1 ЗАГАЛЬНІ ПИТАННЯ КРИМІНАЛІСТИКИ ТА СУДОВОЇ ЕКСПЕРТИЗИ

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THE IMPOSSIBILITY AND REFUSAL TO MAKE CONCLUSIONS BY THE FORENSIC EXPERT

In this article, the authors deal with a topic that does not have a single approach at the international level. The issue concerns the impossibility conclusion formulated by the forensic expert in the expert report, which is often confused with the refusal.

The authors provide gnoseological evidence regarding the delimitation of these two forms of answers offered to the judicial process by the expert.

The importance of the issue discussed stems from the very role of forensic expertise in the administration of justice and to add value in this regard.

Keywords: *forensic expertise, methodical study, conclusions of the expert, impossibility, refusal, explanation, the result of the research.*

Formulation of the problem. The final moment of carrying out the stage of the examination itself, as mentioned, is that of formulating the conclusions, representing the last part of the forensic expertise report.

In the conclusions are told the answers to the questions addressed to the expert, in Romanian literature on this topic: “Or, answering a question involves drawing up the answer, checking data, etc.” [1, p. 18].

Analysis of recent research and publications. Thus, regarding the process of formulation of the conclusions, we consider that the conclusions are formulated based on the reasoning made by an expert in the synthesis stage of the research using logical rules. We ask ourselves, why are certain logical rules necessary for the implementation of this act? The answer is found in the scientific literature, including from Romania, according to which it is mentioned that “logic must watch that any judgment is carried out correctly from the point of view of the rules of thought” [2, p. 29].

The correctness of reasoning, according to Kant is outlined in “...syllogism and is verified by the principle of non-contradiction” [2, p. 29]. Thus, we opine on the application of Kant’s logic by forensic experts when formulating conclusions, as it offers the possibility of establishing scientific truth with varying degrees of certainty, as well as arguing them. We note that in the specialized literature in Romania, the notion of “scientific truth” is used in the field of forensic expertise, as the equivalent of the “conclusion” reached because of “...investigation conducted with the means of science” [2, p. 21]. At the same time, we believe that a conclusion without argumentation has no probative value. In accordance with the opinion expressed in the literature studied in this regard: “Like any scientific truth, the conclusion of the forensic expert's report must have a double foundation: objective and subjective” [2, p. 22], we consider this requirement to be fully applicable to the whole spectrum of forensic expertise.

In this context, we mention that since the activity of forensic expertise is nothing more than a methodical study of the object concerned, carried out with the application of technical-scientific procedures and specialized knowledge, “... in order to formulate reasoned conclusions regarding certain facts, circumstances, material objects, phenomena and processes, the human body and psyche...” [3, art. 2] we can conclude that the expert’s conclusions are presented as a result of the process of scientific knowledge of the object of the expertise. In this sense, the Romanian literature on forensic expertise states: “the expert brings to the attention of the judicial body scientifically motivated conclusions on facts for the clarification of which specialized knowledge is required” [4, p. 20].

From the above, we repeatedly note the need to argue the conclusions of the judicial expert, not just a formulation of opinion, as many actors in the justice sector consider [5].

We offer a definition of the conclusion, considered "more abstract": "The conclusion is a new judgment, not only because of its synthetic character but also because of its informational content distinct from that of previous analytical judgments" [6, p. 197].

The purpose of the study. In this context, if we start from the generally accepted meaning of the notion of "argumentation", to argue means to justify, support, prove, reinforce a claim, prove a point of view, and from the fact that argumentation is the process by which we demonstrate (justify) the truth of our own opinions and try to convince others to accept them, the essence of the process of formulating expert conclusions becomes very clear.

At the same time, conclusions are made by the judicial expert according to certain rules. These rules have arisen from an extensive analysis of the whole process of expert investigation and judicial expert practice, arising from the expectations of the judicial process.

Presentation of the main material. In the structure of the judicial expert report, the expert's conclusions are presented as a separate, self-contained part and contain the expert's answer to the questions submitted. This requirement is reflected in all procedural legislation, which contains provisions on the structure of the expert report.

Thus, in the Republic of Moldova, both civil and criminal procedures and the special law concerning the activity of judicial expertise contain similar stipulations regarding the structure of the judicial expertise report: *"(4) In the final part of the expert's report, the conclusions of the expert are set out, which include the answers to the questions formulated by the expert's authorizing officer. The answers to the questions shall be formulated precisely, without allowing for equivocal interpretations*" [3, subparagraph (4), art. 37]. The same is quoted in the Code of Criminal Procedure [7, subparagraph (4), art. 151], in the civil procedure we have much smaller provisions: "(3) *The expert report shall contain a comprehensive description of the investigations and the conclusions on them, the answers to the questions of the court* ..." [8, subparagraph (3), art. 158], from which it follows that the conclusions appear as a separate part of the report.

In the Romanian legislation, the following provisions are exposed about the conclusions of the expert: "*c) the conclusions, which include the answers to the questions asked and the expert's or specialist's opinion on the object of the expertise* [9, lit c), art. 21].

The theory of forensic expertise has developed and clearly outlined scientific requirements for the expert's conclusions. Thus, expertology considers conclusions are an independent part of the forensic expert report, which contains the answers to the questions submitted to the forensic expert. The answer is given to each question separately, in the order in which they are listed in the introductory part of the expert report [10, p. 140]. This is to be understood in the sense that the conclusion is formulated by the expert in such a way that reading its contents is all clear without referring to the text of the expert report.

In the literature with reference to expert conclusions, we can find one type of conclusion – an impossibility. Some researchers consider that conclusions of the impossibility of solving the problems under examination arise as a result of factors that are generally of an objective nature [11]. If we look further at the arguments underlying the conclusions of impossibility, according to the opinion stated (the most important ones have been selected), we see that these are: – the condition of the objects submitted for examination (altered traces, rotten plant mass, corroded bodies, etc.)); – insufficient comparison materials; – very low quality of the disputed traces; – lack of methods; – wrong choice of working methods; – technical equipment not suited to the complexity of the examinations, we note that the claim that these (the conclusions) are "objective" is not convincing.

We believe that the wrong choice of methods, or the insufficiency of comparative materials, as well as the inadequate technical equipment, cannot be referred to as objective reasons for formulating conclusions of impossibility.

Also in the above sense, we find opinions, such as: "When only very small and disparate portions of the disputed trace remain visible (a scraped or erased text concerning areas of land, sums of money, years of issue, holder's name, etc.), it is extremely difficult to establish what was written previously and to formulate a conclusion "by guessing" is at least lacking in professional seriousness, in the absence of the possibility of demonstration and illustration" [12].

The cited authors warn, however, that reaching this kind of conclusion must always be accompanied by a thorough analysis and a description of all the circumstances on the basis of which a probability or categorical conclusion cannot be drawn. For this reason, we do not consider the alternative solution to be justified, namely that if, after studying the material to be examined, the expert can only reach a conclusion of impossibility, he may return the material to the judicial body, stating the reason for the return [12].

We believe that it is necessary to provide some clarity on the reasoning in the literature on the reasoning of conclusions of impossibility, and we agree with it only in part. At the same time, in relation to what has been stated and supported by the respective authors, we would like to initiate a discussion, which would clarify an aspect, in our opinion important, in the sense of the conclusion of impossibility.

We start from the reasoning that the expert's conclusions arise as a result of the natural process of researching the object/circumstances by applying special knowledge in the respective field of science. The forensic expert, following the scientific assessment of the results, formulates his conclusions, as explained above. In the case, when we have the conclusion of impossibility, generated by the lack/insufficiency of comparative material, or it is found, that the achievements of science and technology do not allow us to solve the questions put forward, in our opinion, no conclusion, including impossibility, can be formulated, because no examinations have been made on the objects (for lack of them or of the methods and means with which research could be carried out).

In this sense, in some countries, the legislator provides for the obligation of the forensic expert to refuse to formulate a conclusion. We consider such an approach to be more correct from the point of view of the gnoseology of the

notion of conclusion. We are of the opinion that the forensic expert should only formulate conclusions following research. What kind of research can we talk about if the expert is not provided with material or does not have the methods and means of examination?

Thus, we believe that it is necessary to distinguish between "refusal to draw conclusions" and "conclusion of impossibility". According to the theory of forensic identification and diagnosis, the conclusion of impossibility is reached when the forensic expert, after evaluating the results of the investigation, is unable to assess these results, even from the point of view of formulating a probable conclusion, since some of the data revealed remain even without an explanation as to their origin. At the same time, we support the need to justify the refusal so that the authorizing officer understands the reasons.

Conclusions. We conclude that the difference between the conclusion of impossibility and refusal, although for the judicial process it seems not to be noticeable, from the point of view of the theory of forensic expertise is that the conclusion of impossibility is always formulated when expert research has been carried out, and in assessing their results there are situations in which the expert cannot pronounce an opinion for scientific reasons, nor probable. Refusal is formulated when the research has not taken place. Both solutions require the expert to provide explanations to the judicial body, prompting it to seek answers to the question in question by other methods.

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НЕМОЖЛИВІСТЬ І ВІДМОВА ВІД НАДАННЯ ВИСНОВКІВ СУДОВИМ ЕКСПЕРТОМ

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У статті автори торкаються теми, що не має єдиного підходу на міжнародному рівні. Йдеться про неможливість висновку, який формується судовим експертом в експертному висновку, який часто плутають із відмовою. Автори наводять гносеологічні докази розмежування цих двох форм відповідей, запропонованих судовим експертом. Відмова надається тоді, коли дослідження не проводилося. Обидва рішення вимагають від експерта надання пояснень судовому органу, які спонукають його шукати відповіді на поставлене питання іншими способами.

Важливість обговорюваного питання випливає із самої ролі судової експертизи у вчиненні правосуддя.

Ключові слова: судова експертиза, методичне дослідження, висновки експерта, неможливість, відмова, пояснення, результат дослідження.