

Norbert Moravanský

Institute of Forensic Medicine, Faculty of Medicine, Comenius University,
Bratislava

forensic.sk Inštitút forenzných medicínskych expertíz s.r.o., Bratislava

ORCID: 0000-0001-9499-041X

norbert.moravansky@fmed.uniba.sk

Lucia Laciaková

forensic.sk Inštitút forenzných medicínskych expertíz s.r.o., Bratislava

ORCID: 0000-0003-1359-9721

laciakova@forensic.sk

Viktor Rekeň

Department of Surgical Oncological, Faculty of Medicine, Comenius
University and St. Elisabeth's Cancer Institute, Bratislava

forensic.sk Inštitút forenzných medicínskych expertíz s.r.o., Bratislava

ORCID: 0000-0002-8887-0814

viktor.reken@fmed.uniba.sk

Ludvík Juříček

DTI University, Department of Management, Dubnica nad Váhom

ORCID: 0000-0002-9974-1743

ludvik.juricek@gmail.com

Peter Kováč

Department of Criminal Law and Criminology, Faculty of Law, Trnava
University, Trnava

forensic.sk Inštitút forenzných medicínskych expertíz s.r.o., Bratislava

ORCID: 0000-0002-2895-4127

kovac@forensic.sk

Luděk Vrtík

First Department of Surgery, Faculty of Medicine and University Hospital
Bratislava, Old Town

forensic.sk Inštitút forenzných medicínskych expertíz s.r.o., Bratislava

ludek.vrtik@fmed.uniba.sk

Jozef Čentěš

Department of Criminal Law, Criminology and Criminalistics, Faculty
of Law, Comenius University in Bratislava

ORCID: 0000-0003-3397-746X

jozef.centesh@flaw.uniba.sk

Expert witnesses professional and methodological mistakes in medical malpractice cases*

Introduction

Expert witness testimony in malpractice cases is necessary for the correct qualification of an act and the decision on many questions, such as intent, negligence, and the causal nexus between an action and the consequence that occurred.

When appraising the provision of health care, it is important to discuss the strength of the medical evidence needed to confirm the alleged malpractice. In this context, the *presentation of medical evidence* means not only the expert opinion but in a broader sense – also the sustainability of the evidence during the cross-examination of the expert witness in preparatory or a court proceeding.

Act No. 382/2004 on Experts, Interpreters and Translators and on amendments to certain acts, as amended (hereinafter referred to as the ZoZTP) forms the legal basis for expert witness activities in Slovakia. Additional regulation is created by:

- Act No. 301/2005 Coll. Criminal Procedure Code, as amended (hereinafter referred to as the Criminal Procedure Code or CPC).
- Decree of the Ministry of Justice of the Slovak Republic No. 228/2018 Coll., by which Act No. 382/2004 Coll. on Experts, Interpreters and Translators, as amended (hereinafter referred to as the Decree) is implemented.

The expert witness is legally defined in § 2(1) of the ZoZTP, as “(...) a natural person or legal entity authorized by the state for the performance of activities under this Act, who is inscribed to the list of experts, interpreters and translators or not inscribed to this list if he or she is appointed as an expert, translator or interpreter under § 15 (*ad hoc* regime). *Ad hoc* expert witness may conduct his or her activities only for a court or other public authority if (i) no person is registered by the Ministry of Justice in the relevant field or sector, (ii) registered experts cannot perform the act, or (iii) disproportionate difficulties or costs could arise with the registered experts”.

In a broader context, an expert witness is a person authorized by the state to perform professional activities under the ZoZTP in cases where the assessment of certain professional issues is necessary to decide on the merits. ZoZTP divides experts into the following categories:

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- a) a natural person registered into the list of experts,
 - b) a natural person not registered in the list of experts who satisfies the prerequisites for performing the expert activity and has been admitted to a proceeding on *ad hoc* basis,
 - c) expert organization – a legal entity specialized in the performance of expert activities in the registered field and sector,
 - d) expert institute – a legal entity, a specialized scientific and professional institution that performs the function of a methodological centre in the respective field of expert activities. The expert institute performs expert activities in most difficult cases requiring a special scientific assessment, eventually serves to resolve the contradiction of expertises in the proceedings,
- 3) a legal entity not registered in the list of experts which satisfies the prerequisites for the conducting of expert activities and has been admitted to a proceeding on an *ad hoc* basis, either as an expert organization or an expert institute,
- f) a legal entity registered as an expert organization admitted to a proceeding on an *ad hoc* basis as an expert institute.

The list of expert witnesses is led by the Ministry of Justice of the Slovak Republic (hereinafter only MoJ) and publicly accessible on the MoJ website. The expert witness may give an expert opinion only within the field of expertise in which he/she is registered by the Ministry of Justice. The same rule applies to expert organizations, but these, due to their nature can be registered in more than one field of expertise, thus enabling to provide interdisciplinary expert opinions in specified cases.

CPC contains specific regulations of expert witness's position in criminal proceedings. Under CPC § 142 the “complexity of the clarified fact important for the criminal proceeding”¹ is always taken into account. CPC directly stipulates the process for recruiting experts into criminal proceedings:

- under the CPC § 143(1) expert organizations registered with the MoJ are preferred,
- if there is no expert organization in the respective field of expertise is registered, a natural person registered in the respective field of expertise with the MoJ shall be admitted,
- if no expert organization or natural person (expert) is registered in the required field (branch), registered entities are unable to submit an expert opinion (e.g., due to bias), or disproportionate difficulties, delays, or costs can occur, another legal entity or natural person with the necessary expertise and civic prerequisites (a so-called *ad hoc* expert) may be retained as the expert witness according to CPC § 143(2), if he/she agrees.

¹ J. Čentěš et al., *Trestné právo procesné. Všeobecná a osobitná časť*, 2. vydanie [Criminal Procedural Law. General and Special Part, 2nd edition], Šamorín 2012, pp.150–864.

The expert witness admitted to a proceeding according to CPC § 144 must be duly instructed. The tasks that an expert witness is dealing with should be specified in the form of questions. It is not for the expert witness to deal with legal issues or even to evaluate the evidence. The CPC in § 145 regulates in more detail elaboration of an expert opinion. CPC prefers a written form of expert opinion. Only exceptionally and in simple cases, an expert witness may be permitted to dictate expert testimony into the minutes of a hearing on a subject that he/she has brought to the proceedings. To deliver expert opinion, the expert witness is permitted to:

- become familiarised, to the necessary extent, with the contents of a case file, especially with the evidence presented,
- propose the taking of evidence needed for the purpose of an expert opinion,
- be present at the taking of evidence proposed by him/her,
- pose the questions to the persons being questioned if the questioning takes place at his/her request.

Police, prosecutor, or the court may allow the expert to:

- take part in the questioning of the accused, witnesses or the taking of other evidence, or
- borrow a case file.

Only in the case where “so-called particularly complex fact” shall be analyzed, CPC allows to involve two expert witnesses. Two experts are required by law to perform the forensic autopsy. The CPC also distinguishes a “so-called particularly complex fact”, which requires two experts for clarification. The law optionally leaves the assessment of whether a particularly complex fact is involved or not to the authority entrusted to recruit an expert. Under § 347 of the Act No. 300/2005 the Criminal Code (hereinafter the Criminal Code or CC)², providing a false expert opinion is a criminal offense punishable by a prison term of up to 5 years. Under aggravating circumstances, the prison term may be up to 10 years.

Material and methods

Between 2008 to 2019, the authors as experts of the forensic.sk Inštitút forenzných medicínskych expertíz³ (hereinafter only forensic.sk)⁴ provided a total of 3098 expert opinions and expert testimonies in both criminal and civil proceedings. The majority of forensic.sk activities relate to cases of alle-

² Act No. 300/2005 Coll. the Criminal Code, as amended.

³ English translation of the trade name is forensic.sk – Institute of Forensic Medical Expertise.

⁴ The forensic.sk is registered with the MoJ as an expert organization (2008) and as an expert institute (2016).

ged medical malpractice. Surgery, emergency medicine, anaesthesiology and intensive care, gynaecology and obstetrics, internal medicine, neurology, and paediatrics were among the most frequent specialities in which alleged malpractice occurred. Based on the review of 11 years dataset, we identified the most significant questionable and incorrect practices of expert witnesses. We summarise the occurrence of identified negative phenomena and the potential consequences in proceedings.

Results

We ranked the identified shortcomings according to their seriousness. evaluated by the direct impact on the decision-making of law enforcement agencies and courts.

Ex-ante; Ex-post

Ex-ante analysis of medical malpractice is the only correct approach to evaluate the provision of the health care. The expert witness shall take into account only those information and medical facts of the case (e.g., manifestations of the disease, symptoms of health disorders, specific parts of medical records in the form of counselling findings, laboratory findings, etc.), which a specific health care worker had available at the time of providing health care in the assessed case. The *ex-ante* approach is closely linked to precise work with the case file, the medical records, examining the availability of examination results, examining the active search for the origin of the disease, etc. A valuable source of expert knowledge, however, is also the testimony of witnesses (health care professionals, patients, and relatives), who can clarify in particular the time and content of the information that could have been available to a particular person at a particular time in the diagnostic and therapeutic decision making. The *ex-ante* approach to expert assessment of a case can also be summarised as an assessment of available medical records and information from the point of view of the person who, at the time when the assessed case was taking place, had access to only a certain amount of information. This is a contrast to the *ex-post* viewpoint, with knowledge of the outcome of the matter, when, in the light of additional information and knowledge, obscured connections become clear and often seemingly easy and simple to explain. This, therefore, involves insight into a specific case from the viewpoint of all available information, which at the time the case occurred may or may not have been available to the person, because it could have come out later, or only after the death of the assessed person in the form of an autopsy

finding. Put simply, these are the pieces of a jigsaw puzzle, which in the end, obviously make sense when everything fits together and creates a solid picture; however, in the expert assessment of a particular case, the expert cannot look at the case from the point of view of the resulting image, i.e., the *ex-post* approach. On the contrary, the expert witness must put him/herself into the position of a health care provider, making a decision at a critical time.

A typical example of *ex-post* assessment of health care provision is the perception of an autopsy finding with a conventional, immediate, and primary cause of death as a basic reference point, which is constantly compared with the working and later final clinical diagnosis of a patient's death. Therefore, it is not an assessment of approaches in the possible differential diagnostic spectrum with the occurrence of a specific health disorder at a specific time (e.g., in the pre-hospital phase, at the central hospital admission, in an outpatient clinic, etc.), but a comparison of an (often surprising) autopsy finding with its usually only non-specific initial manifestations and symptoms of the disease.

However, lapsing into an *ex-post* assessment of a case is a very serious problem, placing the expert opinion in the position of a dangerous tool for erroneous assessment of diagnostic and therapeutic procedures in malpractice cases. This problem can then be a source of long-term persisting litigation, where the poor quality of expert activity secondarily damages a particular case and its sides.

Errors of an expert in the obtaining of medical records

The requesting of medical records by an expert witness is a fundamental precondition for assessing health care provided as the firm basis for any assessment. Although an expert admitted to a proceeding by Slovak law enforcement authorities or the courts has a legal title for the requesting complete medical records (under § 2(8) b) ZoZTP and § 25(1) j) of the Act No. 576/2004 on Health Care, Services Related to the Provision of Health Care)⁵. The authors often come across a flagrant underestimation of the range and completeness of the requested medical records – a fundamental methodological mistake of the expert. An expert who submits an expert opinion even at the request of one of the parties in a proceeding for purposes directly related to the proceedings before the court also has the right to request full access to medical records from any relevant health care provider under § 25(1) j) of the Act No. 576/2004⁶.

⁵ Act No. 576/2004 Coll. on Health Care Services Related to the Provision of Health Care and on amendments to certain acts, as amended; Act No. 382/2004 Coll. on Experts, Interpreters and Translators and on the amendment of certain acts, as amended.

⁶ Act No. 576/2004 Coll. on Health Care Services Related to the Provision of Health Care and on amendments to certain acts, as amended.

Frequently, the expert witness fails to state in written expert opinion which specific medical records he/she had available when preparing the expert opinion (its journalized range and a list of health care providers who provided the patient's medical records to the expert). Often, an expert will only state the platitude of "complete medical records", which is, however, information insufficient for the potential review of such expert opinion. This is a violation of § 17(5) ZoZTP, which requires the composition of an expert opinion must make it possible to examine its content and verify the justification of the procedures⁷. A negative phenomenon among expert witnesses in Slovakia is also the use of highly non-standard methods of accessing the medical records such as:

a) importing data from a person's medical records directly by an expert who, when entering the hospital electronic system, uses as his *login* of the attending physician and accesses without authorisation patient records from another department or even uses in the expert opinion a photograph which is obviously taken as a *screenshot* from the computer on which he/she is examining the medical records. Such practice is not in the line with the applicable laws on personal data protection and or labour law, potentially rendering the expert opinion non-admissible as evidence if objected by an observant attorney of the opposing party,

b) obtaining data from a person's medical records by telephone or e-mail from a known colleague who was the person's attending physician or during a personal meeting with attending physician,

c) informally requesting a person's medical records via e-mail communication with the relevant health care provider, without an official request to the health care provider,

d) obtaining data from a person's medical records exclusively by direct contact with the person to whom the expert evidence is demonstrably related or his/her relative, through a lawyer, etc.,

e) in a specific case the expert stated in the expert testimony in the preparatory proceedings: "Mr... is the head of surgery at the clinic where the injured person was treated, i.e., he has access to the individual actions that were performed during the outpatient examinations, while I only have access to the final discharge report"; confirming his own gross negligence in obtaining medical records for the performing his own expert activity.

Frequently, the expert does not pay close attention to ensure the completeness of medical records and is satisfied, for example, only with a discharge report from hospitalization, without sufficient emphasis on daily monitoring charts, or imaging, or attending specialists' examinations. A similar situation and a source of errors occurs when the expert draws principal findings exclusively from the patient's initial treatment in the hospital, without examining

⁷ Act No. 382/2004 Coll. on Experts, Interpreters and Translators and on the amendment of certain acts, as amended.

the essential records on the provision of pre-hospital health care or subsequent examinations when the patient is admitted to a department. The omission of the analysis of nursing procedures, and nursing records is another source of errors. We observed repeatedly the conflict of nursing records with the doctor's daily monitoring charts. Therefore, it is essential to analyze the process of control of prescribed and administered treatment, as well as the results of prescribed control examinations.

Expert witness deficiencies related to the processing of medical records are usually manifested when the expert is not able to fully answer the question about what the overall health of a specific person was prior to the incriminated and investigated provision of health care or treatment of the post-traumatic state. The deficient and incorrect procedures of an expert witness may be further confirmed if the expert witness does not consider it necessary to become familiar with the medical records from the person's general practitioner. This procedure, however, is essential, notably in cases of analysis of the death of paediatric or elderly patients.

We must point out that the incompleteness of requested medical records is easily detectable by the question of whether the expert was personally acquainted with the picture documentation from medical imaging examinations. The failure to perform one's own expert revision of radiographs or CT/MR scans (by the expert himself or by his/her consultant according to ZoZTP § 16 may therefore be a major contributing factor to the expert's incorrect conclusions⁸.

If during the analysis of the medical records the expert determines a principled limit for objective assessment of the case, it is her or his duty to state such fact in his/her expert opinion. This may even be an objective obstacle that prevents the completion of the expert's task. In such cases, it is possible to try to again make another copy of medical records available, to request cooperation with a law enforcement authority or court to obtain all available documents or information, e.g., about who was the general practitioner for a particular person, which is not always clear from the inpatient medical records. In in the matter of the unavailability of a specific part of medical records, an expert may even propose that law enforcement authorities and the court take evidence through the witness testimony of the health care professional after his/her legal release from professional secrecy obligation, and, of course, with the expert's presence during the questioning and with consent to the asking of questions; the expert may thus clarify the details of the treatment provided with direct targeted questions.

⁸ Act No. 382/2004 Coll. on Experts, Interpreters and Translators and on the amendment of certain acts, as amended; Act No. 576/2004 Coll. on Health Care Services Related to the Provision of Health Care and on amendments to certain acts, as amended.

We emphasize, that the exhaustive listing of documents available to the expert witness, particularly medical records, not only is a legal requirement under the ZoZTP to allow for the review of expert opinion, but also a protective measurement for an expert witness. We therefore recommend always requesting access to the medical records, even though a patient's medical records may be included in the case file. The expert can never rely solely on what is contained in the case file which can contain only fragments of a person's medical records. These fragments may not necessarily be the same as the original medical records.

As another peculiar aspect, we notified that experts only rarely use the option to request the cooperation of the health insurance company when verifying provided health care, or when identifying specific providers who could have participated in outpatient treatment.

The insufficient and inconsistent approach of an expert witness to the procurement of medical records can seriously affect the questioning of the expert in the preparatory proceedings (e.g., after accusations against a particular person) or in a court hearing, when the expert is unable to answer a basic question of the proceeding: "what specifically did the expert base the submitted expert opinion on?". Complex cases may even require the creation of an annex to the expert opinion in the form of a CD or DVD containing scanned medical records. Such annexes may be relevant to the review of the immediate perioperative period according to the surgical protocol or anaesthesiologic records of the patient⁹.

The use of consultants

According to ZoZTP §16(6), the expert witness has the right to consult partial question, not related to his/her own field of expertise, with a specialist. In medical malpractice cases, it could be the assessment of a CT or X-rays, revision of histological slides, evaluation of a specific panel of laboratory tests, etc. For such consultation and conclusions, the full responsibility rests with the expert witness¹⁰. In this seemingly simple area we recorded severe methodological and procedural shortcomings. Model examples of such shortcoming are following situations stated by the expert witness in written opinion:

a) "I consulted X-ray in question with a radiologist, who concluded such an X-ray finding on the X-ray does not indicate a relevant effusion in the pleural cavity". Not disclosing the identity of consultant does not allow to evaluate the professional experience and summon such consultant to confirm the con-

⁹ L. Vrtík, M. Čambal, I. Grgáč et al., *Základy chirurgie* [Fundamentals of Surgery], Bratislava 2019, pp. 377–394.

¹⁰ Act No. 382/2004 Coll. on Experts, Interpreters and Translators and on the amendment of certain acts, as amended; Act No. 301/2005 Coll. Criminal Procedure Code, as amended.

sultation. Furthermore, the partial task or question for the consultant is not disclosed too. This model situation violated the obligation of the expert witness according to § 16(6) ZoZTP, in particular (i) to state the reason why the consultant was selected and (ii) to clearly stipulate a partial task to be resolved by the consultant¹¹.

c) "I went to a hospital where surgery was performed, I met Doctor A.B. who performed the surgery and Chief Physician X.Y. I consulted on the surgical procedure in a difficult operating field in a patient with both of them...". Such activity of the expert witness is clearly above and beyond his/her competencies under the ZoZTP and CPC. The expert witness poorly interpreted the institute of a consultant, who may not be the attending physician, whose treatment is the subject of expert opinion. Such a discussion about violation of due process with the suspect or potential witnesses in the proceedings is not permissible by the law. Such blatant error is documented by the expert in his/her written expert opinion usually results in disqualification of the expert and prolongs the proceeding due to the necessity to obtain another expert opinion.

c) "I consulted on the given case with the head physician and his deputy at a congress, where we explained the interpretation of the operational protocol or the monitoring charts from the day...". Is a copycat of the previous example. Whenever the expert witness is not able to make clear conclusions by analyzing and interpreting the medical records and by his/her other own activities, including consultation with an independent impartial specialist, then he/she may request the summon of any witness to testify or propose to acquire other evidence, even with the participation of the expert him/herself¹².

Autopsy report and interpretation of autopsy findings

The interpretation of the autopsy report by a pathologist or forensic pathologist does not constitute a problem. But recently we observed the experts from clinical disciplines to amend, or change, or deny diagnoses in the autopsy report and even misinterpret the autopsy conclusions. Clinicians often lack understanding what an autopsy report actually is; we recorded even mix-ups of autopsy report and death certificate, or a preliminary autopsy report. Experts from clinical disciplines also do not distinguish a complete autopsy report and list of autopsy diagnoses.

It is obvious for the pathologist or forensic pathologist, that a morphological diagnosis may not be easily interpreted in relation to a documented clinical course of the disorder and therefore in certain cases it is essential to co-

¹¹ Act No. 382/2004 Coll. on Experts, Interpreters and Translators and on the amendment of certain acts, as amended.

¹² Act No. 301/2005 Coll. Criminal Procedure Code, as amended.

operate with experts from clinical disciplines as a team. The opposite setting may however be problematic. The clinical expert witness should use the services of a forensic pathologist or pathologist as a consultant to correctly understand and interpret the immediate and primary cause of death, complications of the primary cause of death, as well as associated and organ findings. When a clinical expert witness tries to interpret the autopsy report on his/her own, the following situations may arise:

a) Negating the autopsy findings as a whole when such expert witness “disagrees with the autopsy findings and declares that the immediate cause of death was... and the primary cause of death was...”.

b) Death of a long-term surviving patient in a vegetative state after poly-trauma, who died due to hypostatic pneumonia, was declared to be non-violent death from a medico-legal point of view.

c) Change in the primary cause of death, negating the results of the microscopic examination of autopsy tissue samples to which clinical expert witness does not even have access during preparation of an expert opinion, because he/she does not have the complete autopsy report.

d) Incorrectly interpreted autopsy finding as a result of inadequate comparison of e.g., echocardiological findings with sectional findings.

e) Clinical expert witnesses do not consider necessary to examine at all whether an autopsy was performed, or whether the autopsy findings have the form of an autopsy report or an expert opinion under the terms of CPC.

In our dataset we even discovered cases where clinical expert witnesses were not aware of the difference between the autopsy performed under Act No. 581/2004 Coll. on Health Insurance Companies, Supervision of Health Care and on amendments to certain acts (health care related indication for autopsy)¹³ and forensic autopsy under the CPC¹⁴.

Work of an expert with case file

Alongside the medical records, the case file is the primary source of information that the expert witness shall take into account when analyzing the alleged medical malpractice. The resolution on initiating the criminal proceedings, a filed criminal complaint, interrogation protocols of witnesses, or accused persons provide the essential information that the expert witness have to confront with medical records. The testimonies of health professionals as witnesses can often be in agreement or contradiction to the medical records. Such testimonies are the factual basis for the decision on whether or not me-

¹³ Act No. 581/2004 Coll. on Health Insurance Companies, Supervision of Health Care and on Amendments to Certain Acts, as amended.

¹⁴ Act No. 301/2005 Coll. Criminal Procedure Code, as amended.

dical malpractice and *non lege artis* procedures occurred. Insufficient work with the case file or even ignoring the content of such file will be discovered when the expert witness is asked to defend, amend, or supplement the expert opinion and is confronted with the question of the attorney representing the health care professional accused of malpractice. In a such situation, detailed knowledge of the case file at the date of providing the written expert opinion is a key factor in the sustainability of the expert conclusions. The opinion, that only the medical records, not the whole case file is important for the expert witness, is a dangerous simplification of the problem. The case file contains valuable information, the analysis of which makes it possible to acquire an *ex-ante* overview of the diagnostic and therapeutic process. Observant and experienced expert witness cannot omit these facts¹⁵. A case file as such can also reveal the limits of expert opinion.

Discussion

Expert witness activities are an integral part of medicine. Expert witnessing in medicine should under no circumstances be considered a less valuable career pathway or a pathological effort to have decision-making authority over suspected medical malpractice cases. The number of erudite and high-quality experts in the field of health care and pharmacy, however, is not increasing in the Slovak Republic. We believe that expert witness activity in medical malpractice cases shall be considered as a part of medical practice¹⁶ for which the appropriate qualification and education are necessary. Only the results of expert witness activities performed in line with the applicable law and up-to-date medical knowledge can contribute to the effectiveness of criminal and civil proceedings.

For the judges and courts is not possible to rule in medical malpractice cases without expert witness activity both in criminal cases and in civil proceedings. While in some countries a substantial part of medical malpractice cases is resolved outside the criminal law system, this is not the case in Slovakia. Most of the alleged medical malpractice will initially pass through the criminal justice system and the civil proceedings are limited to set down a reasonable monetary compensation for pain and disability or compensation infringement of the right to protect one's personal integrity¹⁷.

¹⁵ S.K. Narang, S.R. Paul, *Expert Witness Participation in Civil and Criminal Proceedings*, „Pediatrics” 2017, Vol. 139(3), e20164122.

¹⁶ American Medical Association, Council on Ethical and Judicial Affairs, *E-6.01: Contingent Physician Fees*, [in:] *Code of Medical Ethics*, Chicago 1994.

¹⁷ Act No. 437/2004 Coll. on Compensation for Suffered Pain and on Compensation of Social Impairment, as amended; P. Kováč, *Medical Law in Slovakia*, Alpen an der Rhijn 2012, pp. 100–101.

The expert witness in medical malpractice case shall be aware of the importance of medical evidence derived from the human body or documented in the medical records. It is equally important to be able to assess the significance and limits of such evidence for the case itself. For the expert witness it is essential and important to be aware of the unprovability, deficiencies, or defectiveness of the medical evidence itself, and thus to be aware of the limits of the case. Each “forensically significant finding” shall therefore be understood as the “evidence in the case”, which the expert witness should be ready to “publicly defend in the court of justice” but also before the general public¹⁸.

Medical expert witness report can significantly modify the legal assessment of a case, and therefore it is necessary to pay attention to the proper methodology and standardization of expertise, including the regular training of experts. If we accept the necessity of standard procedures in clinical or morphological medicine, then it is essential to open the question of standardization of methodology for the expert witnesses. Since as early as 1767, the case of *Slater v. Baker and Stapleton*¹⁹ was known in England as an example where for the first-time standard treatment procedures and the expert testimony of physicians as experts in court were used. The question of the standardization of expert procedures appeared for the first time in the traditional American judicial environment in 1989, when the American Academy of Paediatrics published internal procedures for expert activities in paediatrics²⁰.

The role of an expert witness in cases of suspected error in diagnostics or treatment should in principle consist of the presentation of fundamental or annually revised standards for the treatment of the patient. The expert witness should present deviations from standard procedures and its justification and consequently summarize the discovered breach of standard procedures, taking into account the equipment and economic possibilities of the particular health care provider²¹. Without correct methodology, such conclusion of the expert witnesses can be questioned and even overturn.

¹⁸ R. Hanzlick, *Dead Investigation: Systems and Procedures*, London 2007, pp. 50–121.

¹⁹ R.R. Faden, T.L. Beauchamp, N.M.P. King, *A history and Theory of Informed Consent*, New York 1986, p. 116.

²⁰ American Academy of Pediatrics, Committee on Medical Liability, *Guidelines for Expert Witness Testimony*, „Pediatrics” 1989, Vol. 83(2), pp. 312–313; American Academy of Pediatrics, Committee on Medical Liability, *Guidelines for Expert Witness Testimony in Medical Liability Cases (S93-3)*, „Pediatrics” 1994, Vol. 94(5), pp. 755–756; American Academy of Pediatrics, Committee on Medical Liability, Council of Medical Speciality Societies, *Statement on Qualifications and Guidelines for the Physician Expert Witness*, Council of Medical Speciality Societies, Lake Bluff, IL 1989; Committee on Medical Liability. American Academy of Pediatrics, *Guidelines for Expert Witness Testimony in Medical Malpractice Litigation*, „Pediatrics” 2002, Vol. 124(1), pp. 428–438.

²¹ I. Humeník, P. Kováč et al., *Zákon o zdravotnej starostlivosti. Komentár*, 1. vydanie [Act on Health Care. Commentary, 1st edition], Bratislava 2015, 528 pp.

Nowadays the poor quality of expert witnesses' activity and expert reports in medical cases cannot be tolerated, especially if a poor, methodologically incorrect, or even illegal procedure of an expert can adversely influence the decision on merits.

According to the ZoZTP § 9(1) each expert witness shall maintain the liability insurance for damages that may arise in connection with the performance of his/her activities. There are no known cases where the expert witness was sued for damages resulting from his/her activity and the insurer paid these damages in Slovakia since 2004. Historically, expert witnesses enjoyed some kind of immunity from criminal cases as well as civil disputes²². We believe, that the absolute immunity of an expert witness, is simply not acceptable in today's society.

We are of the opinion, that the most significant professional error and misconduct of an expert witness is unauthorized access to the medical records due to the faulty procedures when receiving or requesting access to medical records, and unauthorized communication with anyone involved in suspected medical malpractice. Therefore, it is essential to repeatedly instruct and educate medical expert witnesses to avoid any such communication with parties, other than the official ways of communication through court or police, and to ensure absolute impartiality in the assessment of the case. Likewise, it is also essential to draw attention to the legal obligation of an expert witness under the ZoZTP § 11(1) to immediately notify of a possible bias due to the previous relationship to the matter at hand, if the expert at the time of his/her admission to the proceedings was previously acquainted with the case²³. We are convinced that the question of professionalization of medical expertise, its standardization, and written anchoring of its methodology, as well as repeated educational programs, including programs of simulated court hearings, are the only way to maintain or restore the confidence of professionals and the general public in medical expertise.

Conclusion

The most frequent and severe professional and methodological mistakes of expert witnesses in medical malpractice cases in Slovakia are presented. These are in particular slipping into an *ex-post* analysis of cases; incorrect and unjustified procedures for obtaining medical records; incorrect procedures of an expert

²² M. Glabman, *Scared Silent: The Clash Between Malpractice Lawsuits and Expert Testimony*, „Physician Exec” 2003, Vol. 29, pp. 42–46; M. Hansen, *Experts are Liable, Too*, „ABA Journal” 2000, November, pp. 17–18; S.B. Bal, *The Expert Witness in Medical Malpractice Litigation*, „Clon Orthop Relat Res” 2009, Vol. 467, pp. 383–391.

²³ J. Čentés et al., op. cit., pp. 150–864.

when using a professional consultant, deficiencies while interpreting autopsy findings and the autopsy protocol and fundamental shortcomings in the work of an expert witness with case files. The presented shortcomings may have a direct impact on the outcome of the criminal or civil proceedings in which expert witnesses are involved.

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Summary

Expert witnesses professional and methodological mistakes in medical malpractice cases

Keywords: medical law, medical malpractice, expert witness, professional misconduct, Slovakia.

As any case of alleged medical malpractice, whether in a civil or criminal proceeding, cannot be resolved without involving the expert witness who assists the police, office of public prosecution or the court to rule on merits, the authors aim to identify the most significant questionable and incorrect practices of expert witnesses based on the review of 11 years dataset (2008–2019) consisting of 3098 expert opinions and expert testimonies in both criminal and civil proceedings in Slovakia. To the necessary extent, the legal framework for expert witnesses in Slovakia is also presented. The authors also aim to focus on the significant findings of the dataset, such as the most frequent specialities in which alleged malpractice occurred, which are surgery, emergency medicine, anaesthesiology and intensive care, gynaecology and obstetrics, internal medicine, neurology and paediatrics. The publication is also aimed at the most frequent incorrect or questionable practices of expert witnesses, such as *ex-post* case analysis, questionable practice related to the obtaining of medical records, improper use of consultants by the expert witness, misinterpretation of the autopsy records and autopsy diagnoses and the deficiencies in the processing the case file by the expert witness.

The authors focused on important findings from the dataset, such as the specializations where the alleged medical malpractice most frequently occurred, i.e. surgery, emergency medicine, anaesthesiology and intensive care, gynaecology and obstetrics, internal medicine, neurology and paediatrics. The publication deals with the most common erroneous or questionable expert practices, such as *ex-post* analysis of the case, questionable practice related to obtaining medical records, inappropriate selection of consultants by an expert, misinterpretation of documentation from post-mortem examinations and deficiencies in the preparation of an opinion based on the case file by a court expert.

Streszczenie

Błędy zawodowe i metodologiczne w przypadkach błędów medycznych

Słowa kluczowe: prawo medyczne, błąd w sztuce lekarskiej, biegły sądowy, wykroczenie zawodowe, Słowacja.

Każdy przypadek domniemanego błędu w sztuce lekarskiej, czy to w postępowaniu cywilnym, czy karnym, nie może zostać rozwiązany bez zaangażowania biegłego, który pomaga policji, prokuraturze lub sądowi w orzekaniu co do *meritum*. Dlatego autorzy starają się zidentyfikować najbardziej budzące wątpliwości i nieprawidłowe praktyki biegłych sądowych na podstawie przeglądu 11-letniego zbioru danych (2008–2019) składającego się z 3098 opinii biegłych i zeznań biegłych zarówno w postępowaniach karnych, jak i cywilnych na Słowacji. W niezbędnym zakresie przedstawiono również ramy prawne dla biegłych sądowych na Słowacji. Autorzy koncentrują się na istotnych ustaleniach zbioru danych, takich jak najczęstsze specjalizacje, w których doszło do rzekomych błędów w sztuce lekarskiej, czyli chirurgia, medycyna ratunkowa, anestezjologia i intensywne opiece, ginekologia i położnictwo, medycyna wewnętrzna, neurologia i pediatria. Publikacja skierowana jest również do najczęściej spotykanych błędnych lub wątpliwych praktyk biegłych, jak analiza *ex post* sprawy, wątpliwa praktyka związana z uzyskaniem dokumentacji medycznej, niewłaściwe wykorzystanie konsultantów przez biegłego, błędna interpretacja dokumentacji z sekcji zwłok i sekcji zwłok diagnozy i uchybień w opracowaniu akt sprawy przez biegłego sądowego.

Autorzy skupili się na istotnych ustaleniach zbioru danych, takich jak specjalizacje, w których najczęściej doszło do rzekomych błędów w sztuce lekarskiej (chirurgia, medycyna ratunkowa, anestezjologia i intensywne opiece, ginekologia i położnictwo, interna, neurologia i pediatria). Publikacja traktuje o najczęściej spotykanych błędnych lub wątpliwych praktykach biegłych, jak analiza *ex post* sprawy, wątpliwa praktyka związana z uzyskaniem dokumentacji medycznej, niewłaściwe dobranie konsultantów przez biegłego, błędna interpretacja dokumentacji z sekcji zwłok i uchybień w opracowaniu opinii na podstawie akt sprawy przez biegłego sądowego.

