PAPERS

Krzysztof Jóźwicki[1]
ORCID: 0000–0002–8174–6423

Criminological and penal aspects of issuing a false opinion by an expert witness - draft report on research project with proposals for changes in the law determining the legal status of expert witnesses

Research on the problem of false opinions being issued by expert witnesses has been conducted at the Police Academy in Szczytno on the basis of Regulation No. 28/2013 of the Commander-Rector of the Academy. The main aim of the research has been to diagnose the above-mentioned phenomenon and the motives for expert witnesses' actions, especially with regard to corruption, and to assess their impact on the course of criminal proceedings. From a normative point of view, the goal of the research has been to evaluate the existing legal regulations and to develop proposals for possible changes to those regulations. The research in question is supposed to be part of broader research on the phenomenon of corruption in the area of criminal justice.

Due to the volume limitations of the article, only selected research conclusions have been included in this paper, with particular emphasis on the proposal to create a new chapter in the Criminal Code entitled Crimes against evidence - false testimony and expert opinion. In the future, a broader approach to the subject matter in the form of a monograph is planned.

Justification for the choice of research issues

The phenomenon of issuing false opinions by expert witnesses in criminal proceedings, and other pathologies in the area of functioning of the

[1] Krzysztof Jóźwicki — major, academic teacher, doctor of legal sciences, senior lecturer in the Institute of Police Staff Education in the Police Academy in Szczytno. The author specialises in penal procedural law and has published papers on that topic and participated in research activities.

Contact with the author via the editor.

justice system are rarely discussed in scientific literature. In the available references, there is a noticeable lack of publications relevant to this phenomenon, in particular those discussed from the point of view of criminal-procedure pragmatism, and the authors of comments on the penal codes when discussing the crime under Article 233(4) of the Penal Code are rather reserved[2]. Thus, the achievements of the doctrine in this area should be considered as requiring supplementing - the lack of empirical studies of this phenomenon is particularly noticeable.

Both the experts themselves and the parties to the proceedings are well aware of the power of the experts - after all, different forms of expert opinion usually have a decisive influence on the final outcome of the ongoing proceedings and may, for example, lead to the decision to acquit the accused or award high damages. In this state of affairs, it is possible to attempt to influence an expert to issue an opinion which would be favourable to a given participant of the proceedings, thus creating a real risk of corruption.

Issues related to the defectiveness of expert opinions are one of the most discussed problems in the context of evidence law, but the quality of experts' work is only part of this problem - equally important elements of this problem include the defective shape of legal regulations and incorrect pragmatism of the functioning of procedural authorities[3].

In the course of the research, it was crucial to determine the scale of destructive behaviours displayed by experts, to determine the reasons for issuing false opinions by experts, and to develop preventive solutions. An important aim of the research was also to analyse the existing legal regulations both in domestic and foreign contexts, to critically evaluate them and develop *de lege lata* and *de lege ferenda* postulates, mainly in the scope of legal regulations concerning the position of an expert in a criminal trial, as well as in the aspect of criminal responsibility for presenting a false opinion.

As a rule, the research focussed on the role of experts in criminal proceedings, but most of the conclusions can be applied equally well to other types of proceedings: administrative and civil ones. The same applies to the legal status of the expert and translator, to whom the provisions on experts apply *mutatis mutandis*.

In the study, the terms 'expert' and 'false/faulty expert opinion' are mainly used, but in the same normative sense, the whole work also applies to the expert and the translator. The research results refer to all types of experts - both court experts *sensu stricto* (present on the lists of district courts) and *ad hoc* experts - appointed in view of urgent and specific procedural needs of the case.

[2] Ustawa z 6 czerwca 1997 r. — Kodeks karny (DzU nr 88, poz. 553 ze zm.).

[3] Pawelec S, Wadliwość opinii biegłego w procesie karnym jako pochodna błędów zawartych w postanowieniu o dopuszczeniu dowodu z opinii biegłego, *Prokuratura i Prawo*, 2014, No. 4.

The preliminary results of the research works were included in the post-control report of the Supreme Chamber of Control entitled 'Functioning of experts in the justice system'[4].

This research is very likely to be one of the few such comprehensive studies of the phenomenon of issuing false/untrue opinions by experts, as the broadly understood corruption and pathologies occurring in the judiciary are, as has already been mentioned, one of the less popular research issues.

Main research hypotheses

As the main research hypothesis, it has been assumed that the phenomenon of issuing false opinions is significantly larger than indicated by official statistical data. Another hypothesis has been the assumption that the penal response to the crime under Article 233(4) of the Penal Code is generally lenient, and compared to criminal liability in other countries, Polish criminal law provides for relatively low penalties for committing a crime consisting in issuing a false opinion (based on the legal status in 2014, and before the amendment of the Penal Code in 2016). The author has also assumed that one of the main motives for issuing false opinions by experts is corrupt activity - i.e. in order to obtain a material or personal benefit, and that important criminogenic factors in issuing false opinions by experts include poorly constructed legal regulations or a lack of thereof. Another important hypothesis has been to indicate the existence of the problem of the number of so-called dark crimes under Article 233(4) of the Penal Code, i.e. crimes which have not been discovered by law enforcement agencies, or those where the guilty party escaped criminal liability as a result of errors by law enforcement agencies. Another hypothesis has been the assumption that the existing legal regulations do not provide sufficient protection for the interests of the wronged parties violated as a result of a false expert opinion, and that the penal procedure in its current form has defects that hinder both effective prosecution of experts issuing false opinions and the proper functioning of the national justice system. For the purposes of the research, it has also been assumed that procedural authorities do not show proper interest in prosecuting perpetrators of crimes under Article 233(4) of the Penal Code, and that criminal proceedings in these cases are conducted in an improper manner. The author has assumed that the experts are sentenced to very low penalties for the crime of issuing a false expert opinion in relation to the degree of social harm caused by the act. The research has also assumed that the current shape of the statutory features of the offences referred to in Article 233(4) and (4a) of the Penal Code is not optimal and requires legislative changes.

[4] Raport pokontrolny Najwyższej Izby Kontroli, Funkcjonowanie biegłych w wymiarze sprawiedliwości (Post-inspection report of the Supreme Chamber of Control, Experts in Polish justice system), I/14/006/KPB, Warsaw 2015, pp. 47–48.

Methodology of research work

The paper uses a cross-section range of available research methods and techniques in order to obtain possibly the most complete results. The research has started with the analysis of previous national legal regulations concerning the criminal liability of experts for issuing false opinions and the analysis of available doctrine achievements in the studied area. An important part of the research work has also been the analysis of the currently binding legal regulations concerning the status of experts in criminal proceedings, especially in relation to the penal procedure applied on the basis of the 1997 Code of Criminal Procedure. Part of the research has been based on the analysis of statistical data on completed penal cases involving crimes under Article 233(4) of the Penal Code, which were obtained from prosecutor's offices. In the course of the work, a legal and comparative analysis of foreign legal regulations with criminal law regulations in Poland was carried out in order to identify valuable legal solutions for implementation in domestic criminal law.

The main core of the work has been the analysis of court files of completed criminal cases concerning crimes under Article 233(4) of the Penal Code from all over Poland, starting from 1998, because only such a cross-section, in the opinion of the author, allowed the manner and scale of reaction of the judiciary to a crime under Article 233(4) of the Penal Code to be measured. During the examination of the files, an analysis of selected cases of issuing a false opinion was also made on the basis of the examination of the files of the completed criminal cases.

An interesting part of the research has also been the survey of police officers with experience in conducting criminal proceedings and cooperation with experts, as well as interviews with police officers and selected experts.

Main research conclusions

Due to editorial requirements, only some of the research proposals selected by the author have been included in this paper. Some of the postulates were developed during the initial stage of research launched as early as in 2014, and the changes introduced by the legislator to the Penal Code in 2016 can be considered as confirmation of the legitimacy of the postulates developed previously. These proposals concerned, among others, the introduction of a privileged type of crime for issuing a false opinion due to unintentional guilt into Article 233 of the Penal Code, differentiation of the expert's penal responsibility for issuing a false opinion from the witness's penal responsibility for making false statements due to the greater social harm of the crime under Article 233(4) of the Penal Code, and increasing the penalty for committing this crime.

The research unequivocally shows that the group of experts most frequently manifesting corrupt behaviours are expert psychiatrists. For this reason, in the opinion of the author, it is justified to amend Article 202

of the Code of Criminal Procedure[5]. The second group of experts threatened with corruption are medical experts, and the third group - real estate experts. For comparison, police officers indicated in the survey that, in their opinion, the group of experts most at risk of corrupt behaviour are experts in traffic accident reconstruction - to some extent this can be explained by the specific nature of the preparatory proceedings conducted by the police, who are not authorised to appoint an expert psychiatrist on their own.

Following the amendment of Article 233 of the Penal Code in 2016 and the raising of the upper limit of criminal liability to 10 years of imprisonment, criminal cases concerning the offence of presenting a false opinion by an expert are again conducted at the stage of preparatory proceedings in the form of an investigation. However, in practice, in the vast majority of cases, these investigations are entirely entrusted to the police, which in the author's opinion is an abuse of the institution of entrusting the investigation. In this case, preparatory proceedings, due to their generic character and subject matter of protection, should, as a rule, be conducted in the form of a prosecutor's investigation only and preferably at the level of the district prosecutor's office, and not at the level of the local prosecutor's office, as is currently the case. Therefore, Article 309 of the Code of Criminal Procedure should be amended to include the jurisdiction of summary offences eligible for investigation as well as Article 311(2) of the Code of Criminal Procedure. This provision does not contain any limitations and may therefore lead to abuse. For many reasons, the police are not the most competent authority to conduct such important cases, which in consequence translates into a large number of discontinuances and refusals to undertake proceedings, as well as the occurrence of substantive and formal irregularities.

The catalogue of persons being statutory public officers, listed in Article 115(13)(3) of the Code of Criminal Procedure, should be extended and clarified - the list should also explicitly include the court expert.

The provisions concerning the substantive jurisdiction of criminal courts should be changed, i.e. criminal cases concerning the presentation of a false opinion by an expert and ending with a bill of indictment should be considered in the first instance by the regional court, and not by the local court, as is currently the case. The catalogue of cases covered by Article 25(1)(2) of the Code of criminal procedure, subject to examination in the first instance by the regional court should definitely be extended to include crimes under Article 233 of the Code.

The legal status of the victim, which is currently included in Article 49(1) of the Code of Criminal Procedure, should be clarified in order to state that the victim is a natural or legal person whose legal interests have been directly infringed or threatened by the crime. It is essential to clarify the meaning of the term 'directly threatened' in the context of damage caused by a false expert opinion in order to avoid discrepancies in interpretation. In practice, it turned out that some persons who suffered damage

[5] Ustawa z 6 czerwca 1997 r. — Kodeks postępowania karnego (DzU nr 89, poz. 556 ze zm.).

as a result of a false opinion issued by an expert did not have the status of a victim, and did not retain that status until the end of the criminal proceedings, because procedural authorities arbitrarily assumed that the submission of a false opinion only indirectly infringed the interests of the victim, and only the correct course of criminal proceedings was directly violated. It turns out that in some of the analysed criminal cases, victims who suffered large losses as a result of a false expert's opinion and in preparatory proceedings had the formal status of a victim granted by the prosecutor's office, usually had this legal status revoked and reduced only to the role of a witness by the court in court proceedings. In one of the criminal cases, the victim was deprived of the status of a victim by the court of appeal after he had appealed as an auxiliary prosecutor.

In the author's opinion, the appeal procedure against the decision to refuse to initiate or to discontinue preparatory proceedings is clearly defective because complaints filed by authorised persons against decisions to refuse to initiate an investigation or decisions to discontinue preparatory proceedings are examined, as a rule, only by local courts with territorial jurisdiction to hear the case. This is contrary to the content of Article 176 of the Constitution of the Republic of Poland[6] and the rule that court proceedings shall have at least two stages, as the appeal proceedings before the court are in this case only one degree of jurisdiction and prevent an external review of the legitimacy of the contested decision by another court - not locally connected with the case. In the author's opinion, this is also one of the main reasons for the insignificant effectiveness of the appeal proceedings. In most cases, despite the fact that the contested decisions were manifestly unfounded and numerous shortcomings in the work of law enforcement agencies were found (first of all the fact that another expert was not appointed), the courts uncritically supported the prosecutor's office's stance on the termination of proceedings. In this situation, not only are the court proceedings reduced to one instance, but also the same court is competent to hear an appeal, which in the case of an investigation resulting in a bill of indictment being brought, would have to hear a criminal case in the first instance, which also has a negative impact on the implementation of the principle of objectivity.

In the author's opinion, the remuneration of court experts in Poland is too low in relation to their qualifications and role in the criminal process - the rate of PLN 30-50 per hour of work plus subsequent obligations related to the appearance in court result in at least lowering the quality standards of opinions in some cases and may facilitate corrupting experts. Expert fees should be significantly increased and made more realistic in relation to market labour rates in order to attract the highest qualified persons to perform the functions of expert witnesses. A situation where the same expert receives several times as high a remuneration for an identical service on the

[6] Konstytucja Rzeczypospolitej Polskiej z 2 kwietnia 1997 r. (DzU nr 78, poz. 483 ze zm.).

free market than for work for the judiciary does not favour the recruitment of highly qualified experts and adversely affects the quality of the opinion.

In the course of the research, it has also been found that investigative authorities routinely abuse the institution of the examination procedure referred to in Article 307 of the Code of Criminal Procedure in a situation where there is clearly a justified suspicion that an offence under Article 233(4) of the Penal Code has been committed. In this connection, there are abuses related to the implementation of the principle of material legality.

In order to avoid ambiguity of interpretation, the concept of a private expert (e.g. by extending Article 393(3) of the Code of Criminal Procedure) and so-called private evidence should be immediately defined in the criminal procedure (and in others too).

It is justified to increase the autonomy of the Police as an official body conducting preparatory proceedings by including in the criminal procedure the possibility of appealing against arbitrary decisions of a prosecutor to, e.g. an independent court or a higher-level prosecutor's office. Due to the limited supervisory powers of the court, the prosecutor's authority in police investigations is, in principle, absolute, which may lead to serious irregularities. Sometimes, it happens that the police officer conducting the case believes that additional investigative measures should be taken, e.g. allowing evidence from another expert's opinion, and the prosecutor orders the unconditional discontinuance of proceedings. A policeman conducting proceedings cannot appeal against this decision anywhere, and questioning the legitimacy of an order issued by a prosecutor exposes the police officer to disciplinary consequences of, for example, improper execution of the order of the prosecutor. This could be remedied by indicating, for example, in Article 326, the possibility for the superior of the police officer to appeal to the prosecutor's office superior to the prosecutor's office which has issued the disputed decision.

Legal regulations should be introduced to limit the observed real opportunism of procedural authorities, e.g. by indicating in the guidelines of the attorney general the obligation to request another another expert's opinion in the case of an offence under Article 233(4) of the Penal Code. At present, procedural authorities are not obliged to do so by law and, without appointing another expert, they do not bear any responsibility in principle, but on the contrary - they save on the costs of expert opinions.

Studies have shown that experts found guilty by the court of misrepresentation or translation offences are virtually unpunished. The perpetrators of the offence under Article 233(3) of the Penal Code are not usually sentenced to the penalty of deprivation of liberty. This was the case only if the defendant was subjected to a preventive measure in the form of temporary arrest, and the court, when issuing the conviction, counted the period of temporary arrest towards the sentence of imprisonment.

Consideration should be given to introducing a new qualified subtype of the crime under Article 233 of the Criminal Code by explicitly indicating that a person who gives a false opinion in exchange for accepting financial or personal gain would be subject to a penalty of imprisonment of not less

than 2 years, which would generally stop the possibility of a conditional punishment in the current legal state. The term 'causing substantial damage', as a sign of a privileged form of an offence of giving a false opinion by an expert committed through unintentional fault, should be clarified, since in its current form it will most probably be a dead provision, similarly as in the case of an administrative offence under Article 231 of the Criminal Code committed through unintentional fault. In the doctrine there is an opinion that in order to make a charge under Article 231 of the Penal Code, committed even through wilful misconduct, the damage must be 'significant', but the procedural authorities are not willing to recognise this particular statutory feature of the offence.

The statutory features of a crime of issuing a false opinion due to unintentional fault should be changed. The punishment for such an offence is included in Article 233(4a) of the Penal Code and reads as follows:

'§ 4a. If the perpetrator of an act [consisting in issuing a false opinion - author's note] specified in § 4 acts unintentionally, exposing the public interest to significant damage, they shall be subject to the penalty of deprivation of liberty for up to 3 years.'

In the current form of this provision, there is a clear logical contradiction, since false opinions should be understood as intentional actions of an expert who is aware that they are issuing a false opinion or explicitly agreeing to it, e.g. by deliberately conducting research in an inappropriate manner. It is not possible to issue a false opinion inadvertently, e.g. due to an error or mistake, because it will be an opinion that is certainly defective and contains untruth, but it will not be a false opinion in a criminal-law sense.

Research has shown a significant legislative gap in the form of the absence of a complex act of law on experts, which would comprehensively regulate this issue. There is also a clear lack of a central register of experts and their opinions. This would be a tool intended for supervision of, and more effective cooperation with experts. It would be possible to assess the number of opinions issued, their duration and cost intensity, and to establish a price/quality correlation if, for example, the opinion were legitimately questioned. At the moment, it is not possible to establish this data in a simple way, which is incomprehensible in the era of widespread digitisation.

The Code of Criminal Procedure in Article 201, which reads: 'If the opinion issued is incomplete or unclear, contains a contradiction in itself, or opinions on the same matter are contradictory, the same experts may be recalled, or other experts may be appointed', should also explicitally indicate the possibility of admitting evidence from foreign experts' opinions and of preparing expert opinions abroad, at least in duly justified cases. At present, this issue is not regulated by law. Although Article 201 of the Code of Criminal Procedure does not theoretically prohibit the appointment of any experts and does not limit their circle to national experts, in the opinion of the author, this issue needs to be clarified, as it may be interpreted in certain situations to the disadvantage of the parties.

The existence of the problem of a large number of so-called dark crimes under Article 233(4) of the Penal Code has been confirmed. Most of the examined

criminal proceedings were instituted and entered court with a bill of indictment only when the procedural authorities were somehow forced to fulfil their statutory obligations by the determination of the wronged parties, because only these persons were interested in punishing the offender under the above cited Article and only through their involvement did they succeed in initiating proceedings and convicting an expert for submitting a false opinion.

During the next amendment of the Penal Code (perhaps during the creation of a completely new draft Penal Code), the legislator should consider returning to the solution adopted in the Polish Penal Code of 1932 and include crimes covered by Article 233 of the Penal Code in a separate chapter entitled, e.g., 'crimes against evidence'. This conclusion is justified by the research findings, which clearly show that the current regulation deprives the protection of persons wronged by false testimonies or false expert opinions and is one of the factors contributing to the impunity of perpetrators of crimes under Article 233 of the Penal Code, as a consequence increasing the number of dark crimes under Article 233(4) of the Penal Code.

Therefore, it is also justified to single out from the current Article 233 of the Penal Code the offence of issuing a false/untrue expert opinion as a separate article rather than as a subsection of another article (e.g. 233a of the Penal Code). After its last amendment, Article 233 of the Penal Code has been significantly extended, which disrupts its meaning and results in an erroneous approach to the records of criminal cases kept - sometimes offences of making a false opinion are mistakenly identified with the offence referred to in Article 233(1) of the Penal Code, consisting in making false statements or concealing the truth by a witness.

Both in criminal and civil proceedings, an obligation should be introduced for an expert to appear at a hearing at the request of the parties to the proceedings in order for them to be able to personally ask questions about their doubts concerning the opinion.

The possibility of challenging orders issued by a procedural authority when an order infringes a party's legal interests should also be extended, in particular the possibility of lodging a complaint against an unfounded decision rejecting a motion as to evidence or a decision to bring charges.

Provision should be made in the criminal procedure to clarify the issue of the expert's refusal to accept an order when they do not wish to accept it for justified reasons, such as being overloaded with other tasks.

The criminal procedure should regulate in detail the rules on the appointment of *ad hoc* experts, limiting the possibility to appoint them only in exceptional situations and giving priority to court experts. The previously proposed Act on Expert Witnesses should regulate in detail the consequences of improper performance of expert witness's duties, both in administrative and disciplinary procedures. For example, an unjustified delay in issuing an opinion could result in an automatic 10-20% reduction in the expert's remuneration. The requirements for candidates for experts should specify the obligation to prove at least 5 years of practical experience in a given specialty.

The register of court experts should be public and uniform throughout the country. There should be only one centralised list of court experts. The

national list of experts should include, in addition to the indication of the field of specialisation, information verified by the authority on professional experience, education and general qualifications in a given science, expertise or art.

The establishment of a central list of expert opinions, together with their cost and time of preparation, would enhance the supervision of the work of the experts, and the Appointing Authority would know that the expert of its choice is not currently busy giving an opinion on another matter. At present, sometimes several experts, for various reasons, send the case file back to the commissioning authority in turn, which unnecessarily prolongs the course of proceedings.

Candidates for judicial experts should go through a selection process requiring them to pass a state examination before a committee composed of representatives of procedural authorities and experienced experts of the same specialty as the candidate for the expert. All candidates for experts should also undergo mandatory training in the performance of expert witness's duties. In terms of its content, the training would cover, inter alia, ethical, legal and substantive issues.

Experts should have a clearly defined scope of civil liability for misconduct and possible civil liability insurance. At the moment, the situation in Poland is vague in this respect, unless the civil law provisions directly exclude such liability, they also do not describe it directly. No example of an expert who would suffer civil law consequences for issuing a false opinion in criminal cases has been found in the course of the research.

It is worth considering the introduction of the function of a court physician (coroner), who would be a medical expert employed in the structures of the justice system of a given district, who would cooperate on a regular basis with the procedural authorities in their cases. It seems that this solution would be better and cheaper than appointing an expert each time to, e.g. determine the causes of death of a victim or examine the body of an injured victim.

One of the most striking conclusions resulting from the survey of police officers is the fact that almost half of the respondents indicated that in the event of any substantive doubts as to the quality of the issued opinion, the procedural body left this fact without any reaction - e.g. no other expert was appointed or commissioned to carry out a supplementary opinion. As a consequence, this may mean that in many cases, opinions of doubtful quality could become the basis for legally valid decisions in criminal cases conducted by these bodies.

De lege ferenda **conclusions**

Proposal to amend the criminal provisions relating to the offence of issuing a false expert opinion

Admittedly, the national penal provisions defining the criminal liability of experts in April 2016 underwent significant changes as a result of the

amendment of Article 233 of the Penal Code. However, in the author's opinion, the legislator's consolidation of all of the regulations concerning the criminal liability of an expert and a witness in one comprehensive article is not an appropriate solution, not only because of the different statutory features of the criminal liability of an expert. Moreover, national criminal law still lacks a detailed approach on the statutory constituent elements of the offence and the precise definition of the qualified and privileged forms of criminal liability of the expert for issuing a false/untrue opinion. In view of the interpretative doubts, the catalogue of subjects of this offence should be extended to include a specialist and a so-called private expert.

Therefore, as a summary of all of the studies carried out, the author proposes a draft amendment to the penal provisions relating to the criminal liability of an expert for issuing a false opinion, which, e.g., as Chapter XXXa of the Code of Criminal Procedure could be entitled 'Offences against evidence - false testimony and expert opinion'. Similar solutions now exist in the criminal codes of other countries - e.g. in the German and Estonian criminal codes, and in the past, they were also present in the Polish Criminal Code of 1932.

The project of Chapter XXXa of the Code of Criminal Procedure 'Crimes against evidence - false testimony and expert opinion':

Article 233a

§ 1. Whoever, as an expert, appraiser, specialist, consultant or translator, presents an untrue or concealing opinion, expertise, translation or information intended as evidence in court proceedings or in any other proceedings conducted pursuant to this Act or at the request of a state authority or at the request of a party to these proceedings, or performs unlawful manipulation of evidence, or influences the course of the conducted procedural activity in order to lead to the issuance of a false opinion, or misleads an authority or a person ordering the performance of a procedural opinion or activity, shall be subject to the penalty of deprivation of liberty for a term of between one and eight years, and a fine.

§ 2. If the perpetrator of the offence specified in § 1:

1) acts for profit or for other reasons deserving special condemnation,

2) acts in order to bring about or leads to the conviction of an innocent person for an offence which that person has not committed,

3) causes or may cause other material damage to the public or private interests by their actions,

he/she shall be subject to the penalty of deprivation of liberty for a term of between 2 and 10 years, and a fine.

§ 3. If the result of the offence specified in § 1 is the conviction of an innocent person for an offence which they did not commit, the perpetrator of the offence specified in § 1 shall be subject to a penalty not lower than the penalty unduly imposed, even if not legally binding, on the innocent person.

Article 233b

§ 1 If the perpetrator of the offence specified in Article 233a(1) acts unintentionally, exposing the public or private interest to harm, they shall be subject to the penalty of deprivation of liberty for up to 1 year, and a fine.

Article 233c

§ 1 The court may apply extraordinary leniency of the penalty, or even withdraw from its imposition if:

1) false testimony, opinion, expert opinion, translation, information or manner of performing actions refers to circumstances which do not affect the decision on the case.

2) the offender, on their own initiative, corrects the false testimony, opinion, expert opinion, translation, information before a false decision on the case is made.

3) the perpetrator acted out of fear of criminal liability facing him/her or his/her closest relatives.

Article 233d

§ 1 In the case of conviction for an offence under Article 233a or 233b of the Penal Code, the court adjudicates against the perpetrator of the offence a penal measure in the form of a ban on performing a function, profession or refraining from specific activity and forfeiture of property used to commit the offence or obtained as a result of committing it, as well as compensation for persons harmed as a result of committing this offence.

Article 233e

A natural or legal person whose legal interest is at least indirectly affected or threatened by an offence referred to in this Chapter may enjoy the rights of a victim in criminal proceedings.

The subject of protection for crimes listed in the new chapter of the penal code would be the fulfilment of both the principle of material truth, the correctness of procedural decisions, as well as - consequently - the legally protected interests of the parties to the proceedings, and limitation of the risk of the occurrence of the so-called court error.

The proposed draft amendments that criminalise the presentation/issue of a false/untrue opinion by an expert have relevance both to legislative deficiencies found during the course of research and to conclusions resulting from the analysis of legal solutions functioning in other countries. The proposed changes also repair and clarify as far as necessary the statutory features of this crime, which should limit the occurrence of this phenomenon and lead to more effective prosecution of its perpetrators.

Summary and conclusions

The research results allow for full confirmation of the above-mentioned research hypotheses and unambiguously indicate that the phenomenon of false/untrue opinions submitted by experts (often motivated by corruption) is real and is one of the elements directly hindering the proper functioning of the justice system. The number of final court judgements based on false expert opinions is practically impossible to determine, but based on observations made during the research, this number may be very high. Out of almost 2,400 cases involving the suspicion of a crime under Article 233(4) of the Penal Code having been committed, only in fewer than

60 cases were court proceedings instituted, and this coefficient clearly indicates the existence of significant factors preventing perpetrators of these crimes from bearing criminal responsibility.

In the course of the conducted research, circumstances indicating the existence of a large percentage of so-called dark crimes under Article 233(4) of the Penal Code, i.e. undisclosed cases of issuing false opinions by experts, have been found. The disproportion between the real size of this phenomenon and the official statistics is even more striking, especially in the case of this particular crime. The causes of hidden expert crime have also been diagnosed, and a number of destructive attitudes have been identified in the sphere of criminal justice, which *de facto* allow for the existence of this phenomenon and lead to practical impunity on the part of dishonest experts.

The research findings show that it has been a common and improper practice of the Police and the prosecutor's office to unreasonably avoid admitting evidence from another expert's opinion, aimed at avoiding the initiation of investigations after receiving a notification of a justified suspicion of a crime having been committed under Article 233(4) of the Penal Code. Instead, as a rule, a so-called 'screening procedure' has been put in place in order to formally conclude a case by issuing a decision refusing to initiate proceedings, thus avoiding any adverse impact on the shape of statistical studies and without incurring additional costs for the evidence from the expert's opinion.

If we confront this with the fact that in the vast majority of the analysed court cases the expert was usually charged immediately after the evidence from another expert of the same specialty had been admitted, which as rule unambiguously exposed the falseness of the previously issued opinion, then the reality appears to be very sad.

On the basis of the conducted research, we may put forward a hypothesis that if all of the reports of a false expert opinion were examined by the procedural authorities in a reliable manner, and the truthfulness of the questioned opinions were verified in accordance with Article 193 of Code of Criminal Procedure by allowing evidence from another expert's opinion, it could turn out that instead of 2,400 decisions to refuse to institute proceedings and to discontinue proceedings, there could potentially be 2,400 decisions to bring charges and then bills of indictment. In the opinion of the author, this fully confirms the existence of a large percentage of so-called dark crimes under Article 233(4) of the Penal Code. Additionally, it can be assumed that the number of offences of issuing false expert opinions, which for various reasons have not been reported to anyone, and about which the law enforcement agencies have never learnt, is equally large, if not even greater. Only fewer than 60 proceedings out of 2,400 reports of suspected falsification of opinions by an expert witness resulted in a complaint being filed to the court.

To sum up, there is no doubt that it is possible to prove the falsehood in the expert's opinion only by allowing evidence from another expert's opinion. The termination of preparatory proceedings in a case

concerning a qualified type of a crime under Article 233(4) or (4a), without such evidence being provided, is a serious procedural irregularity and, in principle, may even be considered to be a failure to perform official duties by a procedural authority.

A serious problem is the form of the criminal procedure as regards procedural supervision over the preparatory proceedings conducted by the prosecutor's office and the court competent to consider the case. Despite some changes since the current criminal procedure entered into force in 1998, the basic model for challenging the decision to terminate pre-trial proceedings has not changed significantly and to some extent remains flawed.

In the author's opinion, the national model of pre-trial proceedings shows a lack of the institution of independent investigating magistrates, who would directly supervise the work of the prosecution and other procedural authorities. The decisions of the prosecutor supervising the police investigation are arbitrary and cannot be challenged. The surveyed police officers have often repeated a telling statement that 'the police are too small a fry to deal with corruption in the area of criminal justice'.

On the basis of the research, a number of criminogenic factors have been identified, and possibilities for the implementation of corrective solutions, which could significantly contribute to the reduction of the phenomenon under discussion, have been identified. Criminogenic factors have been diagnosed both as regards expert witnesses and procedural authorities, and the normative sphere, while at the same time indicating the possibility of remedying legal defects by changing them.

Some grounds for moderate optimism can be found in the fact that the legislator seems to perceive this problem - some of the *de lege ferenda* conclusions were implemented through the amendment of the Penal Code of 11 March 2016. Among other things, criminal sanctions facing those who commit an offence stipulated in Article 233(4) of the Penal Code were increased, and a privileged form of criminal liability for committing this offence through unintentional guilt was also introduced.

Despite the changes in the area of criminal law, there is still no statutory act in the legal system that would comprehensively regulate the functioning of expert witnesses.

Even the best standards of substantive criminal law are not meaningful if the procedures to effectively combat this type of crime are flawed. The human factor also fails, because the conducted research has shown that procedural authorities in practice do not see a large social harm in crimes involving issuing false opinions by experts, and in the case of these crimes, they are very often characterised by extreme opportunism, often even bordering on the failure to perform official duties. The cases reported by the wronged parties concerning crimes under Article 233 of the Penal Code most often result in the issuance of a decision refusing to initiate or discontinuing an investigation, usually without admitting evidence from another expert's opinion, which would allow the truthfulness of the disputed expert's opinion to be verified.

Therefore, apart from the changes in the normative sphere, it is extremely important to change the approach of procedural authorities to the phenomenon of broadly understood corruption in the sphere of criminal justice and to treat the fight against this type of crime with due seriousness and reliability. The current penal policy is striking because of the exceptional leniency which courts have shown towards experts sentenced for issuing false opinions - the perpetrators are practically unpunished, and the research shows that none of the convicted experts was sent to prison to serve their sentences. Even more absurd is the fact that the penal measure in the form of a ban on the performance of the function of an expert witness is not always pronounced against corrupt experts, which in some cases allows convicted persons to continue to function in their professional environment.

The previous, undoubtedly lenient penal reaction against persons convicted of committing an intentional crime referred to in Article 233(4) of the Penal Code was an important reason why the applied penal response measures did not, in principle, meet the objectives of general prevention, and did not discourage other persons from turning to crime and from failing to keep the promise they had made, which in consequence only strengthened the feeling of impunity on the part of dishonest experts - all sentences of imprisonment were pronounced as suspended ones. Interestingly, more severe treatment is given to persons accused of false testimony or concealment of truth, referred to in Article 233(1) of the Penal Code.

Without professional and reliable expert witnesses, there can be no honest and efficient justice system, as in the future, their role, whether in criminal or civil proceedings, will only increase.

References

Publications

Pawelec S., Wadliwość opinii biegłego w procesie karnym jako pochodna błędów zawartych w postanowieniu o dopuszczeniu dowodu z opinii biegłego. Prokuratura i Prawo, 2014, No. 4.

Legal Acts

Constitutions of the Republic of Poland of 2 April 1997 (DzU nr 78, poz. 483 ze zm.).

Ustawa z 6 czerwca 1997 — Kodeks karny (DzU nr 88, poz. 553 ze zm.).

Ustawa z 6 czerwca 1997 — Kodeks postępowania karnego (DzU nr 89, poz. 555 ze zm.).

Other sources

Najwyższa Izba Kontroli, Funkcjonowanie biegłych w wymiarze sprawiedliwości, I/14/006/KPB, post-inspection report, Warsaw, 2015.

DOI: 10.5604/01.3001.0014.1144
http://dx.doi.org/10.5604/01.3001.0014.1144

Keywords: expert, evidence, false expert opinion, criminal procedural law, corruption, judiciary

Summary: Evidence in the form of an expert opinion is usually of key importance for settling a pending case in any type of proceedings. In some cases, the role of the expert witness is closer to that of a judge rather than that of a witness, since a judge who does not have special knowledge often has to use evidence given by an expert to render a judgement. For this reason, issuing a false expert opinion results in a very high risk of delivering a wrong and unfair decision in a given case, which in turn has a negative impact on the social perception of the functioning of the justice system.

In the Polish Criminal Code, criminal responsibility for issuing a false opinion is stipulated in Article 233 (4) and (4a) of the Penal Code. At the same time, despite a very large number of reports of suspicion that a crime has been committed by an expert witness, only a negligible number of investigations result in a bill of indictment and a conviction, which causes virtual impunity of perpetrators and has a negative impact on the functioning of criminal justice.

Due to the diagnosed research gap in this area, the need to investigate and describe the phenomenon of issuing false opinions by expert witnesses, both in normative and criminological terms, on the basis of empirical research, has been clearly seen.

The main objective of the research has been to characterise the phenomenon in question on many levels and to determine its real extent, its etiology and symptomatology. An additional aim of the research has been the verification of research hypotheses and recognition of the normative sphere of the expert witness's status, expert evidence, and principles of responsibility for issuing false opinions. The research findings have resulted in proposals of solutions aimed both at limiting the phenomenon of issuing false opinions and more effective prosecution of perpetrators of crimes under Article 233 (4) of the Penal Code, which in turn may translate into more efficient functioning of the entire justice system, as expert witnesses and their work are an extremely important aspect of thereof.

The conducted research has fully confirmed the research hypotheses and precisely indicated defective areas of expert evidence, and consequently the need to introduce immediate legislative changes. Some of the research conclusions and *de lege ferenda* postulates were implemented into the amended provisions of the Penal Code in 2016, which fully confirms their legitimacy. Unfortunately, there is still no legal act of statutory rank which would comprehensively regulate the status of expert witnesses and expert evidence.