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EXPERT CONCLUSION AS MEANS OF PROOF IN CIVIL PROCESS

An author investigates the conclusion of an expert as an item of evidence in the civil procedure of Ukraine. The issue of determination of the role of the conclusion of an expert and its basic signs as the items of evidence is examined as well.

Key words: *expert, conclusion of expert, items of evidence, judicial examination, proving.*

One of the directions for the achievement of the purpose of a civil procedure became the statement at the legislative level of the principle of adversarial parties. At the same time the lack of fundamental theoretical-legal research, developed with the account of practical experience greatly complicates, and sometimes even makes it impossible to use the procedural rights of the persons involved in the judicial process. Special aggravation of this situation is through a process of evidence. In our opinion, under modern conditions to ensure the implementation of constitutional guarantees of the citizens for judicial protection is possible only on the grounds of the theoretical, legal and technological basis. It is substatiated the actuality of the complex theoretical and legal research of a use of means of proof in the civil process, particularly, in the expert conclusion.

It should be noted that a separate issue concerning the expert conclusion has been already researched in the works of such famous scientists in the sphere of civil procedural law, as: A. Belkìn, A. Vlasov, D. Vatman, M. Gurwitsch, E. Drìzhchana, V. Yelizarov, V. Kisil, I. Reshetnikova, I. Rosenberg, V. Tertishnìkov, A. Tkachuk, M. Treushnikov, Y. Fursa, S. Fursa, D. Chechot, M. Shakarian, V. Sherstyuk, M. Stefan, T. Tsyura, Y. Yudelson and others. At the same time the aim of this work is to study the procedural aspects of the expert opinion of the determination of the place of the expert conclusion among the means of the proof in civil proceedings.

Normative statement of the notion "judicial review" is contained in the art. 1 of the Bill of Ukraine “About Judicial Expertise”, namely: "forensic examination is a research expert based on special knowledge of material objects, phenomena and processes, which contain an information about the circumstances of the case, which is in the proceedings of the inquiry, pre-judicial and judicial investigation" [1]. This definition reveals the overall content of the forensic expertise and is common for any kind of the proceedings within the judicial proceedings, however, causes some confusion in determining the ratio between the object and the subject matter expertise.

Admittedly, the right and the same solution to the question about the subject and object of forensic expertise has both theoretical and practical importance, because this debate is hold in the context of the delimitation of the subject and object of judicial evidence.

Before you explore this issue, we believe it to be appropriate to refer to a primary source, namely to ascertain the nature of the term "object". So, the term “object” (from lat. *objectus – subject*) – consists of the philosophy of any phenomenon that exists outside the human consciousness and independently of it. In a broad sense – subject, phenomenon, which a person attempts to cognize (e.g. object of research) and the aims of its activities (building object) [2, p. 228]. Given the field contents of this definition, we can affirm in a general sense, that both terms are quite similar, and therefore becomes clear why regarding the delimitation of these terms in the scientific world aroused a discussion.

A number of scholars insists that an investigation may be solely the objects of the material world, while the processes and phenomena should be excluded from the object of research, because the subject as one, can be understood as the specific actions (primarily it is the result of the examination, confirmation or refutation of the assumptions, the presence or absence of certain grounds), whereas object is nothing else as a material thing, that allows to conduct such a study.

So, T. Averyanova the subject of an investigation defines as "the

establishing of the facts (the evidence), representations of the fact that have meaning for criminal, civil, arbitration cases or cases about administrative offences, by the study of expertise, which is the material carriers of information about the event" [3, p. 305–336]. The scientist denies the possibility of recognition of the processes and phenomena of the objects, because the idea of the subject, which obtained an expert as a result of a perception assessment (process research), constitute the subject-matter expertise, but is last in the media of the material world (the object of examination). This position is supported by other scientists, who through the disclosure of the matter of expertise subject identify the affiliation of the cognitive processes and other phenomena as the subject of research, excluding them from the object. N. Selivanov observes that "the subject of forensic expertise is the fact that occurred (could happen) in the past, the existing one (may be) in the present time, as well as patterns, relationships and relationships underlying this fact" [4].

V. Arsenyev judicial expertise sees "as a side, properties, and relationships of an object (primary and secondary), which are investigated and are learned by means (methods and techniques) this industry expertise in order to address the issues that are of importance to the case and are included in the respective areas of expertise» [5]. Y. Koruhov notes the direct communication and the conditionality of the subject of a study "objects of research tasks that require decision, adopted the methods and conditions, which are these studies" [6, p. 3]. This position supports S. Bychkov, who finds it appropriate to exclude from the art. 1 of the Bill of Ukraine "About Judiciary Examination» links on phenomena and processes as a possible object of the research and defines the concept of judicial review, as follows:"Forensic examination is a research expert based on the special knowledge of material objects that contain an information about the circumstances of the case, which is in the proceedings of the inquiry, preliminary investigation or the Court" [7, p. 5].

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With regard to the following positions offer the subject of forensic expertise to determine how the actual data, the circumstances, the processes, the establishment of which is set for the proper solution of the case, obtained by the application of special knowledge by an expert. Whereas the object of the examination is to be understood as the physical media existing regardless of the wishes of the subject are capable according to their properties provide more expert information that is the subject of research.

Interesting from the point of view of legal science is an approach to the definition of the concept of individual authors, engaged in research and development of certain theoretical and practical models for the definition of the terminology depending on subject and field of expertise and skills. So, O. Doroshenko noted that forensic examination of intellectual property can be defined as research provided to the competent authorities the documents and materials relating to intellectual property, which is held by a court expert using special knowledge for the purpose of establishing the factual data that have a value for the business, which is located in the proceedings and the results of which are highlighted in the conclusion of the expert, which is the independent kind of the evidence [9, p. 5].

In our opinion, this definition is devoided of the specificity regarding the subject of the assignment, because part 1 of the Art. 144 of the CPC of Ukraine determined that expertise is the resolution of the Court. Moreover, the decision of the plenum of the Supreme Court of Ukraine on the application of the rules of civil procedure legislation regulating proceedings before trial from 12.06.2009 № 5, namely p. 17, defined: the conclusion of the examination may be the evidence in the case only when the examination was carried out on the basis of court

appropriate judicial and expert institutions. If the expert opinion is provided by the party as a supplement to claim, i.e. a relevant expert institution for its petition or the petition of its representative, such a conclusion can only be regarded as written evidence, which must be the study in court and the corresponding evaluation [10]. Also it is mentioned by narrowed sources of information, provided to research expert, in our opinion, should not be limited to only the documents and materials, because the expert research is much broader. Consequently, judicial examination can be defined as a study conducted by an expert, material objects, phenomena and processes that contain information about the circumstances of the case to a conclusion.

It should be noted that there are several approaches to the classification of legal expertise, in particular for the following reasons: consistency of expertise (primary and repeated); the volume of research (odnoosobova and Commission); the nature of knowledge, which are used (homogeneous and comprehensive) [11, p. 15]. In turn, the applicable civil procedural legislation provides for the following types of evaluations: commission, integrated, additional and repeated. With regard to the subject of our study, we consider it to be necessary to provide a description of each type of examination in order to identify the general provisions which should take place only in the opinion of an expert.

One of the main features of the comprehensive examination is a simultaneous study of the examination object with the use of special knowledge in different fields, their further comparison and generalization. Our thoughts should be supported by the position of Kudryavtsev, who noted that the procedural point of view, the comprehensive examination must include the use of special expert knowledge regarding various types and classes of judicial expertise [12, p. 256]. Therefore, given the above, it should be inferred that solely this type of examination can be conducted. So, the art. 149 of the CPC of Ukraine consideres the conducting of a comprehensive examination of no less than by two experts. Thus, the kind of expertise must be described by a few experts in the form of a single expert’s opinion with regard of knowledge in different spheres or different

directions within a single field of knowledge. Considering the existing specifics, namely conducting research jointly, the question arises of delineation and ascertain of the relations arising between experts in the context of their autonomy and providing the overall conclusion. Provisions of the legislation to determine the possibility of an expert to express own opinion (in the case of disagreement with the position of the other expert) and to provide a separate opinion on all the issues or with issues that have caused controversy, with personal liability expert, creates the foundation of the objectivity and reliability of evidence obtained as a result of the study. Thus, there is clear, that the experts should be completely autonomous and have equal functions while conducting research and drawing a conclusion.

In the context of this problem, it is also necessary to recall the existence and spread of so-called "synthetic" examination, when one expert (usually criminologist), which has the knowledge of methodologies and techniques of forensic expert research, can synthesize the findings of other experts (chemists, physicists, biologists, etc.) and to solve the tasks of establishing identities and classification, diagnostic and situational tasks [13, p. 152]. Criticism of the experts regarding the use of this type of examination is absolutely illegal, because such methods not only contradict the requirements of the legislation of the personification of the research and studying of the conclusion, she also has no the scientific basis for a clear evaluation of the result of the study, which should be based on relevant scientific criteria, and not only on the experience of the expert.

Commission examination also produced no less than two experts, however, within the same area of knowledge. During the examination, the Commission experts have the right to consult with one another, exchange of professional skills, however it should be noted that each of them has to fulfill its part of the work. The peculiarity of this type of examination is the reason of its assignment, i.e., talking about the necessity of the study of large amounts of material in a short time. In fact, the purpose of the Commission examination is to optimize the time costs associated with this research, therefore, with the purpose of rational use of time, the Court or a person involved in the case, initiation of the Commission

examination.

Additional expertise is West refinement of expertise, and therefore is assigned only if the conclusion of the expert will be deemed to be incomplete or incomprehensible one.

1. It should be noted that traditionally in legal literature are distinguished such signs of the expert conclusion as means of proof: 1) the basis of the expert conclusion is the appointment of court examination; conclusion of the expert must conform to the rules of evidence; 2) a factual data in the conclusion of the expert should be in the form of statements of a fact; the expert conclusion is always associated with other evidence. [14, pp. 11–12].

Although these signs of the expert conclusion were formulated long ago, in our view, they are quite modern and those, that correspond to the progress of civil process. In this context, we consider it appropriate to stay on home assignment.

So, in accordance with the statements of the art. 143 of the CPM, the initiator of the destination expertise can act as a person, who is involved in the case, by submitting to the Court the appropriate solicitation. In this connection, the question arises regarding the possibility of the Court to appoint an examination on its own initiative. As it follows from the provisions of the Code of Civil Procedure of Ukraine, the only occasion when the Court itself assigns the forensic psychiatric examination, is a matter of individual proceedings concerning the adjudjment of a person disability, restriction of legal capacity and renewal in a civil capacity, in other cases the Court takes a passive position and cannot initiate examination. By adhering to the principle of the adversarial, as one of the most influential today principles of civil process, such a revision of the standards is absolutely understandable, however, we cannot accept the fact that in some cases, such a statement could prevent installation of the actual circumstances of the case. Thus, taking into account the statements of the legislation of the appointment of a court expert in matters of individual proceedings the adjudjment of a person disability, legal incapacity and relief from civil disabilities in the order of the Art. 239 of the CPC, which definitely has a similar nature with this example, we propose in the

Art 145 of CPC of Ukraine, which determines the required examination, to determine the possibility of an independent appointment of the examination if the materials of the case do not give reliable data concerning the subject of proof.

It should be noted that the subject of the examination are the factual circumstances that have the significance for the case, which the expert must establish in the results of expert studies, by the application of special knowledge. Such a position is derived from the dispositions of the Code of the Civil Procedure of Ukraine, because the evidence is not only actual data and the actual data must be received by the establishment in the law. Thus, the actual circumstances, that must be established by an expert, should be displayed in the recent conclusion of the expert for the purpose of non-infringement of the principle of the admissibility of evidence.

It is logical and that the conclusion of the expert must conform to the rules of evidence, i.e., be relevant to the subject matter of the dispute. In our opinion, this feature depends entirely on the range of the issues that are formulated by the Court for examination. Because the main objective of the examination it should be considered more scientifically informed, qualified research, by which the Court can obtain objective, correct and reliable answers to the questions about the circumstances of the case. In addition, it should be recalled that the conclusion of the expert may not be built – at teoremas, assumptions, etc., and, therefore, it is about the use of special knowledge for the statements of the fact.

But special attention needs to be paid to the order of the conclusion of the expert of the Court when all the leading scientists take into account only a written conclusion of the expert. According to the author, you must accept the conclusion of the expert in two forms, both written and oral, when the last form will be the first in accordance with p. 2 of Art. 200 of the CPC, but in accordance with part 2 of Art. 147 of the CPC provides oral clarifications and additions of the expert which does not refer to its conclusion, and is recognized as an expert interrogation (p. 3, Art. 189 of the CPC), they use audio, so cannot become the basis for its prosecution. In the meantime, an expert information is considered to be important,

so you need to ensure its correspondence to the reality by the establishing of a liability for giving additional expert conclusions and false explanations.

Therefore, judicial review is a study carried out by an expert, material objects, phenomena and processes that contain information about the circumstances of the case in order to provide the expert conclusion. Subject to the provisions of art. 53 of CPC of Ukraine and the p. 1 of the Art. 10 of the Bill of Ukraine «About Judicial Expertise", we believe it to be necessary to reconcile these dispositions thus to make changes to p. 1 of the art. 10 of the Bill of Ukraine "About Judiciary Examination", replacing "necessary knowledge" to "special knowledge". Consequently, judicial experts can be the persons who have special knowledge for the conclusion of the studying questions. In turn, the conclusion of the expert as means of proof is reasonable answers and conclusions on the questions that arise during the consideration of the case, and that requires special knowledge.

In turn, the conclusion of the expert should be in two forms, both written and oral, when the last form will be first in accordance with part 2 of Art. 200 of the CPC, but in accordance with p. 2 of Art. 147 CPC provides oral clarifications and additions of the expert, which don't refer to its conclusion, and are recognized as an expert examination (p. 3, art. 189 CPC), they are fixed by using audio, so cannot be the basis for his prosecution. In the meantime, provided expert information is considered to be an important one, so you need to ensure its correspondence to reality by establishing liability for giving additional expert conclusions and false explanations. When prescribing the examination and evaluation of the conclusion of the expert as an evidence on the case offers the Court to investigate and take into consideration the scientific degree of expert, research and the number of scientific papers on a range of problems, his specialization in the studying of certain processes and phenomena using computer programs and their complexity, which will evaluate the reliability of the obtained results.

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