WAR OR PEACE? FORENSIC EVIDENCE VS. RIGHT TO COUNSEL AND DEFENCE IN POLISH LAW

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ABSTRACT: Since Gross' handbook was edited forensic science has been traditionally defined as a knowledge utilised in criminal cases by the police and the Prosecutor's Office. Today we try to expand the description of our branch not only onto other (civil and administrative) procedures, but also characterise mentioned discipline as the most significant part of counsels' erudition. For hundred years forensic techniques have developed remarkably, actually all of them are permanently evolving and some have been arising within last years. Therefore nowadays there is no doubt that not all examination techniques seem to be applicable to lawsuit. The judges still do not believe in some forensic techniques, not only because of their unsettled methodology but also for the sake of lawyer's ignorance. Both Polish attorneys and expert-witnesses rather seldom cooperate with each other. They do not realise the collaboration might be mutual profitable. In the paper there will be explained some "forensic scientific" implications of right to defence and counsel in the Polish law. In this number the most important questions are:

1. Whether, and if so than – how the forensic techniques (incl. the most controversial ones like lie-detection and hypnosis) could become an evidence from a defendant's point of view?
2. Whether, and if so than – how the expert's examination seem to be determined by right to defense and counsel?
3. What will change in the nearest future, i.e. what are the forensic science driving at?

In the author's opinion the third answer is the major one. In a short time indeed the attorneys will understand they have a reliable arm – knowledge, the experts will esteem their adversaries and the judges will appreciate forensic science. It will be a serious challenge for the new millennium.

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A few acts of International Law as well as both the Polish Constitution (art. 42, sect. 2) and the Criminal Procedure Code (art. 6) implicate that everyone charged has a fundamental right to be defended. It means that either a party is entitled to be represented by counsel in all proceedings or the accused can maintain his/her own case in a court.

This principle and evident fact has consequences for both lawyers and forensic scientists.

Various procedural aspects of right to defence and counsel have been described for ages, therefore I decided to skip them and focus on some repercussions of mentioned right related to new or controversial forensic techniques. I would like to explain also why the lawyers still do not believe in some forensic techniques. I am going to tell as well some words about attorneys' education in forensic science in Poland, because both Polish barristers and expert-witnesses rather seldom co-operate with each other. They do not realise the collaboration might be mutual profitable and legally required, actually. Finally I would like to impart some conclusions connected with the topic and hopefully encouraging on discussion about remarked problems.

New or controversial techniques of forensic examination seem to be one of the most distinguished difficulties for legislator, lawyers and forensic scientists. The discussion about their lawsuit's applicability has been carrying on in all countries over the world for a long time. It has been growing more intense in Poland in particular during implementation of a new Criminal Procedure Code. There is no doubt, that for 100 years forensic techniques have developed remarkably, actually all of them are permanently evolving and some have been arising within last years. Therefore nowadays it is crystal clear that not all examination techniques seem to be appropriate.

The estimation of a "suitability" of concrete method of examination seem to be a very confounded task. The issue was also recapitulated many times. Consequently instead of echoing well-known dilemmas or commenting famous standards it would be useful to emphasise a few not at all new, but meaningful questions connected with "controversial" techniques.

The first question is: Has the defendant or his/her counsel right to request from court to call an expert for conducting the examination with "doubtful" techniques?

The right to defence and counsel implicates – in my opinion – right to demand the "controversial" (but not directly forbidden) examination. The activity is not prohibited by Criminal Procedure Code and, besides, on a ground of paragraph 15 of Code of Counsels Ethic (Resolution 2/XVIII/98 proclaimed by Main Barristers' Council) the counsel is entitled to set forth uncertain arguments as long as he does it carefully. The Polish Supreme Court[1] explained, what it does mean. To be correctly, in his/her proposal the counsel should always inform about sources of information and show the way of his/her reasoning – using conditional form. It was not resolved what particular circumstances should the arguments be related to. Accordingly the defendant's or his/her counsel's request of conducting an examination

[1] I PAN 3/93, *Palestra* 1999, no. 11, p. 124, 1995, no. 11–12, p. 265.

with unsettled methodology is supposed not to be turned down as illegal or immoral, if this defence line has been argued in a due form and it has been proved that in spite of all there is reasonable chance of showing the defendant's innocence.

The second question sounds: if the defendant has remarked right, than does the court let conduct the demanded examination connected to controversial technique in the case?

First of all the court ought to check if the demand corresponds with above legal conditions. If so, it should be examined whether there are no negative circumstances. They would exist e.g. if the technique seemed to be dangerous for defendant's life or health. But if the examination technique is not prohibited or injurious and the request was formulated in a suitable form, the court, considering right to defence, could approve the examination with new, unsettled technique.

In the situation the court before adjudging would be supposed to call expert-witnesses for giving an abstract-opinion concerning basic facts about debatable examination. By the way, I suppose, the opinion would be very circumspect and careful and I wonder whether it would be really helpful.

Thus the judges should decide finally relating their common sense and having in consideration that even more improbable but reasonable method can't be excluded, if there was a chance for clearing the defendant of a charge.

This explanation could be partly interpreted also on a ground of a project of amendment of Criminal Procedure Code, concerning polygraph examination. This activity was explicitly prohibited in the first variant of this act, however during an interrogation, literally. The legislator presented nevertheless in the reasoning of the Act that it disagrees to using polygraph at all – as well by the expert-witness examination. The serious problem came into being consequently. The solution of this question was strongly criticised, so the approach of lawmakers to this subject has been mutating since the Code came into force. Today the legislator is going to accept that technique – if the defendant agrees to the examination. It has understood the "controversial" techniques can be used in fair trial.

So, although some "controversial" techniques appear unsafe for human life or health – and they will not be never accepted by courts, the rest of them (in that number also polygraph examination or hypnosis) seem to be in generally morally neutral. Therefore a reasonable judge can agree to conduct "controversial" examination also from a moral point of view. Of course, there is always possibility of breaking law and infringing of human rights, it depends however not on the method, actually, but on the person who conducts the activity.

Perhaps the characterised project of amendment will become a beginning of a new, logical trend. Well begun is half done!

The third question is: if the court accept conducting of the examination, than how to estimate results of it? Whether, and if so than how the results could become an evidence in spite of their scientific controversy?

If the court decided to accept the examination connected to using controversial technique it has to analyse results of the activity compiled in an opinion of an expert-witness. Otherwise it would infringe the Criminal Procedure Code. On the base of this act the court deduces the truth from all faced evidence and other sources of information.

In fact the court has enough prerogative to assess both the opinion and the other evidence and to conclude the reality without any reasonable doubts. If the judges would not be positive – are empowered to call the same or other expert-witness anytime, to examine them or give other orders (The Polish courts from time to time seem to avoid decisions and follow up its advantage and power with calling myriad of expert-witnesses. That takes months frequently).

But after the court collects eventually enough data about forensic technique it has to estimate the opinion and adjudge. The judge should not be afraid of accepting the opinion based on a "controversial" technique, if it is correctly motivated and corresponds with law. This opinion can become an evidence.

In spite of non-existing in Poland precedent system the decision may become a paradigm for future. The courts faced analogical questions probably would take pattern by that first adjudging. Therefore the precedent resolution should be extraordinarily turned over in court's mind (like all the other, by the way).

As we realise then, the right to counsel and defence could have many consequences in the characterised field. But there is another problem worth emphasising.

Since Gross' handbook was edited forensic science has been traditionally defined as a knowledge utilised in criminal cases by the Police and the Prosecutor's Office. Today we try to expand the description of our branch not only onto other (civil and administrative) procedures, but also characterise mentioned discipline as a knowledge how to explain this part of reality which caused lawsuit. This interpretation should make the forensic science also the most significant part of counsels' erudition. Nevertheless the reality in Poland looks differently like.

I am sure some people of this audience have been expert-witnesses for ages. As far as I know, they were sometimes surprised with an attorneys' incompetency in forensic science exactly. The situation seem to be comfortable for expert-witnesses, of course, but I myself believe that this ignorance in-

fringes constitutional right to defence. In my opinion if the counsel do not know basic facts about examination techniques, he/she is in fact not allowed to hold brief for anybody and causes damage for his/her client. If I were in the client's shoes I would bring an action against that unqualified counsel.

The keen counsel should first of all satisfactorily participate in an expert-witness examination. The barrister ought to emphasise all inevitable obscure statements and conditional conclusion, he/she is entitled to discuss with an expert-witness. Instead of solid preparing, consulting questions and whole opinion with someone proficient at the branch, one of the main strategies of Polish barristers depends on petitioning next opinion (because of weakness or obscureness of the former ones), best of all from institutions or people overloaded with a work. In that way the procedure will take a few next months (by silent approval of the court).

Looking for a reason of the counsels' inexperience let me tell some words about schooling of apprentices. On the base of the Counsel Act (art. 58, point 12 b.) the Main Barrister's Council is competent to establish rules of apprenticeship in attorney's profession and of passing the attorney's examination. The resolution of the Main Barrister's Council 1/XIV/98 (with amendments to it by Resolution of MBC 10/99) in Section III, paragraph 21 proclaims that an apprentice has to study circumscribed branches. The collected knowledge of future attorneys is proved in final examination in: civil, penal, international, labour, administrative, commercial, constitutional and financial law as well as convenient procedures, barrister's ethic, history and tradition and also rules of contemporaneous attorney's organisation. The District Barrister's Council can also modify the program of study adding branches which in its opinion are required for counsels' erudition. As we realise, there is no obligatory space for forensic science.

Considering this fact the paragraph 24 of mentioned Resolution determined task of an attorneys' examination – checking if the novice seem to be prepared to became counsel indeed, in particular if he/she not only know the law, but also can observe rules and put the knowledge into practice – seem to be quite curious.

Conclusions: there exist forensic techniques with unsettled methodology. The scientists, of course, are expected to eliminate this problem, but the defendant or his/her counsel have a right to request an expert examination with "controversial" method if they prove there is a reasonable chance to clearing the defendant of a charge in that way.

The court should accept this request, if there are fulfilled legal conditions and the request is consistent with common sense.

After the court accepted the activity it is generally empowered to estimate the opinion based on the examination and make it evidence (having in consideration legal and logical circumstances).

The modern forensic science should be defined as knowledge how to clear up the truth before court. Therefore it is required to change current regulations and teach forensic science during counsels' apprenticeship schooling.

In a short time indeed the attorneys will understand they could have a reliable arm – knowledge, the experts will esteem their adversaries and the judges as well will appreciate forensic science. It will be a serious challenge for the new millennium.