o_bieglych_11_2014.pdf)>. Access on: December 22, 2022.

<sup>34</sup> ROJEK-SOCHA, Patrycja. *Biegli w garści Instytutu Ekspertyz Sądowych*. Available at: <<https://www.prawo.pl/prawnicy-sady/projekt-ustawy-o-bieglych-instytut-ekspertyz-sadowych,354101.html>>. Access on: December 22, 2022; POLSKIE TOWARZYSTWO KRYMINALISTYCZNE. *Stanowisko PTK*. Available at: <[https://kryminalistyka.pl/wp-content/uploads/2015/11/stanowisko\\_PTK](https://kryminalistyka.pl/wp-content/uploads/2015/11/stanowisko_PTK)>.

## 5. CRITERIA OF THE ASSESSMENT OF EXPERT EVIDENCE

There is a lack of pre-established legal criteria regarding the assessment of expert evidence by courts. It means that Polish courts are expected to follow a general rule of evidence assessment provided for by Article 7 CCP which says that “courts shall make their judgements based on their conviction, which shall be founded upon evidence taken and appraised at their own discretion, with due consideration to the principles of sound reasoning and personal experience”.

It is evident though that the assessment of expert evidence may create some challenges that cannot be effectively tackled by employing the principles of sound reasoning or personal experiences. Expert evidence extends beyond the standard of assessment specified in Article 7 CCP<sup>35</sup>. Therefore, Polish criminal courts have adopted an open set of dedicated criteria over time. A comprehensive analysis of the case law conducted by J. Dzierżanowska and J. Studzińska sheds some light on the reasoning of the Polish judiciary. According to the authors, there have been several judgements where the courts – Polish appellate courts and the Supreme Court - provided some useful insights, such as follows:

1. while assessing an expert report one should check whether the expert has the special knowledge which is necessary to determine the circumstances that have a significant impact on the outcome of the case;
2. verification of whether the expert report is logical;
3. check whether the report is complete, clear and not in conflict with other opinions disclosed in the course of the process;

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pdf>. Access on: December 22, 2022; WIDŁA, Tadeusz. *Uwagi do projektu ustawy o biegłych*. Available at: <[https://kryminalistyka.pl/wp-content/uploads/2015/11/Uwagi\\_do\\_nowego\\_projektu\\_prof\\_T\\_WIDLTY.pdf](https://kryminalistyka.pl/wp-content/uploads/2015/11/Uwagi_do_nowego_projektu_prof_T_WIDLTY.pdf)>. Access on: December 22, 2022.

<sup>35</sup> GRUZA, Ewa; GOC, Mieczysław; MOSZCZYŃSKI, Jarosław. *Kryminalistyka, czyli o współczesnych metodach dowodzenia przestępstw*. Zagadnienia prawne. Warszawa: C.H. Beck, 2020, p. 84-85.

4. while evaluating a new and unverified forensic method it is necessary that the proof be conducted from the methodological point of view in an irreproachable manner;
5. verification of the completeness of the expert report, completeness of the materials that are its foundation, the accuracy of the test and reasoning methods used;
6. check whether the justification of the report is formulated in an accessible and understandable way;
7. conclusions resulting from the examination should, in principle, be firm and clear;
8. the adjudicating court should be guided by uniformity and universality of the test method and certainty of the results of the research and the organization preparing the report should be certified;
9. the expert report should be evaluated by the court according to the substantive correctness of the statements the report contained<sup>36</sup>.

In the newest case law, there has been an opinion that the substantive sphere of the expert report is controlled by the court, which has no specialised knowledge, only in terms of compliance with the principles of logical thinking, personal experience and common knowledge. Therefore, the court's reference to these assessment criteria constitutes sufficient and proper justification of the reasons for recognizing the expert's opinion as convincing<sup>37</sup>. This proves the lack of a unified approach among Polish judges concerning the issue of expert evidence assessment. It is also worth mentioning that most of the abovementioned assessment criteria require a certain level of training and knowledge to make an accurate judgement. Without such knowledge or qualified assistance, judges cannot make informed choices.

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<sup>36</sup> DZIERŻANOWSKA, Joanna; STUDZIŃSKA, Joanna. Assessment of expert evidence in Polish court proceedings in comparison to other European countries. *Problems of Forensic Sciences*, vol. 106, p. 458, 2016.

<sup>37</sup> Judgement of the court of appeal in Poznan of 18 March 2022, case number: I AGa 118/21, LEX nr 3346786.

## 6. DISCUSSION

Forensic experts provide scientific and professional data on a specific content area that the participants of criminal proceedings – judges, prosecutors, and defence attorneys – are not familiar with. Their opinions and testimonies are expected to be based on a unified, standardized methodology compatible with the current state of scientific knowledge<sup>38</sup>. The problem is that most lawyers are only vaguely aware of the current state of science or its particular fields. Although they could follow the internal logic of the expert report and assess the presented findings in light of other available evidence, their assessment is limited<sup>39</sup>. In practice, criminal courts tend to attach greater importance to the expert's professional reputation, affiliation or other strictly external factors such as enlistment, specific or special education, and certification. These are undoubtedly important criteria, but they might not be so helpful in identifying erroneous expert reports and faulty testimonies. An efficient system of structural and procedural guarantees should be set up to address the issue.

In the case of Poland, one of the proposed solutions is the admission of the opinions of party-hired experts as legally equal to the opinions of the court-appointed experts. Their current unclear legal status serves as a major disincentive for defence lawyers. By rejecting the reports and testimonies of private experts for formal reasons, Polish courts not only deepen a dangerous imbalance between the court parties but also increase their heavy dependency on court-appointed experts. When considering the possibility that a private expert may be biased due to being paid by one of the parties in a case, it should be noted that court-appointed experts are also not immune to bias. In particular, police experts may be suspected of being unobjective and serving the interests of the prosecution<sup>40</sup>. In addition, it is important to notice that court-appointed

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<sup>38</sup> AREH, Igor; VERKAMPT, Fanny; ALLAN, Alfred. Critical review of the use of the Rorschach in European courts. *Psychiatry, Psychology and Law*, vol. 29, no.2, p. 183-184, 2022.

<sup>39</sup> D'EIRDRE, Dwyer. *The judicial assessment of expert evidence*, p. 131.

<sup>40</sup> Numerous studies have shown the existence of strong biases in evidence evaluation among law enforcement professionals who are already “pre-equipped”

experts in Poland are not required to mention other scientific methods which lead to different results. Thus, qualified privately hired experts could be an alternative source of otherwise unavailable information.

In the author's opinion, a potential solution to the problem could be the enforcement of strict ethical rules on both governmental and private, enlisted and non-enlisted experts. The existing model of forensic services in Poland allows for avoiding responsibility for unethical professional behaviour. There is a limited number of professional associations which have codes of professional conduct and enforce ethical norms on their members including the requirement of impartiality. Among them is the Polish Forensic Association, which has a detailed code of professional ethics, as well as established internal control procedures. However, there are currently insufficient incentives for private experts to become members of this or any other professional association, which greatly limits the level of control that can be exerted.

The institution of enlistment has been proven to be highly ineffective in terms of maintaining proper control over enlisted experts. As a result, the concerns about the independence and impartiality of party-hired experts in some cases might be justified. In addition, even if private experts were allowed as a source of evidence, it would be very difficult for the court to determine which of the presented opinions was correct. To address the issue, some scholars argue for the introduction of admissibility criteria modelled upon the Daubert standard<sup>41</sup>. However, the fact that the Daubert criteria have been subject to a variety of criticisms in the United States and beyond should not be ignored. It is highly questionable whether those criteria would be of any significant help because most Polish judges do not have appropriate training or education in science. Others

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with evidence of guilt (METERKO, Vanessa; & COOPER, Glinda. Cognitive Biases in Criminal Case Evaluation: A Review of the Research. *Journal of Police and Criminal Psychology*, 37, p. 106-107, 2021)..

<sup>41</sup> WÓJCIKIEWICZ, Józef. Metodyka ekspertyzy. In: WÓJCIKIEWICZ, Józef (ed.). *Ekspertyza sądowa. Zagadnienia wybrane*. Warszawa: Wolters Kluwer, 2007. p. 19-22; GIRDWOYŃ, Piotr; TOMASZEWSKI, Tadeusz. Czy potrzebne nowe podejście do badań kryminalistycznych (w Stanach Zjednoczonych i nie tylko). In: MOSZCZYŃSKI, Jarosław; SOLODOV, Denis; SOŁTYSZEWSKI, Ireneusz (eds.). *Przestępczość. Dowody. Prawo*. Księga jubileuszowa prof. Bronisława Młodziejewskiego. Olsztyn: UWM w Olsztynie, 2016. p. 123-124.

propose the legalisation of the so-called meta-opinions, i.e., allowing the so-called meta-experts to testify on the substance of the opinion of another court-appointed expert<sup>42</sup>. Nonetheless, under current regulations, such meta-opinions would have a highly questionable legal status since Polish law on criminal procedure does not allow such practices. In this respect, a more favourable variant can be the introduction of the institution of the so-called scientific advisors whose task would be to help the court to understand complex expert evidence and evaluate the methodology applied by the court-appointed expert. Such an institution currently exists in several European countries, among others in Denmark. Experts-scientific adviser does not substitute the judge in the judicial assessment of expert evidence. Their task is to provide necessary assistance in the case of complex scientific evidence. In the Polish criminal procedure, courts should be allowed to appoint such advisors either from governmental or non-governmental, private experts. To address potential implications, the advisor should be excluded from being later appointed as a court expert in the same case. The task of the adviser should be to provide a scientific explanation of the currently used and commonly accepted methodology as well as consult the court on the scientific soundness of the studies conducted by the experts in the case. The function of the scientific advisers should be narrowed to providing information for competent decision-making. The legalization of the already existing practice of courts using experts for scientific advice will serve the rights of the parties involved in the case. Case participants should have the same procedural rights as they have with court-appointed experts, including the right to demand the exclusion of the proposed candidate.

Considering long-run structural solutions, priority should be given to the development of the lawyers' scientific and technical competence. Criminal lawyers should be educated in basic science and modern forensic techniques. The goal is to help lawyers adopt a critical attitude towards expert evidence and facilitate the process of judicial assessment. The

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<sup>42</sup> WÓJCIKIEWICZ, Józef. *Forensics and Justice. Judicature on scientific evidence 1993-2008*. Toruń: Dom Organizatora, 2009, p. 25-28; WILK, Dariusz. O metaopinii i swobodnej ocenie dowodów w polskim procesie karnym raz jeszcze. Polemika z dr. Józefem Gurgulem. *Prokuratura i Prawo*, no. 1, p. 21-23, 2022.

influential 2009 US National Research Council's (NRC) Report named "judges and lawyers who generally lack the scientific expertise necessary to comprehend and evaluate forensic evidence in an informed manner" as an obstacle to reform. In the final recommendations, the NRC highlighted the need to "support law school administrators and judicial education organizations in establishing continuing legal education programs [in forensic science] for law students, practitioners, and judges"<sup>43</sup>. In Poland, numerous studies showed that criminal judges consider themselves unprepared when it comes to expert evidence notably of the kind based on new and sophisticated forensic techniques<sup>44</sup>. Characteristic is the fact that in only one out of ten analysed cases, the judge and the parties questioned the competence of the court-appointed expert<sup>45</sup>. Over recent years, the number of lecture hours and classes on forensic sciences in the case of Polish law faculties has been gradually decreasing. Some universities, including the leading ones, made the courses on forensic sciences non-obligatory or even completely withdrew them from the program. As a result, Polish students of law have only fragmental knowledge about forensic examinations, their methodology, and their limitations.

Another available structural solution is the introduction of obligatory certification and standardization of expert methodology preferably by non-governmental professional associations of practising forensic experts. In Poland, these forms of control are already in place in the case of governmental forensic experts. Although the existing system is not ideal, it can ensure the desired repeatability of the results and

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<sup>43</sup> NATIONAL RESEARCH COUNCIL, *Strengthening Forensic Science in the United States: A Path Forward*. NCJ Number 228091. Available at: <<https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>>. Access on: December 22, 2022.

<sup>44</sup> KWIATKOWSKA -WÓJCIKIEWICZ, Violetta; WÓJCIKIEWICZ, Józef. Sędziowie wobec dowodu naukowego. In: KASPRZAK, Jerzy; MŁODZIEJOWSKI, Bronisław (eds.). *Kryminalistyka i inne nauki pomocowe w postępowaniu karnym*. Olsztyn: Print Group, 2009. p. 43-57; SOLODOV, Ilia. *Etyka biegłego w procesie karnym*, p. 149-150

<sup>45</sup> FUNDACJA EUROPEJSKIE CENTRUM INICJATYW W NAUKACH SĄDOWYCH, Raport: *Biegli w wymiarze sprawiedliwości*. Available at: <<http://forensicwatch.pl/web/index.php?strona=bazawiedzy&kategoria=Raport>>. Access on: December 22, 2022.

allow for the verification of the expert's findings. In the case of private experts, this solution raises many questions and concerns that must be addressed. First of all, there is a need for legal and organizational stimuli encouraging experts to apply for membership in such associations. The purpose of such associations is to establish and enforce professional standards, including ethical guidelines and certification requirements. By becoming members, private experts should have access to ongoing training, continuing education, and support, which can improve their skills and broaden their knowledge. The associations should also provide a forum for forensic experts to discuss current issues and emerging trends, share best practices, and collaborate on research projects. One of the functions of the associations is to establish guidelines for conducting forensic examinations and providing oversight to ensure that forensic evidence is being analysed and presented in a scientifically sound and objective manner. In this way, the associations can help private experts to promote the admissibility and reliability of forensic evidence in court. Being a member of a professional association should be a sign of the enhancement of the expert's credibility and reputation. Membership in a recognized professional organization should demonstrate a commitment to professionalism and a dedication to upholding ethical and scientific standards.

Unfortunately, the existing associations of private forensic experts in Poland rely on limited budget resources for developing forensic standards and relevant policies. Their current legal status imposes essential limitations on their control over the forensic service market and existing practices. Given these circumstances, it would have been impractical to assign them the responsibility of certification without providing adequate legal and organisational conditions.

## **CONCLUSIONS**

1. When confronted with cases involving complex scientific and technical issues, most lawyers and criminal judges lack the scientific background and education necessary to evaluate expert evidence. This gap between expert knowledge and legal expertise places this type of evidence beyond the competence of lawyers, resulting in the credibility of expert

opinions being measured by trust rather than reliability. By relying uncritically on expert evidence, judges relinquish their decision-making power to the experts who issue them. There are possible solutions. First, criminal lawyers could enlist the help of scientific advisers who could provide information on the scientific soundness and reliability of expert opinions. In addition, lawyers could receive training in science and its various fields to develop a critical attitude towards expert evidence.

2. The existing system of forensic science services in Poland is far from ideal. Due to serious organizational flaws, it allows for manipulations and abuses undermining the reliability of expert evidence. The institution of the experts' enlistment in its current state does not provide sufficient guarantees as to the enlisted experts' qualifications and professional skills. The lack of relevant legal provisions considering the national forensic service market creates favourable conditions for unethical practices including the subletting of entrusted forensic examinations and the so-called dry-labbing.
3. Standardization of expert methodology and mandatory certification should be introduced as commonly accepted tools for ensuring control over the quality, reliability, and scientific authenticity of expert studies. Non-governmental professional associations of forensic experts should be preferred as certification and standardization bodies.
4. Information about certified experts should be contained in a unified national database maintained by a respective governmental body. However, professional associations of court experts should have a decisive role in the process of expert enlistment.
5. Effective enforcement mechanisms are necessary to ensure court experts' compliance with the norms of professional conduct. Professional associations of forensic experts should devise and enforce codes of professional ethics.

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