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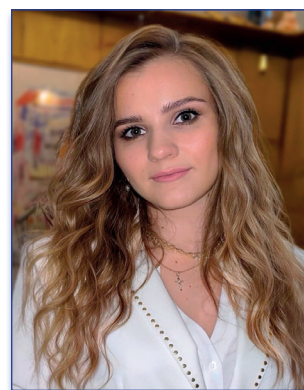
Formation of Inner Conviction when Evaluating an Expert Conclusion as a Source of Evidence in Criminal Proceedings by the Judge

Abstract. *The article analyzes conceptual bases of specific expertise use during evaluation of evidence in a case by the judge. Formation of internal conviction while the judge's evaluation of an expert conclusion is connected with a number of challenges, among which the most significant one is the lack of specific expertise in a judge for a comprehensive and objective evaluation of such a conclusion. The research paper analyzes the process of court evaluation of the expert conclusion as evidence in criminal proceedings "on the basis of internal conviction" as well as identifies challenges faced by a judge in the course of such evaluation and analyzes methods for overcoming doubts during evaluation of an expert conclusion and judicial practice concerning the use by judges of means of clarification of the expert conclusion. Own vision of more efficient methods for overcoming doubts by the judge while expert conclusion evaluation is outlined.*

Key words: *Judicial system of Ukraine, specific expertise, evidence evaluation, forensic experts, expert conclusion.*

Introduction. Currently, the concept of evidence evaluation by a judge "based on internal conviction" is understandable realities for legal community; however, in 2012, before the adoption of the current Criminal Procedural Code of Ukraine, this concept did not exist. Therefore, the Criminal Procedural Code of Ukraine dated 2012 contained an amendment that took the process of evidence evaluation by the court in criminal proceedings purely to subjective opinions of the judge. Despite the fact that in compliance with provisions of Section 2, Article 94, of the Criminal Procedural Code of Ukraine, no evidence has a predetermined force, it is the expert conclusion that is trusted the most among judges, taking into account competence and impartiality of a forensic expert who carried out forensic examination within the framework of criminal proceedings and the judge's lack of specific expertise.

It should be stressed that acceptance by the court of such a conclusion as an indisputable truth without due evaluation is shifting the judge's responsibility onto a forensic expert, which is undoubtedly a significant violation of the criminal procedural law that calls into question legality and validity of such a court decision in general. Taking into account the obligation of the judge to study the expert conclusion at trial and provide evaluation, along with other evidence in case, the logical question is: "how can a judge



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Contributors

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Declaration of Competing Interest

The author declare that they have no conflict of interest.

without sufficient expertise comprehensively evaluate the conclusion of a forensic expert who possesses this expertise?³. In fact, the expert conclusion is evidence in evaluating which the judge faces the greatest challenges since taking into account the subjectivity of the process of evidence evaluation, they must use all methods provided by the criminal procedural law to clarify such research for themselves and other participants in trial, in order to transform their doubts into conviction that in turn is of paramount importance for pending a decision on a case.

Analysis of publications where this problem solution is initiated.

Domestic researchers have dedicated a lot of research to the analysis of a highly complicated topic of an expert conclusion as evidence source in criminal proceedings, its evaluation by the court and formation of a judge's inner conviction. Among them: V. S. Batyrhareieva, A. M. Babenko, V. V. Vapniarchuk, V. H. Honcharenko, Yu. M. Hroshevoi, N. L. Drozdovych, N. I. Klymenko, O. M. Kliuiev, V. Ya. Marchak, Yu. O. Piliukov, O. P. Poliakov, O. O. Sadchenko, S. M. Stakhivskyi, O. K. Chernovskyi, N. Ye. Filipenko, V. Yu. Shepitko, M. H. Shcherbakovskyi¹ and others. Clearly, research papers of indicated scientists have made a significant contribution to the study of the mentioned issues, however, the majority of them studied individual issues of expert conclusion as evidence in criminal proceedings, evidence evaluation by the court, including the expert conclusion, formation of internal conviction in a judge while evidence examination in criminal procedure. This has necessitated the conduct of research on problematics of expert conclusion evaluation by the court during consideration of criminal proceedings based on internal conviction as well as the process of overcoming doubts by a judge concerning such a conclusion and challenges faced by the judge during evaluation.

Aim. Analysis of the process of court evaluation of the expert conclusion as evidence in criminal proceedings based on subjective judgment, considering requirements of current criminal procedural law and current, sustainable judicial practice. Due to conducted analysis, problematics of the court evaluation of the expert conclusions and methods of overcoming doubts by the judge when making such an evaluation are revealed, which in turn contributes to implementation of the principle of legality and validity with regard to the court's decision.

Results and discussion. Analyzing current realities of criminal proceedings investigation, we can draw a conclusion that most of them require the use of specific expertise in the process of proving crime circumstances, which is realized through various forensic examinations.

To solve these tasks, the Criminal Procedural Code of Ukraine stipulates the involvement of a forensic expert or a specialist, that is, people who possess scientific, technical or other specific expertise, have the right to conduct a forensic examination or participate in other procedural actions and who are entrusted with research on objects, phenomena and processes, including information about circumstances of criminal offense commission, and to provide a conclusion or consultation on issues that arise while criminal proceedings and relate to their field of expertise (Articles 69, 71 of the Criminal Procedural Code of Ukraine). Thus, specific expertise in criminal

³ Батиргареева В. С., Бабенко А. М. Аналіз сучасної криміногенної ситуації в Україні як інформаційна модель для розробки стратегії зменшення можливостей вчинення злочинів. Архів кримінології та судових наук : наук. журнал / Ред. кол.: О. М. Клюєв, В. С. Батиргареева, Г. О. Спіцина та ін. Харків : ХНДІСЕ, 2020. No. 1. С 39–53; Клюєв О. М. Удосконалення експертного забезпечення правосуддя: теоретичні, правові та організаційні аспекти. Теорія і практика судової експертизи та криміналістики. Харків : Право, 2019. Вип. 19. С. 102–117; Nechyporuk, M., Pavlikov, V., Ivanović, A., Filipenko, N. (2021) Forensic Science Possibilities Within The Framework Of Criminal Proceedings While Aviation Accidents (Review Article). Archives of Criminology and Forensic Sciences. 1(3). P. 56–66. DOI: <https://doi.org/10.32353/acfs.6.2022.05>; Щербаковський М. Г. Проведення та використання судових експертиз у кримінальному провадженні: монографія. Харків: В деле, 2015. 560 с. та ін.



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**FORMATION OF INNER
CONVICTION WHEN
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CONCLUSION AS A SOURCE
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PROCEEDINGS BY THE JUDGE**

proceedings is used in two forms: in the case of specialists' involvement while individual investigative (judicial) actions and within the scope of forensic examination.

While forensic examination, unlike other procedural actions, essential facts in a case can be established in the absence of an investigator (or the court). This peculiarity helps to explain why the legislator provided the possibility for a system of additional procedural guarantees which observance is designed to ensure reliable, comprehensive and objective establishment of facts by the forensic expert and the comprehensive verification of their conclusions by the investigator and the court. Forensic examination should be ordered only when there is a real need for it, when without an expert's answer to particular questions it is impossible to learn the truth in a case. The study of causes of plane crashes itself provides sufficient grounds to involve forensic experts, specialists and others².

According to information published by the Department of Expert Support of Justice of the Ministry of Justice of Ukraine, during the 2nd quarter of 2022, forensic science institutions of the Ministry of Justice of Ukraine conducted 26,875 forensic examinations and expert researches, of which 22,977 were forensic examinations in criminal proceedings and cases concerning administrative offenses³.

It should be highlighted that despite the fact that the number of forensic examinations performed in the 2nd quarter of 2022 decreased in contrast to the same period in 2021 (34,023 forensic examinations and expert researches, of which 26,836 were forensic examinations in criminal proceedings and cases concerning administrative offenses)⁴, it is obvious that much more forensic examinations are conducted in criminal proceedings than in civil, economic and administrative ones.

This picture is due to the fact that in the legal field it is deemed that forensic examination is the most important and qualified form of using specific expertise.

The concept of expert conclusion, in particular, is enshrined in Part 1 of Article 101 of the Criminal Procedural Code of Ukraine⁵, under which the expert conclusion is exhaustive description of research carried out by a forensic expert and drawn conclusions based on its results, well-grounded answers to questions addressed by a person who involved a forensic expert, or by the investigating judge or the court that ordered forensic examination.

The legislator in Part 1 of Art. 94 of the Criminal Procedural Code of Ukraine provides an exclusive list of subjects of criminal proceedings who are responsible for evaluating evidence, namely: the investigator, prosecutor, investigating judge, court.

In our research, we would like to dwell in more detail on the problematics of expert conclusion evaluation by a judge during consideration of criminal proceedings, since such an evaluation is of paramount importance for determining criminal proceeding circumstances, proving the accused guilt, and, consequently, issuing punishment or, on the contrary, an acquittal.

Abstract. Formation of internal conviction during the judge's evaluation of the expert conclusion is connected with a number of challenges, which should be resolved while transformation of doubts into conviction. The main obstacle in this process is lack of specific expertise in a judge for a comprehensive and objective evaluation of the expert conclusion, especially if research carried out by the forensic expert necessitated the use of complex, multidisciplinary methods, specialized terms and wordings in a conclusion itself.

Despite the fact that a large number of research papers is devoted to the expert conclusion as a source of evidence in criminal proceedings, its evaluation by the court and the formation of the internal conviction in a judge, it is worth stating that the legal literature does not sufficiently disclose the problematics of expert conclusion evaluation by the court while criminal proceedings consideration based on internal conviction, the process of overcoming doubts regarding such a conclusion and challenges faced by the judge in the course of evaluation.

The article aim is the analysis of the process of court evaluation of an expert conclusion as evidence in criminal proceedings "on the basis of internal conviction": identification of challenges faced by a judge in the course of such evaluation, analysis of methods for overcoming doubts during evaluation of an expert conclusion and judicial practice concerning the use by judges of means of clarification of the expert conclusion, own vision of more efficient methods of overcoming doubts by the judge while expert conclusion evaluation.

It has been established that formation of internal conviction during expert conclusion evaluation is associated with continuous elimination of doubts arising while case consideration. In particular, the process of transformation of doubts into the judge's conviction is a substantial psychological aspect for the development of internal conviction. It has been clarified

² Nechyporuk, M., Pavlikov, V., Ivanović, A., Filipenko, N. (2021) Forensic Science Possibilities Within The Framework Of Criminal Proceedings While Aviation Accidents (Review Article). Archives of Criminology and Forensic Sciences. 1(3). 56-66. DOI: <https://doi.org/10.32353/acfs.6.2022.05.C.57>.

³ Міністерство юстиції України: веб-сайт. URL: <https://minjust.gov.ua/m/2-kvartal-2022-roku> (дата звернення: 01.10.2022).

⁴ Міністерство юстиції України: веб-сайт. URL: <https://minjust.gov.ua/m/2-kvartal-2021-roku> (дата звернення: 01.10.2022).

⁵ Кримінальний процесуальний кодекс України (Відомості Верховної Ради України (ВВР), 2013, № 9-10, № 11-12, № 13, ст. 88). URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text>. (дата звернення: 09.10.2022).

that the process of internal conviction formation starts from direct research on the expert conclusion as evidence while court hearing, in the course of which the judge faces more challenges and doubts. Methods clarifying expert conclusions have been analyzed, such as: forensic expert interrogation in court; involvement of a specialist to provide consultations, explanations, certificates and conclusions during trial; ordering of additional, commission, multidisciplinary forensic examination as well as re-examination by the court. Particular attention is drawn to the most common method of explaining the expert conclusion: expert interrogation in court, risks, advantages and disadvantages of its application. When analyzing sustainable judicial practice, it was determined that while expert conclusion evaluation and in each individual case judges use all methods for clarifying its content permitted by criminal procedural legislation, and refusal to use such methods in the event of doubt is grounds for overturning or changing the court's decision while its review in the courts of higher instances. It is stressed that in any case the expert conclusion is evaluated by the court in two aspects: as an individual piece of evidence, and in relation to other pieces of evidence in a case, which is on the one hand, a complex, but on the other hand efficient thinking process, since all evidence-based information studied in conformity with general rules of criminal procedure affects the judge's inner conviction.

Key words: judicial system of Ukraine, specific expertise, evidence evaluation, forensic experts, expert conclusions.

Expert conclusion evaluation is a complex process, which content predominantly depends on type of forensic examination, objects, applied research methods⁶.

Therefore, we cannot agree more with O. P. Polyakova's statement that activity on expert conclusion evaluation is a logical and reasonable thinking process⁷.

In scientific sources, several aspects of expert conclusion evaluation are singled out. Firstly, evaluation of direct conclusion of forensic expert as a procedural act in order to ensure proper conduct of research; secondly, evaluation of facts established by the expert conclusion through comparison with other collected evidence to determine the degree of completeness of performed research, scientific validity of final conclusions, verification of procedural requirements for appointment and conduct of forensic examination, reliability of results⁸ received by the forensic expert.

Given that no piece of evidence has a predetermined force (Part 2, Article 94, of the Criminal Procedural Code of Ukraine), the expert conclusion is evaluated according to the same criteria as other evidence in criminal proceedings, namely, according to internal conviction of the court which is based on comprehensive, full and unbiased investigation of all circumstances of criminal proceedings, in compliance with the law when determining belonging, admissibility, credibility.

It should be emphasized that the Criminal Procedural Code of Ukraine adopted in 2012 included an amendment on evidence evaluation "according to one's inner conviction", which made this process totally dependent on the judge's subjective judgements.

The judge's inner conviction is a subjective part of their activity, which is expressed in decisions they objectively draw in a case when the court examines case circumstances. The judge's inner conviction is based on the judge's legal awareness, their worldview constituting a system of legal principles, ideas, theories, doctrines, conventions, which are the result of a theoretical, rational analysis, reflection of legal reality based on study of patterns of the emergence, formation, functioning and development of law⁹.

Its psychological aspect is vital for revealing the role of the judge's inner conviction in evaluating evidence. A judge's conviction in psychological aspect is characterized by confidence in correctness of the decision drawn in a case, based on research on pieces of evidence collected in a case in their totality in strict compliance with requirements of law, as well as a sense of trust in their conclusion from the point of view of its compliance with law, purpose and tasks of justice¹⁰.

V. Shepitko defines the inner conviction as conscious need of a person, their use of own thoughts, views and knowledge. He argued that no doubts are allowed when making decisions based on inner conviction¹¹.

⁶ Меленевська З. С., Садченко О. О. Оціночна діяльність експерта-почеркознавця як основний компонент діяльності судового експерта. *Криміналістичний вісник*. 2011. № 2 (16). С. 59.

⁷ Полякова О. П. Исследование и оценка адвокатом экспертного заключения. *Криміналістичний вісник*. 2012. № 2 (18). С. 140.

⁸ Щербаковский М. Г. Проведения та використання судових експертиз у кримінальному провадженні: монографія. Харків: В деле, 2015. с. 355–356

⁹ Мелех Л. В. Оцінка доказів як заключний етап процесу доказування. *Вісник Луганського держ-го ун-ту внутрішніх справ імені Е. О. Дідоренка*. 1, 2015. Проблеми теорії та практики застосування законодавства Розділ 2. С. 133.

¹⁰ Дроздович Н. Л. Внутрішнє переконання судді як елемент принципу вільної оцінки доказів. *Часопис Київського ун-ту права*. 2010. № 1. С. 253–254.

¹¹ Шепітько В. Психологія судової діяльності: проблеми теорії та практики. *Вісник Академії правових наук України*. 2004 р. № 3(38). Харків: Право, 2004. С. 167.



Наталія Філіпенко,
Дарина Барабаш

**СТАНОВЛЕННЯ
ВНУТРІШНЬОГО
ПЕРЕКОНАННЯ ПРИ
ОЦІНЦІ СУДДЕЮ
ВИСНОВКУ ЕКСПЕРТА
ЯК ДЖЕРЕЛА ДОКАЗІВ
У КРИМІНАЛЬНОМУ
ПРОВАДЖЕННІ**

Аннотация. Формирование внутреннего убеждения при оценке судьей заключения эксперта связано с рядом сложностей, которые должны быть преодолены им в процессе перерастания сомнения в убежденность. Основным препятствием в ходе этого процесса является недостаточность у судьи специализированных знаний для полной, объективной оценки заключения эксперта, особенно если исследование, проведенное последним, требовало применения сложных, комплексных методов, а в самом выводе используется множество специальных терминов и формулировок.

Несмотря на большое количество работ, посвященных заключению эксперта как источнику доказательств в уголовном производстве, его оценке судом и становлению внутреннего убеждения судьи, необходимо констатировать, что в юридической литературе недостаточно раскрыта проблематика оценки заключения эксперта судом при рассмотрении уголовного производства, по внутреннему убеждению, процессу преодоления сомнений относительно такого заключения и сложностей, с которыми судья сталкивается при оценке.

Целью статьи является анализ процесса оценки судом заключения эксперта как доказательства в уголовном производстве «по внутреннему убеждению», выявление сложностей, с которыми судья сталкивается в процессе такой оценки, анализ разрешенных действующим уголовным процессуальным законодательством методов преодоления сомнений судьей при оценке заключения эксперта и постоянной судебной практики применения судьями средств разъяснения заключения эксперта, изложения собственного видения относительно более эффективных методов

A similar opinion is shared by N.V. Hlynska, who believes that until the decision is made, the investigator, prosecutor or judge should not have any doubts as to correctness of their decision¹².

Such a view, by the way, is entirely consistent with provisions of the current Criminal Procedural Code of Ukraine, in which Article 17 enshrines the presumption of innocence, including the provision stating that all doubts concerning the proof of a person's guilt are interpreted for the benefit of such a person¹³.

It is doubts that haunt the judge while examination of evidence in a case, and especially when evaluating the expert conclusion, given their lack of specific expertise.

Formation of internal conviction is associated with continuous elimination of doubts arising while case consideration. In the psychological aspect, transformation of such a doubt (as a consequence of probable knowledge) into the judge's¹⁴ conviction is vital for internal conviction formation.

Functional purpose of the conviction psychological component helps to overcome such doubts. It is this (psychological) aspect of internal conviction that is based on evidence evaluation and manifested in the power of law to motivate conclusions of a particular subject in a criminal proceeding¹⁵.

As a result, in order to properly evaluate the expert conclusion by the court based on inner conviction, the latter needs to transform doubts into conviction. This process starts from examining the expert conclusion as evidence in court.

In compliance with provisions of Article 23 of the Criminal Procedural Code of Ukraine, the court examines the expert conclusion directly, as any other evidence in a case.

Justification of one's conclusions, in conformity with requirements of Article 95 of the Criminal Procedural Code of Ukraine, can be implemented by the court only based on testimonies that it directly perceived during trial or obtained in the manner stipulated in Article 225 of the Code.

Immediacy of evidence examination means a legal requirement addressed to the court for examination of all pieces of evidence collected in a particular criminal proceeding through interrogation of the accused, victims, witnesses, forensic expert, physical evidence examination, documents announcement, reproduction of audio and video recordings, etc. This principle of criminal procedure is significant for full clarification of circumstances of criminal proceedings and their objective solution. The immediacy of evidence perception allows the court to carefully study and verify it (both each piece of evidence individually and in relation to other evidence), to evaluate it according to criteria stipulated in Section 1 of Article 94 of the Criminal Procedural Code, as well as to develop a full and objective view of actual circumstances of specific criminal proceedings.

Non-observance of the immediacy principle results in violation of other principles of criminal proceedings: presumption of innocence and provision of proof of a person's guilt, guarantee of the right to defense, adversarial procedure and freedom in submitting their evidence and demonstrating its credibility before the court. Therefore, the immediacy principle acts as an essential element of the procedural form of trial, non-observance of it by the

¹² Грошевой Ю.М. Проблемы формирования судейского убеждения в уголовном судопроизводстве. Харьков : «Вища школа», 1975. С 83.

¹³ Кримінальний процесуальний кодекс України: Закон України від 13 квіт. 2012 р. № 4651-VI. Верховна рада України: веб-сайт. URL: <https://zakon.rada.gov.ua/laws/show/4651-17#n2987>

¹⁴ Марчак В.Я. Поняття та юридико-психологічні особливості формування внутрішнього переконання судді. *Європейські перспективи*. 2013. № 5. С. 84.

¹⁵ Вапнярчук В.В. Сутність внутрішнього переконання в кримінальному процесуальному доказуванні. *Науковий вісник Ужгородського національного університету*. Серія : Право. 2015. Вип. 31(3). С. 80.

преодоления судей сомнений при оценке заключения эксперта, для становления внутреннего убеждения.

Установлено, что формирование внутреннего убеждения при оценке заключения эксперта связано с непрерывным устранением сомнений, возникающих при рассмотрении дела. Конкретно процесс перерастания сомнений в убежденность судьи является значимым психологическим аспектом формирования внутреннего убеждения. Выяснено, что процесс становления внутреннего убеждения начинается с непосредственного исследования заключения эксперта как доказательства в судебном заседании, в ходе которого у судьи возникает больше сложностей и сомнений. Выделен и проведен анализ таких методов разъяснения заключения эксперта, как: допрос эксперта в суде; привлечение специалиста для предоставления консультаций, объяснений, справок и выводов в ходе судебного разбирательства; назначение судом дополнительной, повторной, комиссионной и комплексной экспертизы. Особое внимание уделено наиболее распространенному методу разъяснения заключения эксперта – допроса эксперта в суде, выделены риски, преимущества и недостатки его применения. В ходе анализа установившейся судебной практики установлено, что судьями при оценке заключения эксперта используются все разрешенные уголовным процессуальным законодательством методы разъяснений его содержания, в зависимости от каждого частного случая, а неиспользование таковых в случае наличия сомнений является основанием для отмены или изменения приговора суда во время его пересмотра в судах высших инстанций. Отмечено, что в любом случае экспертное заключение оценивается судом в двух аспектах: как отдельное доказательство, и в соотношении с другими доказательствами по делу, что является сложным, однако эффективным мыслительным процессом, ведь внутреннее убеждение судьи влияет вся доказательная информация, которая исследуется согласно общим правилам уголовного процесса.

court, according to Part 2, Articles 23, 86, of the Criminal Procedural Code, means that evidence that was not subject of a direct investigation by the court cannot be recognized as admissible and considered when the court adopts a decision, excluding cases enshrined by the Criminal Procedural Code, and thus the court decision in accordance with Article 370 of the Criminal Procedural Code cannot be recognized as legal and justified in compliance with Section 1, Article 412 of the Criminal Procedural Code, and is subject to overturn.

Such a legal position is solid and is contained in the Resolution of the Criminal Cassation Court within the Supreme Court dated 05.07.2019 in case No. 398/381/16-к (proceedings No. 51-6258 км 18), in which the Resolution of the Court of Appeal is overturned for reasons, in particular, of failure to provide evaluation of the expert conclusion by the latter in its Resolution.

Thus, case files of these criminal proceedings indicate that according to the verdict of the Oleksandriysk District Court of the Kirovohrad Region dated October 19, 2017, PERSON_2 and PERSON_3 were convicted to imprisonment for up to eight years under Section 2 of Article 121 of the Criminal Code.

By the Decision of the Appeal Court of the Kirovohrad region dated March 1, 2018, the verdict of the court of first instance concerning PERSON_2 is overturned, and the criminal proceedings were closed on the basis of paragraph 3, Section 1, Article 284 of the Criminal Procedural Code of Ukraine due to the lack of sufficient evidence to prove the guilt of PERSON_2 in criminal offense commission stipulated in Section 2 of Article 121 of the Criminal Code, and regarding PERSON_3 is changed and excluded from the motivation part of the court reference when qualifying actions of PERSON_3 as “commission of a crime by a group of persons” under Section 2 of Article 121 of the Criminal Code. It was proposed to consider PERSON_3 convicted to imprisonment for up to eight years under Section 2 of Article 121 of the Criminal Code.

The Court of Cassation ruled that according to the court of first instance, testimonies of witnesses who were directly questioned by the court of first instance, as well as written evidence: scene inspection protocol dated November 14, 2015; expert conclusion No. 401/1 dated January 15, 2016; investigation experiment protocol dated January 9, 2016, with participation of a witness; conclusion of the forensic psychiatric examination No. 604 of December 15, 2015, form the basis for the sentence.

However, based on conviction of judges from the Supreme Court, reviewing the criminal proceedings against PERSON_3 and PERSON_2, The Court of Appeal contrary to provisions of Articles 7, 23, 370 and 404 of the Criminal Procedural Code did not comply with requirements of the immediacy principle of evidence examination, at the same time not a single witness was directly questioned and written evidence that had been examined and evaluated by the court of first instance was not studied; therefore, the Supreme Court concluded that there is no sufficient evidence for proving PERSON_2 guilt in criminal offense commission stipulated in Section 2 of Art. 121 of the Criminal Code.

Separately, the Court Resolution indicated that the Court of Appeal did not provide evaluation of expert conclusion No. 911 dated December 15, 2015, under which traces of human¹⁶ blood were found on camouflage pants and the right sneaker of PERSON_2.

Thus, we can conclude that in today's realities provision of expert conclusion evaluation in the court decision is an obligatory requirement for recognizing it as legal, justified and motivated in accordance with

¹⁶ Постанова Касаційного кримінального суду у складі Верховного Суду від 07.05.2019 у справі №398/381/16-к (провадження № 51-6258 км 18). Єдиний державний реєстр судових рішень: веб-сайт. URL: <https://reyestr.court.gov.ua/Review/81722349>



Ключевые слова: судебная система Украины, специальные знания, оценка доказательств, эксперты, выводы эксперта.

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**LES MÉDIAS COMME
COMPOSANTE DES ACTIVITÉS
DE CRIMINOLOGIE DES
UNITÉS DE PRÉVENTION
JUVÉNELE CONCERNANT
L'ÉDUCATION JURIDIQUE DES
ADOLESCENTS**

Résumé : L'article examine le rôle des médias de masse dans la lutte contre la criminalité, l'organisation et la réalisation d'activités criminologiques, ainsi que les problèmes qui se posent dans le cadre d'une telle interaction en Ukraine. La conclusion a été faite sur l'importance, tout d'abord, des mesures préventives visant à limiter les possibilités de commettre des infractions pénales par les adolescents et le rôle clé des médias dans cette activité, principalement à travers l'organisation de campagnes d'information conjointes avec les unités de prévention juvénile. L'objectif est de déterminer le rôle des médias dans le domaine des activités criminologiques des unités de prévention juvénile, de déterminer les possibilités de coopération dans ce domaine et d'identifier les problèmes qui se posent dans le cadre de cette coopération. Pour corriger la situation, toutes les possibilités doivent être utilisées, y compris l'emprunt d'expérience à l'étranger. De plus, l'accent doit être mis sur les efforts de nature préventive, sur les actions qui empêcheraient d'abord l'expansion des phénomènes négatifs, puis contribueraient à leur réduction. Bien sûr, dans ce cas, le plus grand effet pourrait être donné par l'interaction étroite des unités de prévention juvénile d'une part et des médias d'autre part.

Mots clés : forces d'ordre, unités de prévention juvénile, médias, campagnes d'information, criminalité, activité criminologique.

requirements of Article 370 of the Criminal Procedural Code of Ukraine, and lack of such evaluation entails its inevitable overturn.

This raises the question as to how exactly judges should evaluate this very conclusion of a forensic expert within criminal proceedings in court.

Given the relevance of the problematics of expert conclusion evaluation as a source of evidence in criminal proceedings, it was studied by the majority of domestic researchers, in particular: V. H. Honcharenko, N. I. Klymenko, S. M. Stakhivskiy, Yu. O. Piliukov, V. Yu. Shepitko, M. H. Shcherbakovskiy and others.

At the same time, in our view, the most comprehensive evaluation of the structure of the expert conclusion evaluation was suggested by M. H. Shcherbakovskiy, which includes:

1. Formal (logical and procedural) evaluation of the expert conclusion consisting of the following mental operations: determination of examination procedural order; determining correspondence of objects submitted for forensic examination and provided to the forensic expert as well as examined by them while forensic examination; establishing completeness and scope of carried out expert research, clarity of final conclusions; determination of the logical validity of expert conclusions; establishment of the relevance of actual data discovered by a forensic expert to an investigated crime; establishment of conformity of the expert conclusions developed while criminal proceedings with other evidence;

2. Content (special) evaluation of the expert conclusion that entails: determination of scientific validity of final conclusions of the forensic expert as well as his/her competence; identification of a sufficient number of objects received for forensic examination to solve set tasks, application of standard expert methodology; evaluation of the quality of submitted objects, accuracy of source data; evaluation of expediency, legality and scientific validity of the research methodology (method) applied by a forensic expert; evaluation of completeness of performed research; evaluation of the correctness of description and interpretation of objects identified features; evaluation of scientific validity of intermediate and final conclusions; determination of the forensic expert's competence¹⁷.

As to requirements for evaluating an expert conclusion in domestic legislation, the Resolution of the Supreme Court of Ukraine No. 8: On forensic examination in criminal and civil cases dated May 30, 1997, clarifies that when reviewing and evaluating an expert conclusion, the court must ascertain:

- whether requirements of legislation were met when appointing and conducting forensic examination;
- whether there were any circumstances that precluded the expert's participation in a case;
- competence of a forensic expert and whether they do not exceed their powers;
- sufficiency of research objects submitted to a forensic expert;
- comprehensiveness of answers to questions raised and their conformity with other factual data;
- consistency between the research part and final conclusion of forensic examination;
- the validity of the expert conclusion and its consistency with other case files¹⁸.

¹⁷ Шербаковський М. Г. Проведення та використання судових експертиз у кримінальному провадженні: монографія. Харків: В деле, 2015. С. 364–411.

¹⁸ Постанова Пленуму Верховного Суду України від 30.05.1997 №8 «Про судову експертизу в кримінальних і цивільних справах». Верховна рада України: веб-сайт. - <https://zakon.rada.gov.ua/laws/show/v0008700-97#Text> (дата звернення: 01.10.2022).



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**INNERE
ÜBERZEUGUNGSBILDUNG
BEI DER WERTUNG EINES
SACHVERSTÄNDIGEN
SCHLUSSES ALS
BEWEISQUELLE IN EINEM
STRAFVERFAHREN DURCH
DEN RICHTER**

Abstrakt. Die Bildung einer inneren Überzeugung während der Beurteilung des Gutachtens durch den Richter ist mit einer Reihe von Herausforderungen verbunden, die bei der Umwandlung von Zweifeln in Überzeugung gelöst werden sollten. Das Haupthindernis in diesem Prozess ist der Mangel an spezifischem Fachwissen eines Richters für eine umfassende und objektive Bewertung des Gutachtens, insbesondere wenn die Recherchen des forensischen Sachverständigen die Verwendung komplexer, multidisziplinärer Methoden, Fachbegriffe und Formulierungen in einem Gutachten erforderten selbst.

Trotz der Tatsache, dass sich eine große Anzahl von Forschern mit dem Expertenurteil als Beweisquelle in Strafverfahren, seiner Bewertung durch das Gericht und der Bildung der inneren Überzeugung eines Richters befasst, ist es erwähnenswert, dass dies in der juristischen Literatur der Fall ist nicht hinreichend die Problematik der gerichtlichen gerichtlichen Gutachtenerhebung im Rahmen der strafprozessualen Prüfung aus innerer Überzeugung, den Prozess der Überwindung von Zweifeln an einem solchen Gutachten und die Herausforderungen, denen sich der Richter im Zuge der Begutachtung gegenübersteht. Das Ziel des Artikels ist die Analyse des Prozesses der gerichtlichen Bewertung eines Sachverständigengutachtens als Beweismittel in einem Strafverfahren „auf der Grundlage einer internen Überzeugung“: Identifizierung der Herausforderungen, denen sich ein Richter im Laufe einer solchen Bewertung gegenübersteht, Analyse von Methoden zur Überwindung von Zweifeln während der Bewertung eines Gutachtens und gerichtliche Praxis in Bezug auf die Verwendung von Mitteln zur Klärung des Gutachtens durch Richter, eigene Vorstellung von effizienteren Methoden zur Überwindung von Zweifeln durch den Richter während der Bewertung eines Gutachtens.

Es wurde festgestellt, dass die Bildung einer inneren Überzeugung während der sachkundigen Schlussfolgerungsbewertung mit einer kontinuierlichen Beseitigung von Zweifeln verbunden ist, die während der Fallbetrachtung auftreten. Insbesondere der Transformationsprozess von

Having studied indicated guidelines, it can be summarized that only “validity of the expert conclusion and its consistency with other case files” refers to direct evaluation by the court of research carried out by the forensic expert, and other requirements: to conformity with current legislation concerning the form, identity of a forensic expert, etc.

Despite the fact that obligation to comply with Resolutions of the Supreme Court of Ukraine Plenum is not legislated, many judges use the above-mentioned criteria for reviewing and evaluating expert conclusions. And if the first six points do not present difficulties, the last point raises the main problem: how the judge can evaluate the expert conclusion based on results of research conducted by forensic expert using specific expertise, which the judge may not possess or possess only to a certain extent.

Undoubtedly, the latter, as a professional lawyer, possesses a certain level of specific expertise that they gained while studies at a higher educational institution, but it is probably sufficient only for accurate establishment of the type of forensic examination to be performed, evaluation of issues proposed by the parties and to be addressed to a forensic expert, etc.

However, this expertise is not enough to objectively evaluate the entire expert conclusion by the court, especially if the research carried out by the forensic expert necessitated the use of complex, multidisciplinary methods, and many specific terms and wordings are used in conclusion itself.

What is more, the statement “how can you evaluate something if you don’t understand it yourself” has long been firmly entrenched in the legal consciousness, therefore the conclusion of a recognized expert with corresponding expertise is accepted as knowingly accurate, absolute and indisputable, which directly contradicts Section 2 of Article 94 of the Criminal Procedural Code of Ukraine under which no evidence has a predetermined force.

Imperturbable trust in the expert conclusion and overestimation of its probative value are quite common among investigative bodies and courts. It is believed that if it is based on accurate scientific calculations, then there can be no doubt as to its credibility. 82% of surveyed investigators and 74% of judges deem the expert conclusion to be a more important source of evidence compared to other sources. This circumstance is conditioned by subjective and objective reasons. The former include the excessive trust of the investigator, the judge in the forensic expert as an impartial well-informed person (especially if they are employees of a specialized state forensic science institutions or service), the latter: a real impossibility of evaluating a conclusion fully (especially in terms of scientific validity of the expert research) by a participant involved in process who does not possess a required specific expertise¹⁹.

That is why very often the expert conclusion is beyond doubt, evaluation of such evidence by the court is reduced to reviewing compliance with requirements as to the form, subject of forensic examination, completeness of conclusions and their correspondence to questions addressed to a forensic expert. The text of forensic examination itself can simply be copied and added to the court decision.

Considering the above, it will be logical to conclude that self-education of judges in the field of forensic science will solve the problem of lack of expertise in this field, and thus will enable to comprehensively evaluate results of performed examination. However, in practice, in our opinion, this method is hardly ever used due to primitive lack of time in judges as a result of excessive workload. In addition, it should not be forgotten that the judge is first of all a professional lawyer whose role in the criminal process is proper

¹⁹ Щербаковский М. Г. Проведення та використання судових експертиз у кримінальному провадженні: монографія. Харків: В дель, 2015. С. 357 - 358

application of rules of law, so it will be more appropriate for them to acquire new expertise in the field of law enforcement.

Studying ways of overcoming difficulties by judges in the understanding of the expert conclusion while its evaluation, the most effective is application of the right enshrined in Article 356 of the Criminal Procedural Code of Ukraine to summon the forensic expert to a court session to clarify drawn conclusion at the request of criminal proceedings party, the victim, or at the court's own initiative. In such a case, the forensic expert testimony can explain unclear parts of research to the court and parties of a procedure, in particular, the content part, and eliminate any doubts about the veracity of conclusion made.

At first glance, such solution to a problem is very simple and efficient, but in fact, even in this case, the judge faces many challenges.

Firstly, it is the summoning of an expert to the court who may be in business trip, sick, or even ignore the obligation to appear in court to testify. Secondly, it is more expedient to interrogate a forensic expert with participation of all parties in a case whose attendance cannot be predicted in advance. It should also not be forgotten that failure of parties to attend court sessions (with or without prior notification of the court about reasons) where interrogation of the forensic expert is planned is also one of the types of delaying the trial and abusing one's procedural rights, which in turn raises the level of tension and emotional fatigue among participants in trial. What is more, all this is at least loss of a plenty of time which in itself leaves the judge with a difficult choice regarding expediency of such interrogation, since you can always simply agree with a conclusion.

When a forensic expert is interrogated at a court session, the judge also faces the influence of the interested party of prosecution or defense, which manifests itself in manipulating insecurities in expert's answers in order to create the image of an incompetent specialist and give the judge doubts as to correctness of compiled conclusion.

Thus, in accordance with Section 3 of Art. 356 of the Criminal Procedural Code of Ukraine, a forensic expert may be asked questions about the expert's specific expertise and qualifications on the issues under investigation (education, work experience, academic degree, etc.) related to the subject of their expertise; applied methods and theoretical developments; sufficiency of information on which bases a conclusion is provided; scientific validity and methods by which the expert reached a conclusion; the applicability and correctness of applying principles and methods to facts of criminal proceedings; other questions concerning conclusion veracity.

Given such a substantial list of possible questions, it is quite easy to create an uncomfortable atmosphere for a forensic expert, which will entail the same insecurity in answers and possible mistakes that can be used by the parties as a lever to objectively evaluate the expert conclusion by the court.

In addition, while interrogation of the forensic expert by the parties to the court procedure, the court conducts a complex analytical activity of questions posed to the latter to filter out those that do not belong to subject of performed examination but were identified by the forensic expert while its conduct. Separately we should stress the importance of preventing information manipulation by the party obtained by a forensic expert during forensic psychiatric examination: presenting it as evidence, for example, confession of guilt by the accused. In judicial practice, such statements are inadmissible evidence, since a person is warned about the possibility of refusing to testify and answer questions.

Let us cite as an example the Resolution of the Criminal Cassation Court within the Supreme Court dated 26.04.2018 in case No. 135/1530/16-к (proceedings No. 51-447 км 17), where explanations of the accused provided

Zweifeln in die Überzeugung des Richters ist ein wesentlicher psychologischer Aspekt für die Entwicklung der inneren Überzeugung. Es wurde klaggestellt, dass der Prozess der internen Überzeugungsbildung mit der direkten Recherche des Expertenurteils als Beweismittel während der Gerichtsverhandlung beginnt, in deren Verlauf der Richter mit mehr Herausforderungen und Zweifeln konfrontiert wird. Methoden zur Klärung von Expertenurteilen wurden analysiert, wie z. B.: forensische Expertenbefragung vor Gericht; Hinzuziehung eines Spezialisten zur Bereitstellung von Beratungen, Erklärungen, Bescheinigungen und Schlussfolgerungen während des Gerichtsverfahrens; Anordnung zusätzlicher, kommissioneller, multidisziplinärer forensischer Untersuchungen sowie gerichtlicher Nachuntersuchungen. Auf die gebräuchlichste Methode zur Begründung des Gutachtens wird besonders hingewiesen: Sachverständigenbefragung vor Gericht, Risiken, Vor- und Nachteile ihrer Anwendung. Bei der Analyse der nachhaltigen Rechtsprechungspraxis wurde festgestellt, dass zwar die sachverständige Schlussfolgerungsbewertung und die Richter im Einzelfall alle strafprozessrechtlich zulässigen Methoden zur Klärung ihres Inhalts anwenden, deren Verweigerung im Zweifelsfall aber ein Grund für eine Aufhebung oder Änderung ist die Entscheidung des Gerichts während ihrer Überprüfung in den Gerichten höherer Instanzen. Es wird betont, dass das Gutachten in jedem Fall vom Gericht unter zwei Gesichtspunkten gewertet wird: als Einzelbeweis und im Verhältnis zu anderen Beweismitteln in einem Fall, der einerseits komplex, aber weiter ist andererseits effizienter Denkprozess, da alle evidenzbasierten Informationen, die im Einklang mit allgemeinen Strafprozessregeln untersucht werden, die innere Überzeugung des Richters betreffen.

Schlüsselwörter: Justizsystem der Ukraine, spezifisches Fachwissen, Beweiswürdigung, forensische Sachverständige, Sachverständigengutachten.



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KSZTAŁTOWANIE SIĘ WEWNĘTRZNEGO PRZEKONANIA PODCZAS OCENY WNIOSKU biegłego JAKO ŹRÓDŁO DOWODOWE W POSTĘPOWANIU KARNYM PRZESZDZIEGO

Abstrakcyjny. Kształtowanie się wewnętrznego przekonania podczas oceny przez sędziego opinii biegłego wiąże się z szeregiem wyzwań, które należy rozstrzygnąć, przekształcając wątpliwości w przekonanie. Główną przeszkodą w tym procesie jest brak specjalistycznej wiedzy sędziego do wszechstronnej i obiektywnej oceny wniosku biegłego, zwłaszcza jeśli badania przeprowadzone przez biegłego kryminalistycznego wymagały użycia skomplikowanych, wielodyscyplinarnych metod, specjalistycznych terminów i sformułowań we wnioskach samo.

Pomimo tego, że bardzo dużo prac naukowych jest poświęconych wnioskowi biegłego jako źródłu dowodu w postępowaniu karnym, jego ocenie przez sąd oraz kształtowaniu się wewnętrznego przekonania sędziego, warto stwierdzić, że literatura prawnicza nie ujawnia w wystarczającym stopniu problematyki oceny przez sąd wniosku biegłego w postępowaniu karnym na podstawie wewnętrznego przekonania, procesu przezwycięzania wątpliwości co do takiego wniosku oraz wyzwań stojących przed sędzią w toku oceny. Celem artykułu jest analiza procesu sądowej oceny wniosku biegłego jako dowodu w postępowaniu karnym „na podstawie wewnętrznego wyroku skazującego”: identyfikacja wyzwań stojących przed sędzią w toku takiej oceny, analiza sposobów przezwycięzania wątpliwości podczas oceny opinii biegłego i praktyki orzeczniczej dotyczące stosowania przez sędziów środków doprecyzowania opinii biegłego, własnej wizji skuteczniejszych metod przezwycięzania przez sędziego wątpliwości przy ocenie opinii biegłego.

Ustalono, że kształtowanie się wewnętrznego przekonania podczas oceny wniosków eksperckich wiąże się z ciągłym eliminowaniem wątpliwości pojawiających się podczas rozpatrywania sprawy. W szczególności proces przekształcania wątpliwości w przekonanie sędziego jest istotnym

Formation of Inner Conviction when Evaluating an Expert Conclusion as a Source of Evidence in Criminal Proceedings by the Judge

by them while psychiatric examination as evidence are not specified in the motivation part of the judgement and the court order.

Thus, the court found that according to the judgement of the first instance court, PERSON_2 was found guilty of committing crimes stipulated in paragraphs 9, 10, 13 of Section 2 of Article 115, Section 2 of Art. 152, Section 2 of Art. 15, Section 2 of Art. 152 of the Criminal Code. By the Decision of the Court of Appeal, the specified sentence was left unchanged. In the cassation appeal, the defender asked to overturn the court decisions and close criminal investigation against PERSON_2 based on paragraph 3, Section 1, Article 284 of the Criminal Procedural Code due to failure to find sufficient evidence to prove a person's guilt in court. Based on results of the cassation review, the Supreme Court changed the appealed judgment and court order proceeding from the above.

It can be seen from the judgement of the local court that the court referred to testimony of PERSON_2 as evidence of guilt provided by the latter while forensic psychiatric examination. Although the Court of Appeal stressed that it takes into account the behavior of PERSON_2 described in the report of the inpatient forensic psychiatric examination, however, the statement “he was sincerely worried about what he had committed” can also be viewed as confessional testimony.

The Court of Cassation emphasized that in accordance with Article 87 of the Criminal Procedural Code evidence obtained as a result of substantial violation of human rights and freedoms guaranteed by the Constitution and laws of Ukraine, international agreements, the binding consent of which was provided by the Verkhovna Rada of Ukraine, as well as any other pieces of evidence obtained due to information received as a result of a significant violation of human rights and freedoms, are inadmissible. The court is obliged to recognize as significant violations of human rights and fundamental freedoms, in particular, such actions as receiving testimony or explanations from a person who was not informed about their right to refuse to testify and not to answer questions, or obtaining them in violation of this right.

One of the methods of psychological research is clinical psychologist interview (conversation), during which a forensic expert makes contact with a person and finds out information required to compile a conclusion. Before the start of the interview, a person is not warned about the possibility to refuse to testify and not to answer questions. Therefore, according to the Supreme Court, a person's testimony provided to a forensic expert while forensic psychiatric examination is inadmissible as evidence²⁰.

Thus, in the specified Resolution, the Supreme Court pointed the local and appeal courts to improper evaluation of the accused testimony during forensic psychiatric examination, which cannot be viewed as evidence at all: confession of guilt by the letter in criminal offense commission. At the same time, such information that a forensic expert found out while forensic psychiatric examination can be a lever for moral influence of the concerned party of the court procedure on the way to convince the court, for example, of the accused guilt.

The above situations are not uncommon; therefore, the court must carefully evaluate content of questions addressed to the forensic expert in order to prevent manipulation by the parties to the court procedure with information that is not evidence in a case but may have an impact on the judge's subjective judgement concerning evaluation of other evidence in a case.

To conclude, interrogation of the forensic expert in court as one of the ways to overcome difficulties in evaluating an expert conclusion is highly

²⁰ Постанова Касаційного кримінального суду у складі Верховного Суду від 26.04.2018 у справі №135/1530/16-к (провадження № 51-447 км 17). Єдиний державний реєстр судових рішень: веб-сайт. URL: <https://reestr.court.gov.ua/Review/73758522>

efficient, but oftentimes rather exhausting and takes too much procedural time.

The second, alternative, in our opinion, method is to involve a specialist in accordance with Article 360 of the Criminal Procedural Code of Ukraine for provision of oral advice and written clarifications.

In compliance with provisions of Article 71 of the Criminal Procedural Code of Ukraine, a specialist in criminal proceedings is a person who possesses specific expertise and skills and can provide consultations, explanations, certificates and conclusions while pre-trial investigation and judicial review on issues requiring relevant specific expertise and skills.

In our view, a specialist, as a person possessing specific expertise, can also provide explanations on forensic examination conducted by a forensic expert, its scientific validity, etc.

What is more, as stated in provisions of the current Criminal Procedural Code of Ukraine, the specialist is granted with right to draw attention of criminal proceedings party that involved them or the court to particular circumstances or features of things and documents, as well as to provide their conclusion with information essential for criminal proceedings and in respect of which they were not addressed questions (paragraphs 3, 3-1, Section 4 of Article 71 of the Criminal Procedural Code of Ukraine).

In this way, the legislator entrusted the specialist with the duty not only to answer addressed questions, but also with the right to provide clarification at his own initiative in the part that, in their view, is significant for proper evaluation of evidence in a case by the court, including expert conclusion. Such an approach is definitely useful, given the judge's lack of specific expertise to evaluate the expert's conclusion, as it helps to understand its content, define complex, professional terms, or replace them with easy-to-understand wordings. Additionally, alternatives for expert research methods may be provided in such clarifications.

However, despite an obvious benefit of involving a specialist during expert conclusion evaluation by the court, such procedure is not common, since a specialist's help is inherently only a consultation, that's why it is perceived by the judge at their own discretion and can be taken into account by them when evaluating forensic examination results, which, undoubtedly, oftentimes does not entirely satisfy concerned parties in case and according to their opinion is less efficient than expert interrogation at court hearing.

It should be separately stressed that given the possibility of initiating specialist involvement during trial by a party in a case, or providing such a party with specialist conclusion for its inclusion in case files, judges should focus on a thorough evaluation of a specialist's impartiality.

It is worth emphasizing that calling a forensic expert and involving a specialist are not the only ways in overcoming doubts while expert conclusion evaluation. Thus, in Article 332 of the Criminal Procedural Code of Ukraine, the legislator addressed the issue of ordering a forensic examination during trial, namely:

The court has the right to entrust forensic examination to forensic science institution, forensic expert or experts, regardless of motion availability, if:

1) the court was provided with several experts conclusions contradicting each other, and interrogation of experts did not allow to eliminate identified contradictions;

2) in the course of trial, there were grounds stipulated in the second part of Article 509 of this Code;

3) there is clear objective evidence to consider the expert (experts) conclusion unsubstantiated, contradicting other case files or raising other reasonable doubts about its validity (Section 2 of Article 332 of the Criminal Procedural Code of Ukraine).

aspektem psychologicznym dla rozwoju przekonania wewnętrznego. Wyjaśniono, że proces kształtowania się przekonania wewnętrznego rozpoczyna się od bezpośredniego badania opinii biegłego jako dowodu w toku rozprawy sądowej, w trakcie której sędzia napotyka coraz więcej wyzwań i wątpliwości. Przeanalizowano metody wyjaśniania wniosków biegłych, takie jak: przesłuchanie biegłego sądowego w sądzie; zaangażowanie specjalisty w celu udzielania konsultacji, wyjaśnień, zaświadczeń i wniosków w trakcie rozprawy; zarządzenie dodatkowego, komisijnego, wielodyscyplinarnego badania kryminalistycznego oraz ponownego zbadania przez sąd. Szczególną uwagę zwrócono na najczęściej spotykaną metodę wyjaśniania wniosku biegłego: przesłuchanie biegłego w sądzie, zagrożenia, zalety i wady jego zastosowania. Analizując trwałą praktykę orzeczniczą, stwierdzono, że o ile biegły w ocenie wniosków i w każdej indywidualnej sprawie sędziowie stosują wszelkie dozwolone przez prawo karne procesowe metody wyjaśniania jego treści, to odmowa ich zastosowania w przypadku wątpliwości stanowi podstawę do uchylenia lub zmiany decyzji sądu podczas jej kontroli w sądach wyższych instancji. Podkreśla się, że w każdym przypadku wniosek biegłego oceniany jest przez sąd w dwóch aspektach: jako indywidualny dowód oraz w stosunku do innych dowodów w sprawie, która z jednej strony jest złożona, ale z drugiej z drugiej strony sprawny proces myślenia, gdyż wszelkie informacje oparte na dowodach badane zgodnie z ogólnymi zasadami postępowania karnego wpływają na wewnętrzne przekonanie sędziego.

Słowa kluczowe: system sądowiczy Ukrainy, ekspertyzy specjalistyczne, ocena dowodów, biegli sądowi, wnioski biegłych.

Given that Article 332 (paragraph 2, Section 2) of the Criminal Procedural Code of Ukraine refers us to Article 509 of the Code which concerns the ordering of psychiatric examination; the issue of overcoming doubts while expert conclusion evaluation is outlined in Article 332 (para. 1,2, Section 2) of the Code.

It is important to mention that in Article 75 of the Criminal Procedural Code of Ukraine dated 1960 (expired), types of such forensic examinations (re-examination or additional)²¹ were clearly defined by a legislator; however, the current Criminal Procedural Code of Ukraine does not include such classification.

At the same time, Resolution 10 of the Plenum of the Supreme Court No. 8: On forensic examination in criminal and civil cases dated 30.05.1997 stipulates that additional examination is scheduled after the court has reviewed conclusion of initial examination, when it becomes clear that it is impossible to get rid of incompleteness and obscurity in a conclusion through expert interrogation. The conclusion is defined as incomplete when a forensic expert has not studied objects submitted or provided comprehensive answers to questions addressed to them. A conclusion that lacks clarity or possesses an undefined, non-specific nature is considered obscure²².

Also, the definition of additional examination is included in paragraphs 1.2.11, 1.2 of Instructions on the appointment and conduct of forensic examinations and expert research approved by the Order of the Ministry of Justice of Ukraine (in the wording of Order No. 1950/5 dated December 26, 2012), under which additional examination is when it is necessary to carry out additional research or examine supplementary materials (samples for comparative research, source data, etc.) which has not been submitted while initial examination in order to solve tasks related to the object that has been studied during initial examination²³.

Therefore, if there are several forensic conclusions in case file contradicting each other and experts interrogation did not help to eliminate identified contradictions, the court should schedule additional examination.

In this case, the court's non-ordering of additional examination is violation of criminal procedural law requirements, which is rather substantial as it calls into question legality and validity of court decision which, in accordance with amendments of paragraph 1, Section 1 of Article 438 of the Criminal Procedural Code of Ukraine, is grounds for overturning such a decision.

A confirmation of this viewpoint may be a sustainable judicial practice.

For example, the Resolution of the Criminal Cassation Court within the Supreme Court dated 14.11.2019 in case



²¹ Кримінальний процесуальний кодекс України: Закон України від 28 груд. 1960 р. № 1001-05. Верховна рада України: веб-сайт. URL: <https://zakon.rada.gov.ua/laws/show/1001-05#o28>

²² Постанова Пленуму Верховного Суду України від 30.05.1997 №8 «Про судову експертизу в кримінальних і цивільних справах». Верховна рада України: веб-сайт. - <https://zakon.rada.gov.ua/laws/show/v0008700-97#Text>

²³ Інструкція про призначення та проведення судових експертиз та експертних досліджень, затверджена Наказом Міністерства Юстиції України (в ред. наказу від 26 грудня 2012 року № 1950/5). Верховна рада України: веб-сайт. URL: <https://zakon.rada.gov.ua/laws/show/z0705-98#Text>

No. 236/3420/15-к (proceedings No. 51 - 3201 км 19) overturned the decision of the Court of Appeal, in particular for the reason of its non-ordering of additional commission forensic medical examination.

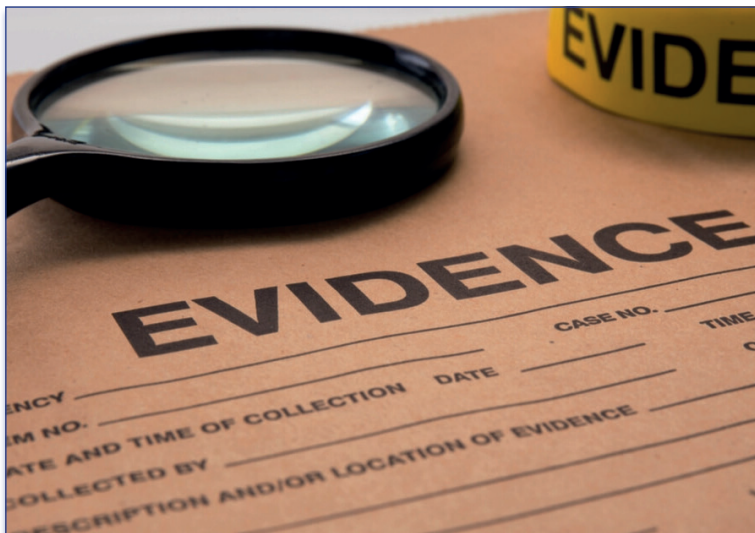
Thus, when reviewing criminal proceedings, the Court of Appeal, in the availability of several conflicting expert conclusions in a case file, did not take all measures enshrined in the Criminal Procedural Code of Ukraine to eliminate them and did not schedule forensic examination, including at the request of the prosecutor to order additional forensic commission: a medical examination with a mandatory direct examination of a victim, which, according to the opinion of the Supreme Court, is a substantial violation of criminal procedural law requirements²⁴.

In addition, when considering the issue of the court's evaluation of two contradicting expert conclusions, it is expedient to refer to paragraph 13 of the Resolution of the Plenum of the Supreme Court No. 8: On forensic examination in criminal and civil cases dated 30.05.1997, under which if contradictions are contained in two individual expert conclusions, the court should not give preference to a conclusion of forensic examination only because it was carried out on a commission basis, repeatedly, or by a forensic expert from a respected forensic science institution or by the one who possesses more expertise in forensic expert work, etc. In cases where several forensic examinations, including multidisciplinary, commission, additional or re-examination, have been carried out in case concerning the same subject, the court must evaluate each conclusion from the standpoint of integrity, completeness and objectivity of expert research. Individual conclusions of forensic experts (members of commission or multidisciplinary examination) who did not sign a joint conclusion are also subjected to such evaluation.

It should be borne in mind that expert activity during forensic examination is aimed at facilitating truth-telling, and therefore at overcoming the judge's doubts about guilt or innocence of the accused person. Meanwhile, two expert conclusions contradicting each other raise even greater doubts in the judge's mind and complicate the evaluation process of pieces of evidence in their entirety. In such a case, the court often orders commission as well as multidisciplinary forensic examinations, which are designed to dispel doubts and clarify case circumstances.

For example, I would like to cite the Ruling of the Poltava Court of Appeal dated 01.06.2022 in case No. 554/18239/14-к (proceedings No. 11-кп/814/96/22), where, in particular, multidisciplinary commission forensic-medical and transport-trace evidence examinations are ordered.

The reason for ordering the above forensic examinations was that conclusions of forensic medical examination, additional forensic medical examination, multidisciplinary commission forensic medical and transport-trace evidence examinations, multidisciplinary commission



²⁴ Постанова Касаційного кримінального суду у складі Верховного Суду від 14.11.2019 у справі №236/3420/15-к (провадження № 51 - 3201 км 19) Єдиний державний реєстр судових рішень: веб-сайт. URL: <https://reyestr.court.gov.ua/Review/85678674>

forensic-medical and transport-trace evidence re-examination, which are available in case files of criminal proceedings, contradict each other in terms of identifying a person who was driving a car at the time of traffic collision, and experts interrogation did not allow to eliminate contradictions²⁵ found.

Having analyzed the tendency of judges to order additional forensic examinations while consideration of criminal cases in court, it can be concluded that the latter often refer to the above-mentioned explanations of the Plenum and order additional examination in case if after consideration by the court of initial examination conclusion it is apparent that it is impossible to eliminate incompleteness and obscurity in a conclusion through expert interrogation. Such a view of the court is aimed at confirming or denying circumstances which clarification may be of paramount importance for adoption of a legal, reasoned and fair court decision in order to prevent violations while adhering to completeness of investigation of circumstances in criminal proceedings, ensuring unconditional observance of rights of parties in proceedings in terms of adversarial nature of procedure.

An example is the Ruling of the Dnipro District Court of Kyiv dated August 16, 2022, in case No. 755/9185/19 (proceedings No. 1-кп/755/190/22), which during the trial of the case ordered an additional examination in connection with the fact that questions raised by the prosecutor while forensic examination in necessary volume were not the subject of research during pre-trial investigation and were not resolved through expert interrogation. The issues that were raised by the prosecutor during the examination in the full, required extent were not the subject of study during pre-trial investigation and were not resolved by interrogation of the forensic expert, and therefore, according to the court, it is necessary to conduct additional research on some issues that were not addressed while forensic examination and order additional forensic examination on issues posed by the prosecutor, since initial forensic examination has already been carried out²⁶.

While analyzing regulations in Section 2, Article 332 of the Criminal Procedural Code of Ukraine, it worth stating that paragraph 3 provides the following grounds for ordering forensic examination during trial: in case of sufficient grounds, to consider the expert (experts) conclusion unjustified or that contradicts other case files, or such that raises other reasonable doubts about its correctness.

As stated in paragraph 11 of the Resolution of the Plenum of the Supreme Court No. 8: On forensic examination in criminal and civil cases of 30.05.1997,

re-examination is ordered when there are doubts as to correctness of the expert conclusion associated with its insufficient justification or the fact that it contradicts other case files, as well as with substantial violations of procedural rules governing the procedure for conducting and ordering forensic examination. In particular,

²⁵ Ухвала Полтавського апеляційного суду від 01.06.2022 у справі №554/18239/14-к (провадження № 11-кп/814/96/22). Єдиний державний реєстр судових рішень: веб-сайт. URL: <https://reyestr.court.gov.ua/Review/104638691>

²⁶ Ухвала Дніпровського районного суду м.Києва від 16.08.2022 у справі №755/9185/19 (провадження № 1-кп/755/190/22). Єдиний державний реєстр судових рішень: веб-сайт. URL: <https://reyestr.court.gov.ua/Review/105799519>



violations that led to limitation of rights of the accused or other persons may be recognized as substantial. Circumstances raising doubts as to correctness of the expert's preliminary conclusion are stressed in the ruling (resolution) on re-examination. Re-examination can be entrusted only to another forensic expert.

Analyzing Section 2, Article 332 of the Criminal Procedural Code of Ukraine through the prism of paragraph 11 of the Resolution of the Plenum of the Supreme Court, we should emphasize that in this case we are talking about ordering of re-examination, which purpose is to get rid of doubts regarding correctness of the expert conclusion raised due to:

- insufficient justification;
- inconsistency with other case files;
- other grounds raising doubts about its correctness.

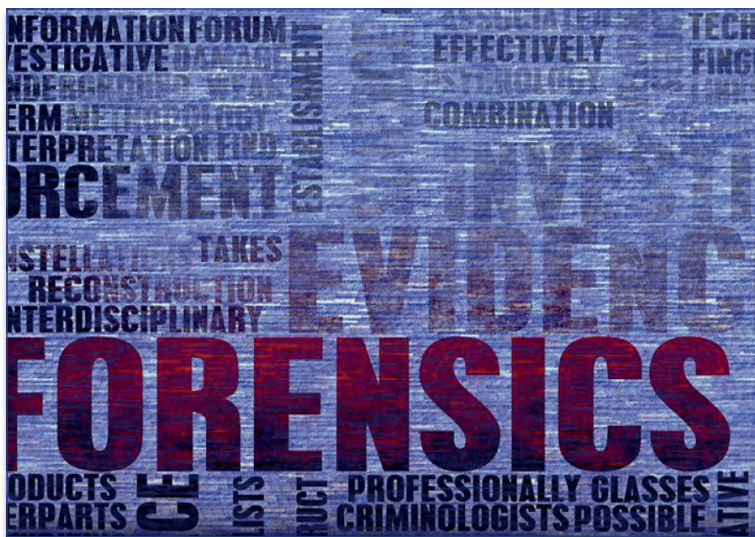
If the concept of insufficient justification is generally clear to us, then contradiction with case files in a case as grounds for ordering re-examination is of particular interest, since at this stage the judge evaluates the expert conclusion in relation to the totality of other pieces of evidence in case, which, according to us, meets requirements of Section 1, Article 94 of the Criminal Procedural Code of Ukraine concerning evaluation of the totality of the collected pieces of evidence from the standpoint of sufficiency and relationship for adoption of a corresponding procedural decision.

In our viewpoint, such an approach to evaluating the expert conclusion is quite efficient, since all evidence-based information that is studied in compliance with general rules of criminal procedure²⁷ affects the internal conviction, and the process of forming the judge's internal conviction itself is connected with continuous resolution of doubts arising while case consideration²⁸.

When evaluating the expert conclusion in relation to other evidence in a case, the judge can not only dispel their doubts about it, but also assume that conclusions drawn by the forensic expert are inadequate, since the latter is, first of all, a person, and it is human nature to make mistakes.

Thus, in the Resolution of the Chernihiv Court of Appeal dated September 26, 2017, in case No. 750/92/16-к (proceedings No. 11-кп/795/23/2017), the judicial panel reached a conclusion that the verdict of the court of first instance is based on conflicting evidence, and a conclusion of forensic automotive technical examination ordered by the appeal court does not make it possible to draw an unambiguous conclusion on guilt or innocence of the accused, which became the basis for overturning of the verdict of the local court.

The appeal court determined that as case files of pre-trial investigation testify, it is believed that at the time of initial contact with the car, the pedestrian (victim) was in a vertical or close to it position, with the left side of the body facing car surface that



²⁷ Марчак В. Я. Поняття та юридико-психологічні особливості формування внутрішнього переконання судді. *Європейські перспективи*. 2013. № 5. С. 84.

²⁸ Черновський О. К. Психологічна особливість суддівської діяльності. *Боротьба з організованою злочинністю і корупцією (теорія і практика)*. 2009. Вип. 20. С. 148.

had caused an injury. This conclusion of forensic examination contradicts testimonies of the victim and the witness to whom the car approached from the right side while their movement along the roadway. How did the car manage to hit the victim's left side surface of the body and not the right one? It was undetermined and the appeal court failed to identify it.

Therefore, the appeal court drew a conclusion that in such a case the expert conclusion can only be used as evidence proving guilt of the accused in the availability of other pieces of evidence complementing each other²⁹.

Conclusions. Summarizing the above, the following should be stressed: the expert conclusion is essential among other pieces of evidence in criminal proceedings, however, judges struggle to properly evaluate it. The expert conclusion, as any other evidence, does not have a predetermined force as stated in provisions of Section 2 of Article 94 of the Criminal Procedural Code of Ukraine, but is highly credible among judges, given the lack of specific expertise and professionalism in a forensic expert, impartiality of a forensic expert who is not interested in results of criminal proceedings. Such an undeniable trust is clearly harmful for consideration of criminal proceedings, and the lack of expert conclusion evaluation in the court decision, following the sustainable judicial practice, is grounds for its overturning and recognition as not legal, justified and motivated in compliance with requirements of Article 370 of the Criminal Procedural Code of Ukraine.

The court evaluates the expert conclusion, similar to other evidence in criminal proceedings, on the basis of internal conviction which stems from a comprehensive, full and impartial research on all circumstances of criminal proceedings, and is guided by the law when determining belonging, admissibility and credibility. It is the internal conviction that helps to categorize the expert conclusion into the judge subjective judgements. And it is formed, in particular, through transformation of doubts into convictions. In turn, such a process starts from the judge's examination of the expert conclusion as evidence in the court session, which undoubtedly meets the principle of immediacy while evidence examination enshrined in Article 23 of the Criminal Procedural Code of Ukraine.

When studying the expert conclusion during trial, the judge frequently faces the problem of lack of specific expertise that would allow to objectively evaluate the entire expert conclusion, especially if research carried out by the forensic expert necessitated the use of complex, multidisciplinary methods, and the use of the variety of specialized terms and wordings in a conclusion itself. Taking into account the fact that a judge is primarily a professional lawyer whose calling is appropriate application of legal rules, an increase in the level of specific expertise within the field of forensic science may facilitate the process of perceiving information presented in the expert conclusion, but does not perfectly resolve the very issue of objective evaluation of such conclusion. Thus, it will be more efficient for the judge to get rid of doubts while expert conclusion evaluation through the application of the methods of clarification and verification permitted by criminal procedural law in respect to such conclusions, which include: forensic expert interrogation in court; involvement of a specialist to provide consultations, explanations, certificates and conclusions during trial; ordering of additional, commission, multidisciplinary forensic examination as well as re-examination by the court. Such methods are intended to dispel the judge's doubts on proper conduct of expert research and help objectively evaluate its results as well as clarify case circumstances.

²⁹ Постанова апеляційного суду Чернігівської області від 26.09.2017 у справі №750/92/16-к (провадження № 11-кп/795/23/2017). Єдиний державний реєстр судових рішень: веб-сайт. URL: <https://reyestr.court.gov.ua/Review/69266032>



Separately, it should be emphasized that in any case the expert conclusion is evaluated by the court not only as an individual piece of evidence, but also through the prism of relationship with other evidence in a case. This approach to expert conclusion evaluation is, on the one hand, quite complex, and on the other hand, efficient, since all evidence-based information studied in conformity with general rules of criminal procedure affects the judge's inner conviction. So if the expert conclusion does not contradict the totality of pieces of evidence in a case, doubts concerning it are transformed into conviction, and vice versa, in case of apparent contradictions, the judge can draw a conclusion about erroneousness of made conclusion which is impossible with ordinary evaluation of individual piece of evidence.

To conclude, it should be noted that in the course of expert conclusion evaluation in criminal proceedings the fiercest debates between the defense and the prosecution take place, since it is this piece of evidence that is highly credible in the legal community and can tip the scales of the judge's conviction to one side or another. The subjective nature of evaluation of such evidence by the court has both disadvantages and advantages, however, only by overcoming doubts through a complex, logical, prudent process can the judge reach a conviction, which is the basis of their inner conviction.

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