ANETA PALECZNA
https://doi.org/10.33995/wu2022.1.7

Commentary[1] on the judgment of the Supreme Court, Civil Chamber, of 15 January 2021, file reference V CSKP 201/21[2]

This commentary is an attempt to analyse the basis and scope of compensatory liability of an expert witness for a prepared expert opinion in the context of the judgment of the Supreme Court, Civil Chamber, of 15 January 2021 (file reference: V CSKP 201/21). The study contains considerations on the impact of an expert opinion prepared in court proceedings on the content of the decision delivered in the case. In this context, the role and procedural conduct of a party in the proceedings become especially vital, including the party's exercise of its procedural rights and legal instruments allowing to questioning an expert witness's opinion and the findings made by the expert in such opinion. A matter of equal importance is the question of the statute of limitation for claims asserted against an expert witness, particularly, the starting date of the 3-year period (Art. 442[1] § 1 CC) and method of ascertaining the 20-year period (art. 442[1] § 2 CC). In the summary, an attempt was made to specify practical consequences of adopting an expert witness's liability as proposed by the Supreme Court in the judgment of 15 January 2021.

Keywords: liability of an expert witness; expert witness opinion; false opinion; indirectly injured party; civil liability insurance of an expert witness.

1. Although the problems of liability of an expert witness for an opinion prepared in court proceedings generated interest in judicial practice,[3] the considerations made so far show symptoms

1. This research was funded in whole or in part by National Science Centre, Poland, project number: 2021/41/N/HS5/02285. For the purpose of Open Access, the author has applied a CC-BY public copyright licence to any Author Accepted Manuscript (AAM) version arising from this submission. Commentary financed from the funds available under a project of the National Science Centre, Poland, project number: 2021/41/N/HS5/02285.

2. Legalis No. 2525216.

3. Judgment of the Court of Appeal (CA) in Białystok of 9.03.2018, I ACa 905/17, LEX No. 2558930; judgment of the Supreme Court (SC) of 29.05.2015, V CSK 479/14, Legalis No. 1331223; judgment of the SC of 5.02.1974, I PR 518/73, OSNKW 1974 No. 6.

of fragmentariness and are lacking a comprehensive analysis of the subject matter of high importance to private substantive and procedural law. Views expressed in judicial decisions have caught the eye of academic authors.[4] The ensuing discussion gave rise to researchers' opinions deviating from the judicial practice.[5]

In the judgment discussed in this commentary, the Supreme Court (SC) brought to the fore the problem of determining if the defendant – expert witness can be charged with a crime under Art. 233 § 4 of the Penal Code (PC), committed with eventual intent (dolus eventualis), as previously assumed by the Court of Appeal, which, in turn, has a bearing on the application of the statute of limitation for compensatory claims as provided for in Art. 442^1§ 2 k.c. Resolution in this regard should precede any further considerations on the liability scope of an expert witness within a normal causality framework, considering behaviour of the injured party which contributed to the emergence of damage (Art. 362 CC). However, as far as the last aspect is concerned, the analysis should cover not only the inactivity of a party in court proceedings and omission to use the available procedural rights but also the lack of any actions to challenge enforceability of the enforceable title. Finally, from the perspective of contributory behaviour, other important aspects are rights under statutory warranty, guarantee claims or claims asserted as a part of compensatory liability. In this perspective, as emphasized by the Supreme Court, importance attaches also to materials held by the party, which confirmed the defective performance of works. Although the essence of the case presented to the SC boils down to seeking an answer to the question if, and if so, on what basis and to what extent, an expert witness is liable for a damage caused by preparing a false expert opinion, answering that question calls for careful and detailed analysis. This question is highly important not only for determining the basis and scope of compensation for loss but, in the first place, for the practice and environment of an expert witnesses. The imposition of compensatory liability on expert witnesses will enforce the offering of new insurance products, also in the class of compulsory insurance.

2. The judgment of the Supreme Court was delivered in the following factual situation: under a contract between the parties, a contractor company undertook to carry out renovation of the tenement house belonging to the claimant – investor. The works were concluded in September 1998, however, the investor refused to pay remuneration, contending that the works were defectively performed In the court proceedings initiated by the contractor, the claimant filed a counter-suit in which the claimant sought the award of stipulated damages from the contractor and return of overpaid remuneration for the executed works. The Circuit Court, by the decision of 19.06.2001 allowed evidence in the form of opinion of an expert witness in the area of construction to establish the following circumstances: "value of the renovation – construction works executed in the said tenement house, including the cost of labour, materials used (if the bills corresponded to the consumption of materials) and value of the executed utility installations (internal electric installation, sewerage,

4. For example, see: J. Dzierżanowska, J. Studzińska, *Biegli w postępowaniu cywilnym i karnym. Praktyczne omówienie regulacji z orzecznictwem*, Warszawa 2019; T. Widła, *Odpowiedzialność biegłych – nowe problemy*, „Palestra" 7–8/ 2005, p. 123–132; D. Zienkiewicz, *Stosunek prawny łączący organ procesowy i biegłego*, „Zeszyty Naukowe Śląskiej Akademii Medycznej" 4/1995.

5. For example, see M. Fras, *Odpowiedzialność deliktowa biegłego za szkodę spowodowana wydaniem nieprawdziwej lub nieprawidłowej opinii w postępowaniu sądowym. Rozważania na tle najnowszej judykatury*, „Gdańskie Studia Prawnicze" 1/2021, p. 66–84; T. Widła, *Odpowiedzialność biegłego za wydanie nieprawidłowej opinii. Glosa do wyroku Sądu Apelacyjnego w Katowicach z 29.11.2019 r.,* V ACa 266/18, „Glosa" 2/2020, p. 128–134.

central heating, ventilation, water installation), if the building was renovated according to the rules of the trade, if the works were performed according to the design; in case of any defects, if the defects were material, that is precluding the building's normal use, if the defects were attributable to the contractor, if the defendant investor's refusal to accept the building on 31 August 1998 was justified and, if so, by what factors." Preparation of expert opinion was entrusted to the defendant, who was a permanent expert witness. By the judgment of 31.12.2002, the Circuit Court awarded from the claimant, and defendant in that case, to the contractor the amount of 388,532.70 together with statutory interest and legal costs, dismissed the remainder of the main suit and dismissed the counter-suit in its entirety. The Court of Appeal, by the judgment of 19.03.2004, dismissed the appeal filed against that judgment by the claimant. Then, in 2004, upon request of the company, enforcement proceedings were initiated against the claimant for the purpose of recovering the amount awarded by the judgment in the case in which the defendant – as expert witness – prepared the expert opinion. As a part of the enforcement proceedings, the claimant's immovable property was sold in auction for a price of 1,600,000 PLN.

3. Without prejudice to the theses made in further parts of this study, it becomes necessary to consider the limits of liability of an expert witness in the light of the liability of the State Treasury. The Supreme Court, in the judgment of 15.01.2021, did not refer exhaustively to the question of liability of the State Treasury vis-a-vis an expert witness, considering decided the question that an expert witness is liable to third parties for damage caused by a defective opinion, and the expert witness's liability is unaffected by (ir)regularity of a legally valid court decision delivered in reliance on the expert opinion put into question. Notably, a legally valid decision, or even assessment made on the basis of the questioned expert opinion do not exonerate the expert witness. Such categorical opinion expressed by the Supreme Court lacked considerations in respect of the nature of the relationship between an expert witness and the procedural authority and, in the same way, impact of the procedural authority on the form, content and scope of the expert opinion and analysis of the source of the loss suffered – if this was the mere expert opinion prepared in the proceedings or the court decision delivered in the case. The absence of statutory law comprehensively regulating the position and status of an expert witness does not make the task easy, however, a good pattern of the expert witness's role in the legal process is reconstructed by the doctrine.

The State Treasury incurs tortious (delictual) liability for damages caused by delivering a legally valid judgment or final decision. In such situation, redress of the damage may be sought upon declaring such judgment or decision unlawful in appropriate legal proceedings, unless otherwise provided in separate provisions (Art. 417^1 § 2 CC). Therefore, in principle, it is necessary to obtain a prior ruling declaring a legally valid judgment or final decision unlawful.[6] It must be remembered, at the same time, that awarding compensation from the State Treasury should be based on legal provisions taking into account constitutional values, including certainty of law and legal security, and protection of the individual's trust in the state and the law, and, at the same time, such award should consider judicial independence.[7] Moreover, liability for unlawfulness of public

6. Judgment of the CA in Wrocław of 10.2.2012, I ACa 1418/11, Legalis No. 732716; judgment of the CA in Białystok of 26.01.2018, I ACa 761/17, Legalis No. 1719930.

7. Judgments of the Constitutional Tribunal (CT) of 27.9.2012, SK 4/11, OTK-A 2012, Nr 8, poz. 97 and of 1.4.2008, SK 77/06, OTK-A 2008, Nr 3, poz. 39.

authorities' acts should be corrected in relation to situations of exercising judicial powers. As a result, the subject matter of evaluation should be not only the content of the respective ruling but also the legally relevant circumstances accompanying its delivery (including subjective elements of judge's behaviour).[8] The specificity of the State Treasury's liability has, on multiple occasions, been emphasized by the Supreme Court, which pointed out that an unlawful ruling is one whose irregularity is blatant, qualified, elementary and obvious.[9] The need for restrictive qualification of such defectiveness has also been noted by European Courts, which emphasized that a court ruling may be a source of compensatory obligation when the violation of law is "sufficiently material."[10]

Without losing sight of the above considerations, one should approve of the view, well established in academic literature,[11] that the legal relationship between an expert witness and the authority ordering the expert opinion is based in procedural rules, that is to say provisions of public law and, at the same time, this is not a relationship between two equal parties. Such opinion seems to be a corollary of a true observation that the authority appointing an expert witness decides unilaterally about the establishment of that legal relationship (Art. 278 § 1 and Art. 279 of the Code of Civil Procedure (CCP)), scope of the expert witness's activities, which are then supervised by the authority, form of the expert opinion (Art. 278 § 3 CCP), amount of the expert witness's remuneration and deadline for preparing the opinion (Art. 285 § 3 CCP), the authority may participate in the activities, and has normatively defined coercion measures that can be used against the expert witness (Art. 287 CCP). Opinion by an expert witness is an instrument used by the authority to examine the evidence material.[12] As a result, an expert witness is a connection between an element of the factual situation requiring specialist knowledge and the procedural authority, provided that it is the court to dispose of the collected evidence material, including the expert opinion prepared by the expert witness. Consequently, the procedural authority evaluates the completeness, exhaustiveness, clarity and explicitness of the opinion, guided by the principles of correct reasoning, knowledge and life experience (art. 233 § 1 CCP).

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8. Banaszczyk (in:) K. Pietrzykowski (ed), *Kodeks cywilny. T. I. Komentarz. Art. 1–44910*, Legalis 2020, nb 33.
9. In the opinion of the SC "Judgment should be contrary to principal rules which are not subject to diverging interpretation, to the generally accepted resolution standards or delivered in consequence of a particularly blatant erroneous interpretation or improper application of law." See SC decisions of 25.05.2021, I CNP 2/21, Legalis No. 2580939, of 12.03.2021, III CNP 9/20, Legalis No. 2543565 and of 10.12.2020, V CNP 51/19, Legalis No. 2571183. From this perspective, it is impossible to identify unlawfulness of a decision with the concept of widely understood unlawfulness as adopted in the context of civil law liability. See judgment of the CA in Gdańsk of 29.06.2020, V ACa 525/19, Legalis No. 2457644.
10. See the judgments of the CJEU of 30.9.2003, C-224/01, Gerhard Köbler v. Republik Österreich, EU:C:2003:513, paragraphs 32, 33 and 56, and of 24.11.2011, C-379/10, European Commission v. Italian Republic, EU:C:2011:775.
11. See: J. Dzierżanowska, J. Studzińska, *Biegli w postępowaniu cywilnym i karnym. Praktyczne omówienie regulacji z orzecznictwem*, Warszawa 2019, p. 50. See the judgment of the SC of 28 November 1974, III CZP 76/74, OSNCP 1975/7–8, poz. 108, and of 28 May 1997, OSP 1998/3, poz. 61, Widła T., *Uwagi o przeprowadzaniu dowodu z opinii biegłego*, „Palestra" 3–4/2002 p. 67; D. Zienkiewicz, *Stosunek prawny łączący organ procesowy i biegłego*, „Zeszyty Naukowe Śląskiej Akademii Medycznej" 4/1995, p. 109 et seq.; application to the Constituional Tribunal No. RPO-498998-VI/05/MC-Z of 1 November 2005; decision of the SC of 25.06.2003, IV KK 8/03, Legalis No. 58180, M. Fras, *Odpowiedzialność deliktowa biegłego za szkodę spowodowana wydaniem nieprawdziwej lub nieprawidłowej opinii w postępowaniu sądowym. Rozważania na tle najnowszej judykatury*, „Gdańskie Studia Prawnicze" 1/2021, p. 68.
12. T. Widła, *Ocena dowodu z opinii biegłego – jednostkowa i finalna*, „Problemy Współczesnej Kryminalistyki", t. III/ 2000, p. 327 et sec.; judgment of the SC of 6.02.2003, IV CKN 1763/00, Legalis No. 59166.

In the context of the above considerations, academic literature duly addresses the problems of applying the norm under Art. 430 CC in conjunction with Art. 415 CC to the liability of an expert witness.[13] In case of assuming this liability basis, the State Treasury would incur risk-based strict liability[14] if the damage arose out of wrongful conduct of a subordinate. I put forward the thesis that it is the State Treasury that incurs liability for the activities undertaken by an expert witness in performance of the decision to take evidence in the form of expert opinion, and for the consequences of using the opinion prepared by the expert witness. It is the authority that entrusts to the expert witness preparation of the opinion, and the expert witness is subject to supervision by the authority and is obliged to follow the authority's directions, and the activity is entrusted "on the account" of the entrusting authority and within the area of its competence. It must be added that among the prerequisites of liability of the Court – State Treasury one should list inappropriate assessment of evidence or choice of expert witness (*culpa in eligendo*), incompleteness of the examined material, absence of reasonable doubts about the expert witness's expertise or impartiality,[15] but also incorrect (as to the scope or subject matter) formulation of the evidence thesis by the court or taking such evidence in a situation when specialist information is not needed.

The question that must be answered in the above context relates to the prerequisites of tortious liability of an expert witness and qualification of the expert opinion prepared in court proceedings as a harmful event. Whereas two prerequisites of the expert witness's liability can be established in the form of harmful event and damage, I put forward the thesis that damage of one of the parties is not a normal consequence of preparing an expert witness opinion of specific content. Therefore, at this point a question may be asked about the rights of a litigant party in a situation when a legally valid ruling is delivered, among others, in reliance on an opinion whose content is clearly contrary to the facts. In such case a litigant party may invoke either the above-mentioned Art. 430 CC or Art 417^1 § 2 CC.

Such arguments, in favour of attaching liability to the State Treasury, have not been faced so far by judicial practice, which detaches the expert opinion prepared in legal proceedings from the course of the proceedings and position of the procedural authority. For the reasons cited above, it is impossible to agree with the thesis about independent tortious liability of an expert witness for an improperly prepared expert opinion regardless of the course of the process itself. Notably, acceptance of the view expressed by the Supreme Court leads to exclusion of the State Treasury's liability in most cases in which evidence was taken in the form of opinion prepared by an expert witness. Such conclusion follows also from the written motives of the Supreme Court's judgment, in which the Court emphasized the role of an opinion in adjudication, pointing out that "irregularity of the expert opinion prepared by the defendant and delivery on its basis of a legally valid judgment awarding to the contractor remuneration for the execution of construction works (...) does not mean that the contractor's claim was not legitimate."

13. T. Widła, *„Biegły sądzony",* [in:] *Biegły w sądzie, Konferencja w 40. rocznicę śmierci prof. J. Sehna*, Kraków 2005, p. 88; K. Łoś, *Ubezpieczenie OC biegłego sądowego*, „Nieruchomości" 6/2008.
14. This would preclude the possibility of the State Treasury's exculpation.
15. See K. Łoś, *Ubezpieczenie OC biegłego sądowego*, „Nieruchomości" 6/2008; J. Dzierżanowska, J. Studzińska, *Biegli w postępowaniu cywilnym i karnym. Praktyczne omówienie regulacji z orzecznictwem*, Warszawa 2019, p. 300; Ł. Jędruszuk, *Odpowiedzialność cywilna biegłego sądowego*, Temidum 2014/2 (77); M. Fras, *Odpowiedzialność deliktowa biegłego*, *op.cit.* p. 69; A. Olejniczak, *Komentarz do art. 430 k.c.,* [in:] A. Kidyba (ed), *Kodeks cywilny. Komentarz – tom III. Zobowiazania – część ogólna,* LEX 2010.

4. Several comments should be made upon analysis of the adequate causal link between the preparation of opinion and delivery of the judgment,[16] and between the preparation of opinion and the damage caused. Because of the nature of expert opinion as evidence and criteria of its evaluation, a thesis may be put forward that a normal consequence of preparing an opinion of specific content is not delivery by the court of a ruling corresponding to the opinion. Otherwise, the outcome of the legal proceedings would be known already at the time of delivering the opinion and rulings would be, principally, passed by expert witnesses and not by the court.

The legislator provided, in Art 316 § 1 of the Code of Civil Procedure, the principle of the ruling's (judgment's) currentness, instructing to take account of the factual situation as on the closing date of the trial. This principle relates both to the factual basis of the action and to its legal basis.[17] On the other hand, in the course of the proceedings, the court gathers the evidence material and evaluates it according to the precepts of life experience, general knowledge and logical reasoning,[18] and an expert's opinion is also evaluated taking into account the expert witness's knowledge, the methodology adopted, the opinion's theoretical grounds, as well as consequences and the degree of firmness of the opinion's propositions.[19] On the other hand, the parties may challenge the opinion with all available procedural measures, including by requesting a supplementary opinion (written or oral), or requesting appointment of another expert witness.

Moreover, opinion of an expert witness differs from other evidence types in that it cannot be easily assessed using the criterion of truth and falsehood.[20] As such, opinion consists in certain assessment by the expert witness of facts, using the expert witness's specialist knowledge. In the same way, in its preparation much importance attaches to the type of the used evidence material and facts, their completeness, methodology and research tools, as well as the expert opinion's compliance with the thesis formulated by the court. It must not be forgotten that an expert witness should not interfere in the scope of the Court's exclusive competence, which means that the expert witness should not independently establish the facts of the case, assess evidence or predict the outcome of the case.[21] The expert's specialist knowledge relates to facts, rather than the law.[22] Moreover, despite its nature, there are no legal grounds to conclude that this type of evidence should be treated as privileged in relation to other evidence types.[23]

16. See the judgment of the Supreme Court of 14 March 2002, IV CKN 826/00, Legalis No. 278060; see, e.g., the judgments of the Supreme Court of: 18.05.2000, III CKN 810/98, Legalis No. 315818 and 19.03.2008, V CSK 491/07, Legalis No. 313326; decisions of the Supreme Court of: 10.12.1952,1 C 584/52, PiP 1953 No. 8–9, p. 366 and 21.06.1960, 1 CR 592/59, OSN 1962, nr III, poz. 84.
17. Judgment of the SC of 7.3.1997, II CKN 70/96, Legalis.
18. So: CA in Białystok in the judgment of 11.04.2013, I ACa 65/13, LEX nr 1314669 and in the judgment of 19.02.2018, III AUa 143/17, LEX nr 247626.
19. Judgment of the SC of 7.11.2000, and CKN 1170/98, Legalis No. 49256.
20. T. Widła, *Odpowiedzialność biegłego za wydanie nieprawidłowej opinii. Glosa do wyroku Sądu Apelacyjnego w Katowicach z 29.11.2019 r.,* V ACa 266/18, Glosa 2020 nr 2, p. 129.
21. So: SC judgment of 6.02.2003, IV CKN 1763/00, LEX No. 78280.
22. SC judgment of 17.01.1987, V KRN 474/86, OSNPG 1988 nr 3, poz. 29; c.f. judgment of the CA in Warsaw of 5.02.2018, VI ACa 530/14, LEX No. 1661270. See also Judgment of the CA in Łódź of 5.11.2014, I ACa 839/14, Legalis No. 1554767, judgment of the CA in Białystok of 23.03.2018, I ACa 961/17, Legalis No. 1841941.
23. So: K. Jaegermann, S. Kłys, *Rola biegłego w sądowym stosowaniu prawa*, „Nowe Prawo" 11–12/1980, p. 83 et seq.; M. Rybarczyk, *Biegły w postępowaniu cywilnym,* Warszawa 2001, p. 28–29; J. Turek, *Dopuszczenie dowodu z opinii biegłego,* [in:] J. Turek (ed), *Rola biegłego we współczesnym procesie,* p. 11 i n., S. Włodyka, *Zagadnienie*

6. Without prejudice to the above considerations, it must be highlighted that in the assessment of the causal link between the preparation of opinion and the damage caused, one should, first of all, consider how the proceedings would have concluded if the court had received an opinion favourable to the claimant. The situation looks the same when it comes to the liability of professional attorneys, as also in their case a "process within a process" should be held. As the SC noted in the discussed judgment, the mere content of the expert opinion did not mean that the contractor's claim was not legitimate in its entirety or at least in an amount corresponding to the compensation sought against the defendant.

In this context, the element which comes to the fore is non-payment by the claimant (there: defendant) of remuneration in a situation of improper performance of works. This is the case as the contractor's remuneration is an equivalent of the works performed and – depending on the content of the legal relationship between the parties – of the materials. First, an investor has a number of rights under the guarantee and statutory warranty, which legal instruments should, indeed, be used in case of defects in the executed works. Another remedy is set-off defence, which can be raised by a party dissatisfied with the results of the executed works. Defects may also give rise to claims under the compensatory liability regime or to a counter-suit.[24] In such situation, it is necessary to include findings in the protocol about the quality of the works rendered, list of defects and flaws, and the deadline for their removal, or the investor's declaration of choosing another remedy available to the investor for the contractor's defects identified during the acceptance.[25] Second, the opinion expressed by the SC that the ordering party is not obliged to accept the work and pay remuneration in case of delivery of the work with material defects is not convincing. Both under the previously (Art. 637 CC) and presently applicable regime, the investor is obliged to accept works (Art. 647 CC and Art. 643 CC, Art. 18(1) of the Construction Law Act[26]). It can only be added that the possibility of unilateral acceptance is intended to avoid situations in which the investor refuses to effect acceptance, trying to shun the payment of remuneration.[27] Regardless of what the Supreme Court accurately noted, in this case the claimant, acting as investor, accepted the contractor's work under a protocol, which gave rise to the obligation to pay remuneration, without forfeiting the right to demonstrate improper performance of the agreement.

The SC accurately concluded that the scope of liability within the normal causal link should include: the impact of defects in performance on the contractor's remuneration, the investor's possibility to avoid payment of remuneration, the method of calculating the damage, and consequences for the investor, who, under a protocol, accepted the works and reported defects – if the expert witness had made a regular opinion. As far as the last of the Supreme Court's indications is concerned,

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dowodowe w nowym Kodeksie postępowania cywilnego, „Nowe Prawo" 1/1966, p. 6 et seq. See the judgments of the SC of 29.11.1949, WaC 167/49, Nowe Prawo 1951 nr 2, p. 62 and of 10.02.2000, II UKN 399/99, OSNAPiUS 2001/15, poz. 497, judgment of the CA in Poznań of 30.10.2013, III AUa 1270/13, LEX No. 1403756.

24. See the judgment of the CA in Warsaw of 24.04.2019, V ACa 416/18, LEX No. 2728635; judgment of the CA in Gdańsk of 21.02.2018, V AGa 50/18, LEX No. 2522662.

25. See the SC judgment of 5.03.1997, II CKN 28/97, OSNC 1997 nr 6–7, poz. 90; SC judgment of 4.07.1998, II CKN 673/97, Legalis No. 32292; judgment of the District Court (DC) in Szczecin of 30.05.2016, XI GC 19/16, Legalis No. 2192392.

26. Act of 07 July 1994 – Construction Law (Dz.U. 1994, nr 89 poz. 414).

27. For more, see: M. Hendzel, *Charakter prawny i dopuszczalność jednostronnego odbioru przedmiotu świadczenia w umowie o roboty budowlane*, „Studia Prawnoustrojowe" 48/2020, p. 45 et seq.

a reservation should be made that the investor's (claimant's) notifications of the defects should have been made in the proceedings, using appropriate procedural measures.

Careful analysis of the ruling points to one more element in the causal link, that is the auction of the immovable property belonging to the claimant. Although, in the context of the discussed decision, it would be difficult to charge the expert witness with liability for the damage equal to the sum awarded by the court from the claimant (defendant in those proceedings), it would be even more difficult to assume liability equal to the value of the immovable property auctioned off in excess of the sum awarded by the court. Execution proceedings and the auction held within such proceedings are of secondary nature and are a consequence of the lack of voluntary payment to the creditor. Similar comment should be made in respect of the interest claim.

7. In the discussed ruling, the Supreme Court justly drew attention to the so far unfathomable subject matter of the injured party's behaviour contributing to the emergence or increase of the size of damage, in respect of which the injured party has obligations, among others, under Art. 362 CC and Art. 354 § 2 CC. An expert opinion may be subject to both parties' criticism, and the parties may oppose to the opinion with any available evidence measures, or request appointment of another expert witness[28] or preparation of a supplementary opinion.[29] From the perspective of contribution, one should also consider the legal instruments discussed above, which were not taken advantage of by the claimant – contractor, and which were available to the claimant under statutory law. In this regard, the SC pointed to rights under statutory warranty or compensatory claims for construction work defects. The Court also stressed that the claimant held not only private expert opinions but also administrative decisions which confirmed the defective execution of works. In this context, the appellate court did not make any findings which would enable review of the challenged judgment by cassation appeal.

8. Moving on at this point to a key, in the context of the discussed case, matter of preparing a false expert opinion, which would fulfil the statutory elements of the prohibited act under Art. 233 PC[30] and, in the same way, justify the 20-year statute of limitation period, the concept of false opinion should be commented on. This task is difficult in the absence of any legal definition of the term "false," and in the context of an opinion, there are no reasons to identify "falsehood" with an inconsistency between the propositions made in the opinion and the actual situation. In this respect, additional analysis must be offered with regard to an incomplete or unreliable opinion.

Considering the nature of an expert opinion, it must be concluded that application of the criterion of truth to such opinion is inasmuch difficult as the opinion's content is an assessment made by a person holding specialist knowledge, even if flawed by a specific error.[31] The literature

28. So: T. Ereciński, [in:] E.Ereciński (ed), *Kodeks postepowania cywilnego. Komentarz*, cz. 1, t. I, art. 278, p. 1114.
29. See, e.g., the SC judgment of 11.12.2007, II CSK 348/07, unpublished. See also: SC judgment of 18 April 2013, III CSK 243/12, LEX No. 1353200). See also: SC judgment of 27.01.2004, V CK 279/03, LEX No. 602086; judgment of the CA in Szczecin of 17.03.2017, I ACa 251/15, http://orzeczenia.szczecin.sa.gov.pl/content/$N/155500000000503_I_ACa_000251_2015_Uz_2017–03–13_001 (last accessed: 3.08.2021); judgment of the CA in Gdańsk of 5.12.2012, I ACa 542/12, Legalis No. 744942; judgment of the SC of 6.10.2017, V CSK 20/17, Legalis No. 1705374.
30. Art. 233 § 4 PC. "Whoever, acting as an expert, expert witness or translator, provides a false opinion or translation to be used as evidence in proceedings specified in § 1 shall be subject to the penalty of imprisonment up to 3 years."
31. L. Gardocki, *Komentarz do kodeksu karnego*, 2018, Legalis, nb. 25.

amply discusses the criteria of evaluating evidence in the form of expert opinion, and such criteria include: principles of logic and level of the expert witness's knowledge, uniformity and universality of the method; certainty of scientific research results; professionalism, reliability, logicality; "laboratory attestation;" exhaustion and completeness; firmness.[32] Notably, that catalogue does not include consistence of the opinion with reality since – as justly noted by the SC in the discussed judgment – the expert witness's truth is truth in a moral, and not logical, sense. Developing that thought, the Court emphasized that the same truth cannot be referred to an expert witness as to a witness or procedural authority. Whereas a witness makes a vow under Art. 188 § 1 of the Code of Penal Procedure (CPP), in the context of which the liability of a witness for giving false testimony does not raise any doubts, an expert witness vows to perform the entrusted duties "with all scrupulousness and impartiality" (Art. 282 CCP, Art. 197 § 1 CPP).

Another issue faced by an increasing number of expert witnesses is precise and careful formulation of the evidence thesis. As an expert witness is bound by the evidence thesis and such thesis has a bearing on the subject matter and scope of the expert opinion, this Court's task should be considered pivotal, although it is undoubtedly unacknowledged and neglected.

By an amendment of 11 March 2016, [33] in Art. 233 § 4a PC, a new type of prohibited act was introduced, consisting in unintentional provision by an expert witness, valuer or translator of a false opinion, expertise or translation, which are to serve as evidence in court or any other proceedings held under statutory law and which expose a public interest to a material damage. A justification for penalising such unintentional behaviour was the need to prevent a practice of submitting "unreliable opinions," including by "private expert witnesses."[34]

Continuing the thread of false opinion, many attempts have been made in the doctrine to systematise the prerequisites of recognising an expert opinion as false, including: clear contradiction with the current state of knowledge; contradiction with actual facts; wrong methodology adopted by the expert witness.[35] Addressing this issue, the SC drew attention to the fact that an expert witness will fulfil the prerequisites of the prohibited act if, in the opinion, the expert witness offers findings other than made in the expert appraisal, conceals the actual findings negating the conclusions made or deliberately deploys incorrect argumentation. Beside objective falsehood, an opinion should also be untrue in the subjective sense. The author should be aware of its objective inconsistency with facts, either with direct or eventual intention.[36] This view deserves particular approval as it accentuates the specificity of evidence in the form of opinion prepared by an expert witness, whose propositions may not be assessed only using the criterion of truth and falsehood.

32. J. Dzierżanowska, J. Studzińska, *Kryteria oceny dowodu z opinii biegłego w orzecznictwie sądów powszechnych i Sądu Najwyższego*, „Roczniki Nauk Prawnych" 2/ 2015.

33. Dz.U. 2016, item. 437.

34. Academic literature draws attention to the infelicitous combination of the definition elements leading to penalisation of "unintentional" delivery of a "false" opinion, expertise or translation. The word "false" may, in fact, suggest intentionality in the preparation of an opinion, expertise or translation, and recklessness or negligence in their delivery. See K. Wiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz*, Legalis 2021, nb 16, http://orka.sejm.gov.pl/Zapisy8.nsf/wgskrnr/NKK-9.

35. L. Tyszkiewicz, [in:] Filar (ed), *Kodeks karny*, 2010, p. 1080–1081.

36. See Z. Masłowski, [in:] Z. Resich (ed), *Kodeks cywilny. Komentarz*, t. II, Warszawa 1972, p. 983; judgment of the SC of 11.01.2001, IV CKN 150/00, OSNC 2001, nr 10, poz. 153; judgment of the SC of 11.05.2005, III CK 522/04, LEX No. 151664; M. Fras, *Odpowiedzialność deliktowa biegłego*, op. cit. 75.

In consequence of adopting Art. 233 § 4a PC, careful attention must be given to delimiting the borderline between eventual intention and unintentionality. The essence of eventual intention is that the perpetrator predicts the possibility of committing a prohibited act and consents to such commission.[37] The perpetrator does not want the consequence of their behaviour, as specified in statutory law, to materialise but, at the same time, the perpetrator does not want the same consequence not to materialise.[38] In the same way, the perpetrator is completely indifferent to the possibility of realising such consequence – in the context of what they do or what may result from their behaviour.[39] Adoption of such form of intentionality must be based on the determination that, first, a given consequence was indeed predicted by the perpetrator and, second, that the perpetrator accepted the consequence.[40] At the same time, the acceptance must take the form of an act of will consisting prior consent to the ensuing state of affairs.[41] It is noteworthy that, following the view expressed in the written motives of the discussed ruling, which sheds doubt on the process of assessing evidence in the discussed case before the appellate court, one should take into account the basic principle of penal law, *in dubio pro reo*, also when deciding if a given act constitutes an offence (Art. 11 CCP).

Bearing in mind the solutions presented above, it must be concluded that consent to the consequence may not be presumed; in any case, it should be clearly demonstrated that such consent was an element of the processes taking place in the perpetrator's mind.[42] The concept of intention does not belong to the domain of assessments and values; it is an element of the objective reality and, as such, is subject to evidencing just as elements of *actus reus* of a prohibited act of a given type.[43] Findings about eventual intention cannot be based on fragmentary facts relating to the actions performed but should be a necessary conclusion following from the entirety of objective and subjective circumstances of the criminal event, but also from its background, the perpetrator's behaviour preceding and following the criminal event.[44] It is necessary to carefully analyse the intellectual and volitional phenomena in the mind of the perpetrator. Conclusion that the perpetrator acted in performance of their eventual intention is out of question not only when the perpetrator took steps to prevent commission of the prohibited act, but also when they partly abandoned the aim they had pursued.[45]

37. Judgment of the CA in Cracow of 29.05.2014, II AKa 26/14, Legalis No. 1180382.
38. Judgment of the CA in Wrocław of 12.09.2021, II AKa 223/17,Legalis No. 1683508.
39. Intention is not a process but result of a process or, strictly speaking, of mental processes. This mental experience can be verbalised as follows: "I admit such possibility," "I do not care if this happens or not." See M. Budyn – Kulik, *Glosa do wyroku Sądu Apelacyjnego w Gdańsku z dnia 18 kwietnia 2013 r.,* II AKa 92/13, LEX nr 1314694, „Wojskowy Przegląd Prawniczy" 3/2014, p. 3.
40. So: judgment of the CA in Wrocław of 16.10.2009, II AKa 297/09, OSAW 2010/1/157, Prok. i Pr. – wkł. 2010/4/14, KZS 2010/1/31/; judgment of the CA in Wrocław of 30.09.2015, II AKa 236/15, LEX No. 1927502.
41. Judgment of the SC of 4.12.2018, II K 104/18, LEX No. 2586256; see also the SC judgment of 6.02.1973, V KRN 569/71, OSNPG 1973/6/72.
42. Judgment of the SC of 6.02.1973, V KRN 569/71, OSNPG 1973/6/72.
43. Judgment of the CA in Gdańsk of 18.04.2013, II AKa 92/13, LEX No. 1314694; judgment of the SC of 3.07.2019, IV KK 143/18, Legalis No. 1969735.
44. Judgment of the SC of 4.12.2018, II KK 104/18, unpublished.
45. See A. Wąsek, [in:] O. Górniok, S. Hoc, M. Kalitowski, S. M. Przyjemski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek (eds), *Kodeks karny. Komentarz t. I, art. 1–116*, Warszawa 1999, p. 107–108; judgment of the Circuit Court in Warsaw of 6.06.2014, file reference: X Ka 418/14.

Transposing the above to the context of the discussed ruling, the conclusions made by the SC should be met with approval. Although the appellate court found that the expert witness's behaviour fulfilled the statutory prerequisites of the offence under Art. 233 § 4a PC, there were no grounds for such conclusion. In her expert opinion, the expert witness and the defendant described the defects she discovered in the inspection, wherein she limited the scope of her expert opinion to the defects notified by the investor. Equally importantly, in the contents of the expert opinion, the expert witness pointed to incompleteness of the construction documentation and even independently requested public authorities for their provision. As a result, the expert opinion was prepared only on the basis of documents included in the case file, as obtained from the authority, and on the basis of inspection. Since the expert witness made reservations in the prepared opinion, the expert witness did not predict the possibility of committing a prohibited act and, all the more, did not consent to such commission. In consequence, she could not be assigned even eventual intention.

Nearing the end of this part of the considerations, as a matter relevant from the perspective of assessing (criminal and penal) liability of an expert witness, it must be noted that in civil law intentional (dolus) and unintentional (negligence) forms of fault are distinguished. The latter covers gross negligence and negligence *stricto sensu*. The relevant factor for the assessment of negligence is the standard of care adopted as pattern for proper conduct.[46] More importantly, gross negligence – in the civil law context – was equated with intentionality and, despite its qualification as negligence, its legal consequences should be treated as consequences of intentional fault.[47] In consequence, the fact of passing a judgment convicting for an unintentional crime, as a rule, does not predetermine whether or not, in the civil law context of liability for damage, the convict's guilt will be assessed as ordinary negligence or gross negligence.[48]

10. When assuming the prerequisites of liability of an expert witness as formulated by the SC in the discussed ruling, it seems difficult to point to a party whose sphere of rights and interests could – as a result of preparing the expert opinion –be violated indirectly.

Although the term "indirect damage," so far, has no legal definition in the Polish legal system, the doctrine[49] and judicial practice[50] attempted to systematise the concept. In literature, it is assumed that an indirect violation of one's sphere of rights or interests takes place when the operation of the harmful agent (cause) is directly aimed against another interest than the one actually

46. Judgment of the CA in Łódź of 22.06.2017, III Ca 263/17, LEX No. 2477648.

47. M. Fras, *Odpowiedzialność deliktowa biegłego za szkodę spowodowana wydaniem nieprawdziwej lub nieprawidłowej opinii w postępowaniu sądowym, op.cit.*, p. 74.

48. Judgment of the SC of 17.02.1964 , I CR 30/63, LEX No. 290.

49. J. Winiarz, *Obowiązek naprawienia szkody,* Warszawa 1970, p. 21; A. Koch, *Związek przyczynowy jako podstawa odpowiedzialności odszkodowawczej w prawie cywilnym*, Warszawa 1975, p. 59.

50. Resolution of the SC of 22.11.1963, III PO 31/63, OSNC 1964 poz. 7–8 nr 128; resolution of the SC of 12.07.1968, III PZP 26/68, OSNC 1969 poz. 3 nr 42; judgment of the SC of 29.04.2011 , I CSK 457/10, LEX nr 1318300; judgment of the CA in Warsaw of 13.04.2017, I ACa 1599/14, LEX No. 2317753.

suffering a detriment (ricochet damage).[51] In the same way, indirect damage is a detriment suffered by a third party, other than the party against whom the perpetrator's act was directed.[52]

Regardless of whether the expert witness's liability is detached from the liability of the State Treasury, neither a litigant party nor the expert witness, not the State Treasury will be an indirectly injured party. Against the background of the indirect damage construction as presented above, one may seek indirect damage not as much in the relation: expert witness – State Treasury – litigant party as in the relation: expert witness or the State Treasury – third (indirectly injured) party whose sphere of rights or interests is affected by the opinion prepared by the expert witness. There are situations in which an expert opinion prepared in legal proceedings between A and B is then used in legal proceedings held with the involvement of A and C.[53] This – upon fulfilling the prerequisite of adequate causal link – has a bearing on the resolution delivered in relation to C. The presented problem allows to formulate a question if the boundaries of an expert witness's liability are delimited by the participants of the proceedings.

Without going into much detail and aware that commentary is a summary form of assessing a court ruling by an academic author, I am inclined to consider the principle of rationalising damage both in the objective and subjective dimension. This principle prevents such a far-reaching obligation to compensate for damage.

11. Although the Supreme Court, in the written motives of the discussed ruling, considered the problems of adequate causal link, contributory behaviour of the injured party and, finally, prerequisites of the offence under Art. 233 § 4a PC, the Court assessed too briefly the nature of the relationship between an expert witness and the procedural authority, detaching the expert witness from the activities of other actors in court proceedings. The absence of statutory regulation governing the scope and prerequisites of liability of an expert witness – unlike in the German legal system (§839a, § 839 BGB)[54] – calls for even more careful analysis, taking into account the course of the process, attitude of the parties and the procedural authority, and the content of the expert opinion itself. Otherwise, a resolution negative to one of the parties will always be attributed to the expert witness, who has prepared, as a part of the proceedings, an expert opinion unsatisfactory to that party. The expert witness will also be accountable for incompleteness

51. *B. Lanckoroński, Odpowiedzialność za tzw. szkody pośrednie w polskim prawie cywilnym*, [in:] J. Jastrzębski (ed), *Odpowiedzialność odszkodowawcza*, Warszawa 2007, p. 134.

52. W. Popiołek, *Odpowiedzialność spółki dominującej za szkodę «pośrednią» wyrządzoną przez spółkę zależną,* [in:] Dańko-Roesler, A. Oleszko, R. Pastuszko (eds), *Rozprawy z prawa prywatnego i notarialnego. Księga pamiątkowa dedykowana Profesorowi Maksymilianowi Pazdanowi,* Warszawa 2014, p. 317. For more, see: E. Bagińska, *Modele regulacji zadośćuczynienia za śmierć osoby bliskiej w wybranych krajach europejskic*h, [in:] Z. Strus, K. Ortyński, J. Pokrzywniak (eds) *Zadośćuczynienie po nowelizacji art. 446 Kodeks cywilnego na tle doświadczeń europejskich,* Warszawa 2010; M. Wałachowska, *Wynagrodzenie szkód deliktowych doznanych przez pośrednio poszkodowanych na skutek śmierci albo uszkodzenia ciała lub rozstroju zdrowia osoby bliskiej*, Warszawa 2014; L. Stecki, *Problematyka odpowiedzialności za szkodę pośrednią,* [in:] S. Sołtysiński (ed), *Problemy kodyfikacji prawa cywilnego (studia i rozprawy). Księga pamiątkowa ku czci Profesora Zbigniewa Radwańskiego*, Poznań 1990.

53. Judgment of the CA in Katowice of 16.12.2021, II AKa 467/21, unpublished.

54. M. Fras, *Odpowiedzialność deliktowa biegłego za szkodę spowodowana wydaniem nieprawdziwej lub nieprawidłowej opinii w postępowaniu sądowym. Rozważania na tle najnowszej judykatury*, Gdańskie Studia Prawnicze 2021 nr 1, p. 82–83.

of the evidence material or omission by one of the parties to take advantage of the legal instruments available to them within or outside the process.

Such categorical position of the judicature, detaching the tasks of an expert witness from the role of the procedural authority, will lead to further discussion about the status of an expert witness and provide a stimulus for introducing a new category of civil liability insurance for pursuing the activities of an expert witness.[55] This would be a manifestation of an intended, currently observable tendency to extend insurance protection to an increasing group of parties and fortuitous events. The lack of legal provisions on the status of expert witnesses, on one hand, and the judicial practice, on the other one, reinforce expert witnesses' activities shifting the financial burden to insurers. Such activities should be met with approval of potentially injured parties because of the ease to enforce compensation from a financial market operator, rather than directly from the expert witness. In my opinion, *de lege ferenda*, conclusion of a civil liability insurance should be one of the preconditions of entry on the list of expert witnesses. An argument in favour of such solution is the fact that unintentionality (recklessness, negligence) is sufficient to incur tortious liability under Art. 415 CC.

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55. Poland – following France with over 200 types of compulsory insurance – is one of the countries which have introduced the highest number of such insurances. See E. Kowalewski, *Dylematy prawne ubezpieczeń obowiązkowych a kodeks ubezpieczeń*, Studia Iuridica Toruniensia, tom *7*, 2010, p. 12.

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Glosa do wyroku Sądu Najwyższego Izby Cywilnej z dnia 15 stycznia 2021 r., sygn. V CSKP 201/21

Glosa stanowi próbę analizy podstawy i zakresu odpowiedzialności odszkodowawczej biegłego sądowego za sporządzoną opinię sądową na tle wyroku Sądu Najwyższego Izby Cywilnej z dnia 15 stycznia 2021 r. (sygn. V CSKP 201/21). Opracowanie zawiera rozważania na temat wpływu opinii biegłego sporządzonej w toku postępowania sądowego na treść wydanego w sprawie orzeczenia. Na tym tle w sposób szczególny zarysowuje się rola i postawa procesowa strony w toku postępowania, w tym korzystanie przez nią z uprawnień procesowych i instrumentów prawnych zmierzających do zakwestionowania opinii sądowej oraz ustaleń dokonanych przez biegłego w jej ramach. Równie ważką kwestią pozostaje zagadnienie terminu przedawnienia roszczeń wobec biegłego sądowego, zwłaszcza ustalenia daty początkowej biegu 3-letniego terminu (art. 442^1 § 1 k.c.) oraz sposobu ustalenia biegu 20-letniego terminu (art. 442^1 § 2 k.c.). W podsumowaniu podjęto próbę oznaczenia praktycznych konsekwencji przyjęcia odpowiedzialności biegłego sądowego w kształcie zaproponowanym przez Sąd Najwyższy w wyroku z dnia 15 stycznia 2021 r.

Słowa kluczowe: odpowiedzialność biegłego sądowego; opinia sądowa; fałszywa opinia; pośrednio poszkodowany; ubezpieczenie odpowiedzialności biegłego sądowego.

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