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The Role of an Expert Witness in Civil Procedure with Special Focus on Compensation Matters in Restricted Use Areas

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ABSTRACT

This article presents the necessary theoretical grounds, results of analyses as well as observations and conclusions on the main tasks of an expert witness in evidentiary proceedings in civil matters. The purpose of the article is to identify the activities performed by expert witnesses, especially valuers and experts in the area of construction in compensation cases for value impairment of residential properties located in restricted use areas of Polish airports. The results of the analysis show that courts are shifting the burden of searching for the harmful factor to the expert witness although such expert witness may not replace the court or do the court's job by suggesting specific conclusions or resolution of the case depending on the final findings of fact. The role of an expert witness is auxiliary to the judicial system in situations requiring specialist knowledge. Special attention is drawn to the American rule of evidence in respect of admissibility of an expert opinion (so called Daubert standard). The accompanying overview of academic literature indicates that relatively few studies have been devoted to the problem of so called private experts.

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INTRODUCTION

It follows from practical observations that the percentage of civil matters in which an expert witness is consulted is increasing (Wiśniewski, 2013). This is a natural consequence of the progressing specialization in specific areas of contemporary life. As a rule, in matters involving expert witnesses the factual situations are sophisticated and oftentimes complicated. One example are claims for compensation on account of the establishment of restricted use areas (hereinafter: RUA) or – as misinterpreted by certain lawyers – matters for compensation for aircraft noise (*Hałas lotniczy*..., 2020). However, it must be noted that in case of clearances provided for in case of establishing a RUA, the legislator does not envisage the requirement that such clearances be made in court proceedings. The parties may independently make respective settlements, although there is no doubt that, because of the need to establish if the property's value has been impaired as a consequence of imposing restrictions on its use, involvement of a valuer is practically necessary. Unfortunately, because of systemic mistakes in the interpretation and application of the provision of Art. 129(2) of the Act of 27 April 2001 - Environmental Law (Dz.U. 2020, item 1219, 1378, hereinafter: ELA) the discussed type of matters ae resolved by courts, and the involvement of an expert valuer is necessary. The dispute relates not only to whether there has been a value impairment of a property but also if the preconditions to compensatory liability as provided by the legislator have been satisfied. In such situation, the factor impeding expeditious civil proceedings in respect of RUAs is not only the fact that such matters are brought to court but also the consultation of expert witnesses. As a result of the above, special importance attaches to the observance by courts of the basis for admitting evidence in the form of expert opinion, the scope of such expert opinion and the very method of taking such evidence (Wiśniewski, 2013).

This article presents necessary theoretical grounds, results of analyses as well as the most important observations and conclusions on the main tasks of an expert witness in evidentiary proceedings in civil matters. The purpose of the article is to identify the activities performed by expert witnesses, especially valuers, in compensation cases for value impairment of residential properties situated within RUAs of Polish airports, as well as expert witnesses in the area of construction, with a view to determining the type and value of outlays necessary to guarantee the required acoustic protection of buildings on a property located within the limits of an airport RUA.

One of the essential issues is the problem of courts shifting the burden of searching for the harmful factor to the expert witness although the witness

may not replace the court or do the court's job by suggesting specific findings or outcome of the case depending on the final findings of fact. Similarly, in a vast majority of cases, courts do not specify in the evidence thesis the date of the property's condition, which implies a delegation of the obligation to specify such date to the expert witness. Such practice must be considered incorrect and posing procedural shortcomings during the evidentiary procedure.

Bearing in mind the subject matter of the article, as necessary illustration of the analysed questions, this study uses the results of the research of court evidence theses in compensation matters within RUAs, carried out by the research team in the following composition: dr hab. prof. UŚ Magdalena Habdas, dr inż. Jan Konowalczuk, mgr Jakub Bryła, mgr Marcin Tomecki and the Author of this article as a part of the program "Sowa 2020" The Restriction of Negative Consequences of Noise Nuisance from Airports in Poland, led by dr inż. Jan Konowalczuk (Report, 2020, p. 100).

Overview of Literature and Case-law

The term expert witness, also known in literature of the subject as expert or assessor (Ereciński, 2016) has been defined neither in civil procedure provisions nor in criminal procedure law. The concept has not been made specific in any non-Code piece of legislation admitting the possibility of such person's appointment. Legislation uses the terms expert witness (Art. 278 of the Act of 17 November 1964 – Code of Civil Procedure, Dz.U. 2020, item 1086, hereinafter: CCP) and judicial expert (Art. 157 of the Act of 27 July 2001 – Law on the ordinary courts, Dz.U. 2020, item 1086). The term "judicial expert" refers to a person entered on the expert list maintained by the chief justice of a circuit court (Dzierżanowska & Studzińska, 2019). On the other hand, the concept of "expert witness" is wider as relating to experts appointed by the judicial authority to provide an opinion in a given procedure, whether entered on the list maintained by the chief justice of a circuit court or not, the latter referring to so called ad hoc experts (Nowak, 2017, pp. 76-77; V CSK 206/19, 2019; III KR 371/73, 1974).

Tomasz Demendecki (2012, p. 362) points out that expert opinion is a judgement about factual circumstances, conditions or events, whose identification and explanation requires a specific amount of specialist information in different areas of science, technology, arts, craft or business transactions and professional experience, formulated and expressed in the proceedings by a person designated for that purpose by the court, disinterested in the outcome of the case, facilitating at the same time the court's proper assessment of the facts and resolution of the specific case. On

the other hand, the precondition to expert witness's involvement in court proceedings was defined in Art. 278 CCP. Under the said provision, expert witness should be appointed in a situation requiring specialist information. This refers to situations in which the resolution of the case requires specialist knowledge (Kołakowski, 2016, p. 1096). However, the concept of such information is open for evaluation, and its scope is evolving along the general development of knowledge. Fulfilment of the precondition under Art. 278 CCP, that is the requirement of specialist information, is always subject to the court's evaluation in the circumstances of a specific case (Turczyn, 2020).

As explained by the Supreme Court in the judgment of 18 July 1975, "if the resolution of a case requires information reaching beyond the scope of knowledge of a majority of intelligent and generally educated individuals, the evidence in the form of expert opinion is necessary even if any member of the adjudicating panel has such knowledge" (I CR 331/75, 1975). Any solution to the contrary would deprive the parties of the possibility to ask questions or criticize a given position, and lead to an inadmissible combination of the functions of judge and expert witness (Demendecki, 2012, p. 363). Anticipating further considerations, it must be resolved that understanding of a legal provision is the court's task and may not be subject to expert witness's opinion. This was confirmed in the judgment of the Supreme Court of 12 September 2000: "the role of an expert witness is to talk about facts (…) and not about the law (understanding of the law)" (I PKN 10/00, 2000). In consequence, the subject matter of an expert opinion may not be the provisions of Art. 129 and 135 ELA or resolution of a voivodeship assembly establishing a RUA.

In the context of the above argument of the Supreme Court of 12 September 2000, it seems necessary also to draw attention to the fact that there is a difference between gauging physical phenomena and evaluating theoretical matters, for example certain concepts. This difference is clearly manifest in the area of social sciences, such as law. As a result, one should realize that a statement of an expert in hard sciences, assessing certain physical phenomena through their appropriate measurement, differs from statements of witness experts on facts within the realm of social sciences. In the latter case, it is not always possible to dimension a given phenomenon, not necessarily a fact, in an exact manner. On the other hand, as far as expert witnesses in hard sciences are concerned, their views are undoubtedly more unequivocal. Therefore, statements from expert witnesses in both these branches of science will be qualitatively different.

The functions of expert witnesses in court proceedings are subject to controversies both in academic literature and judicial practice. Even in regard to situations when the legislator itself defined the acts that must be made by

an expert witness or which are made with such expert's involvement, we come across different positions about their nature or the scope of the witness expert's rights, including especially the admissibility of making the expert's own factual findings reaching beyond the scope of the opinion. According to the traditional, dominant position, an expert witness is to be "summoned" when, upon completion of the evidentiary proceedings regarding the factual circumstances essential to the resolution of the case, it turns out that complete evaluation of such evidentiary proceedings requires a closer look at the precepts of a given discipline. Therefore, the expert witness should explain and elucidate the general precepts considered applicable in a given discipline or only refer to particular questions referred to the expert witness as problematic. It must be stressed that the task of an expert witness is not to evaluate the facts of the case but to elucidate and enable the court's understanding of the circumstances from the point of view of the expert witness's specialist information considering the collected case materials provided to them (V CSK 360/06, 2006). It is considered inadmissible for the expert witness to invoke their own observations about facts, whose establishment is a matter of the court. In such situation, it is necessary to hear the given person as witness and not expert witness (I CR 374/76, 1976).

According to a different position on the role of the expert witness in court proceedings, analysis of the remaining CCP provisions on the expert witness, and not only Art. 278 CCP, points to an increasing and much broader role of experts than mere explanation in an opinion of specific questions raising the court's doubts (Kołakowski, 2016, p. 1098). The above discrepancies relating to the expert witness's function may be illustrated by entrusting to a valuer the duty to asses an asset, for example, to determine a possible change in a property's value as a consequence of establishing a RUA for an airport and the resulting restrictions on the property's use. In conclusion of their activities, the valuer establishes the property's value and, if needed, provides the basis for the assessment. However, first the expert has to describe the condition of the examined property and its purely physical features based on the evidence material collected by the court, and then move on to assess that condition. In order to appraise the property, the valuer must use their professional experience, knowledge of the market, trade in such type of assets and other possible specialist information (Małkowska & Uhruska, 2018, p. 24). Depending on the prioritized elements, one can reach a different conclusion on whether the expert witness merely provides an opinion or may (or even has to) establish facts. In consequence, a question arises about the admissible scope of witness experts' findings about factual circumstances. At this point, it should be decided that the role of a valuer is not to establish facts

but to assess them – based on the entirety of evidence collected and established by the court.

As a result, the first opinion seems more accurate. An expert witness may not replace the court or do the court's job by suggesting specific findings or resolution of the case depending on the final findings of fact. Such stance is also supported by the well-established position of the Supreme Court (I CKN 1170/98, 2000). As Małgorzata Sieńko argues (2020), the expert witness's role is to provide an opinion about the circumstances being the subject of evidence. On the other hand, legal evaluation of the opinion's conclusions falls within the scope of application of law and is a matter of the court.

The above thought should be supplemented by the statement that evidence in the form of expert opinion should be admitted only once the factual material has been collected enabling the expert witness to provide the opinion. The judge's thorough reflection on the case and consideration of the material collected in the proceedings is an entry condition for a clear specification of the arising doubts and precise formulation of the questions referred to the expert witness (Demendecki, 2012, p. 364; IV CR 281/79, 1979). It must be stressed that evidence in the form of expert opinion is intended to explain the problems requiring specialist knowledge, and not to seek materials useful for the sake of the resolution (Turczyn, 2020). In this context, an interesting opinion has been expressed in literature that „expert witnesses formulate their advice only within the process, based on the collected facts and evidence, and present the advice to the court. Therefore, they are the judge's assistants in the determination or assessment of the facts of the case" (Ereciński, 2016).

Due to a massive development in science and technology, expert opinions have become a necessary element of most civil procedures. Another type of opinion that frequently appears are so called private opinions, ordered by the parties and not by the court. Although private opinions are not evidence in the understanding of CCP provisions, their significance cannot be disregarded. It must be concluded that relatively few studies have been devoted to the problem of so called private experts, whereas the literature on expert witnesses in the understanding of the CCP is extensive (Wiśniewska-Śliwińska &Marcinkowski, 2011; Małkowska, & Uhruska, 2018).

SIGNIFICANCE OF SO CALLED PRIVATE EXPERT OPINIONS

Expert opinion is only an opinion prepared by a person designated by the court. It is argued in literature and case-law that one cannot treat as evidence in court proceedings an expert's opinion, even if prepared by a permanent

judicial expert, if the opinion has been ordered by a party and filed in case records (Demendecki, 2016, p. 365; I PKN 468/00, 2001; III CR 121/56, 1956). So called private expertise, prepared upon a party's instruction before or in the course of the proceedings, should be treated, in case of its admission by the adjudicating court, as explanation in support of the party's position, taking into consideration specialist information. It must be remembered that the rules of using and evaluating evidence differ from the rules of using and evaluating the parties' assertions or explanations, as long as the latter have not also become evidence in the form of the parties' interrogation. A written statement produced by a party from a person being an expert in a given discipline and signed by that person is a private document benefitting from the presumption of authenticity (Art. 245 CCP). However, such document is not a proof of specialist knowledge, which must be ascertained by evidence in the form of expert opinion (Art. 278 CCP). An opinion produced by a party may be used to rebut the opinion of expert witnesses, or include evaluation of the same problem requiring specialist information, but cannot supersede an opinion of a judicial expert or be an exclusive basis for accepting the position of the party producing the opinion against the opinion of a court-appointed expert witness. However, it may prove as circumstance justifying admission by the court of an additional opinion by the same or other expert witnesses (Sieńko, 2020; I Aga 124/19, 2020).

This position is consequently reflected in the judicial practice of the Supreme Court (I PKN 468/00, 2001). On the other hand, so called private expertise, out-of-trial opinions or opinions prepared by persons having specialist knowledge are delivered for the purpose of a specific process and may be of crucial importance to the given case. Therefore, a question arises if the fact that they have been prepared by a person non-appointed in the formal procedural sense to perform the role of an expert witness means that they should be always ignored by courts. One should note the argument of the Supreme Court that such evidence must not be disregarded as it contains information about evidence which may be important for the resolution of the case (so called "starting proof", I KR 105/85, LEX nr 17683). It can be concluded that the main qualifying factor follows from purely procedural matters, which gives rise to a thesis that the specialist knowledge necessary to establish the circumstances of vital importance to the outcome of the case cannot be ignored. In any case, this correlates to the principle of substantive truth, expressed in Art. 3 CCP (Nowak, 2017, p. 77).

Just as in Poland, also in Germany the parties order private expertise. The German Code of Civil Procedure (Zivilprozessordnung 12.12.2019, BGBI. I S 2633, hereinafter: ZPO) addresses the question of appointing judicial experts

(§§ 404-414 ZPO), however, the same cannot be said about "private" experts. German courts, similarly to Polish ones, believe that private expert's opinion does not have the evidentiary value attaching to an opinion prepared by a judicial expert (Rauh, 2016, p. 34). Such opinion is treated as a party's position, or as supplementation or development of the factual and legal argumentation deployed by a party, rather than evidence in the case. On the other hand, a position has been expressed in German literature that private opinion prepared upon instruction of one of the parties can be admitted as evidence in the case only then both parties so consent (Wolf & Zeibig, 2015, p. 47).

In the recent years, the Federal Court of Justice (Bundesgerichtshof, hereinafter: BGH) has multiply noted that "private" experts play an important role in the process. The BGH has introduced the principle that the party losing the case is obliged to reimburse to the other party their costs relating to the preparation of private expertise. Moreover, the BGH has imposed on the court an obligation to take position in respect of its content. The court may not omit evidence in the form of private expertise without any justification. In any case, the court should read the expertise and explain why, in the court's view, the opinion does not deserve to be considered (Timmerbeil, 2003, pp. 177-179). In the judgment of 12 January 2011, the BGH expressed the view that private expertise contradicting an opinion prepared by a judicial expert may not be disregarded by the court as this could violate a party's right to fair process (IV ZR 190/08). It can thus be concluded that the role of "private" experts is increasing. It is worth adding that, in the context of disputes relating to RUAs, the legislator does not require that mutual clearance be made in a courtroom. In general, the entire dispute on account of RUAs could be successfully resolved by experts. These are experts that should enable the parties to reach an amicable resolution of the dispute, out of the court.

In German literature, there appear critical voices about expert witnesses and their role in the process. In many cases, this is not the judge but in fact the judicial expert that resolves the case. The judge ceases to be independent. Because of the lack of specialist knowledge, the judge must rely on the expert witness, who turns out to be the decision-maker in the case (Timmerbeil, 2003, p. 180). The situation looks different in common law countries, where the role of an expert witness is to assist the judge in the understanding of certain facts and evidence in the case, however, in the end these are judges and/or jurymen to decide about the outcome. In German civil process, there is usually only one expert witness, who testifies in the case and is appointed by the court. On the other hand, in the USA expert witnesses are appointed by the parties. The role of such expert witnesses is to support the party's assertions and assist by providing specialist knowledge. Most often,

there is more than one expert witness, and courts have to do with more than one opinion. The American civil system assumes the establishment of truth, and it is admissible to ask questions to the expert witness appointed by the other party (so called cross-examination – such construction is missing in Germany), to impeach an expert or to appoint one's "own expert." In theory, an American judge has the power to summon one or a number of expert witnesses to consult their opinion, just as judges in Germany or Poland, but does not exercise that power because of the judge's role in the proceedings.

In German court proceedings, expert witness is generally appointed by the court and has an actual influence on the outcome of the case. They are referred to as fact finder. In the USA, judicial experts are rather seldom appointed, as opposed to "private" experts. Such private experts provide the court with information about the matter. The German system assumes avoidance of biased experts, but has no instruments to control or limit the extensive autonomy of judicial witnesses. In a vast majority of cases, German courts allow expert opinions in full (Jurs, 2012, pp. 1386, 1388-1389). A part of German academic authors even call expert witnesses "silent judges." Others go a step further and conclude that, in general, European judges approach the provisions on judicial experts as means to delegate their own adjudicating powers. That last comment is in line with the opinion of Tadeusz Widła about Polish expert witnesses that "we can observe a progressing decline in the quality of taking the evidence in the form of expert opinion, which may have an impact on the regularity of adjudication. The basic reason for such situation is the progressing annihilation of the court's evaluation of evidence in the form of expert opinion. However, courts blame only expert witnesses for such state of affairs." (Widła, 2020).

SCOPE AND CONTENT OF AN EXPERT OPINION

It is not sufficient to simply "summon" an expert witness to consult their opinion by the rules. It is necessary to deliver an order on taking evidence in the form of expert opinion. Such ruling should designate the tasks entrusted to the expert witness, including the facts subject to description and evaluation (e.g., assessment if on the property there have actually been transgressions of the admissible aircraft noise level provided for residential housing, or if appropriate noise climate has been ensured to the property in connection with the location of the analysed property in a RUA), preparatory activities and their notification to the parties, the requirement to participate in an inspection or evidentiary proceedings, the form and deadline for submitting the opinion. It must be emphasized that it is not the expert witness to decide in their

discretion about the basis of the opinion. There is no doubt that proper formulation of the evidence thesis is sometimes difficult. Frequently, already at that stage the expert witness's tasks must be determined so as to eliminate the possibility of independent, free orienting of the opinion's subject matter (Kołakowski, 2016, pp. 1107-1108). The questions asked to the expert witness must strictly relate to the matter and refer only to the area in which the expert is a specialist. They should be formulated so that the expert witness can generally give a definite answer, in the affirmative or in the negative (III AUa 697/13, 2014).

To illustrate the above, based on the abovementioned project "Sowa 2020" The Restriction of Negative Consequences of Noise Nuisance from Airports in Poland (Report, 2020, p. 100), it is worth mentioning that for the purpose of determining compensation it is not sufficient to merely point to the fact of establishing the RUA under a resolution or regulation. Such formulation of evidence thesis must be considered incorrect. Proper specification of the purpose of valuation requires that the court cites, in the evidence thesis, the legal provision specifying the purpose of valuation, that is, in the examined situations, the provision of Art. 129(2) ELA in conjunction with Art. 135 ELA (Habdas & Konowalczuk, 2018, pp. 6, 9-10). Such citation should be a formal requirement of the court's evidence thesis. If the legal provision specifying the purpose of valuation is missing in the evidence thesis, such thesis must be considered incomplete. This, in turn, leads to adoption of an incorrect valuation purpose by valuers and experts in the area of construction, and further related consequences.

It should be added that regardless of the legal basis of the claim as indicated by plaintiffs, courts, in the evidence theses for expert witnesses, describe very extensively the harmful event, allegedly causally linked to the value impairment of the property. Imprecise specification by the court of the harmful event, indication of different circumstances to be taken into account (the fact of establishing a RUA, noise, condition of the market, other factors), invoking restrictions on the property's use (which, in a vast majority of cases, have not been imposed at all in respect of residential housing) allow valuers to prepare assessments associating the value impairment of a property with different factors, and not with the harmful event set out in Art. 129(2) ELA (Habdas, 2020a, pp. 14-19; Habdas, 2020b, p. 48). The basic mistake found in evidence theses, resulting in incorrect valuations is the instruction to establish the value impairment when no restrictions have been imposed on the use of residential buildings in a RUA.

Sometimes courts exceed their competences since specification of the harmful event is a task of the adjudicating panel and the role of the expert

witness is only to assess the extent of impact of that event on the property's value. In this connection, it can be concluded that the court shifts the duty of searching for the harmful event to the expert witness, although the expert witness may not replace the court or do the court's job by suggesting specific findings or resolution of the case depending on the final findings of fact.

It also happens that courts do not specify the price level date in the evidence theses. Omission to specify the dates relevant to valuation, or their improper inclusion in the thesis by providing several dates for the property's assessment, as well as situations when the court does not distinguish between the date of the property's condition and the date of the market's condition are incorrect and necessitate an independent specification of the dates by valuers or construction experts, or their correction. Such practice must be considered incorrect and posing procedural shortcomings since in the course of evidentiary proceedings the court, by formulating the thesis, should set both the date of the property's condition and its actual condition to the date of the RUA's establishment.

The lack of properly specified relevant dates in opinions follows from incomplete evidence theses or theses including two dates of assessing the value (establishment of RUA and the current date), or theses which fail to distinguish between the element of the property's condition and of the market's condition. When the theses are incomplete or ambiguous in terms of the indication of relevant dates, expert witnesses specify such dates independently and adjust them to the adopted method of assessing value impairment.

Moving on to the contents of an opinion, it is accepted that every duly prepared opinion has the following integral elements:

1) recount of the performed activities and observations;
2) answers to the questions referred to the expert witness, given categorically, and the expert witness's conclusions;
3) justification allowing the court's verification of the expert witness's logical line of reasoning (Cempura & Kasolik, 2016; C 25/51, 1951).

However, it must be remembered that in case of a valuer's opinion we have to do with a formalized statement, due to the profession's institutionalization. On such occasions, opinion assumes the form of valuation report. Under the provision of Art. 156(1) of the Act of 21 August 1997 on real estate management (Dz. U. 2020, item 1990), "Valuer prepares in writing an opinion about the property's value in the form of valuation report." On the other hand, the method of preparing, form and content of valuation reports is governed by § 55 and following of the Regulation of the Council of Ministers

of 21 September 2004 on valuation of properties and preparation of valuation reports (Dz. U. 2004, No. 207, item 2109, as amended).

Evidence in the form of expert opinion is subject to the court's evaluation, taking into account Art. 233 § 1 CCP, according to the subject-specific criteria of the opinion's compliance with the precepts of logic and general knowledge, the expert's level of knowledge, theoretical grounds for the opinion, method of justification and definiteness of the conclusions expressed in the document (V CKN 1354/00, 2002). Expert opinion is a special means of evidence. By definition, it should be considered exceptional when the judge, having knowledge of a given area, is capable of verifying the accuracy of assessment and the expert witness's conclusions. Contrary to popular suggestions of certain attorneys, the court is not the "supreme expert." The court should on no account be compared with an expert witness since their roles are completely different. The court resolves the dispute based on the evidence material, and the task of the expert witness is only to provide an element of such material to the court.

Moreover, justification of an opinion is necessary not only to the parties but also to the court (I ACa 543/13, 2013). The requirement of the expert opinion's justification is not a formality since it enables evaluation of that piece of evidence, as a part of which the adjudicating court is also obliged to provide its motives and position in respect of the evidence taken. The lack of justification of an expert opinion, just as fragmentary or insufficiently hermetic justification, preclude free evaluation of that piece of evidence or render it incomplete (defective).

Opinions specifying value impairment of a property, both private and ordered by the court, should be prepared in the form of valuation reports. In practice, however, such opinions are often prepared in an unlawful form, inconsistent at the same time with Guidance Book 1. The scope of activities carried out by valuer experts covers the specification of damage to properties (Art. 159 of the Act on real estate management, Dz. U. 2020, item 1990, hereinafter: REMA). If the purpose of valuation follows from Art. 129(2) ELA, valuers specify the reduction of the property's value and the opinion must be prepared in the form of valuation report since in this case the legislator did not envisage a possibility of preparing another type of opinion, i.e. compilation or expertise prescribed for other purposes in Art. 174(3a) ELA. The matter is regulated similarly by the professional standard (Guidance Book 1), providing that an opinion specifying a decrement in the property's value must be prepared in the form of valuation report. Such solution is methodologically sound since opinions in that form are methodologically structured, characterized by transparency, can be tailored to the implemented valuation

purpose, and it is easier to carry out their formal evaluation, including in terms of completeness and methodological regularity.

It can be inferred from the provision of Art. 285 § 3 CCP that an opinion should be exhaustive, that is cover all the questions included in the evidence thesis of the court's decision. Where appropriate, opinion should cite academic publications, which enhances its persuasive power (IV CKN 1383/00, 2000; I ACa 501/16, 2016). If during the preparation of an opinion, the expert witness uses one of several available methods, the expert witness should indicate in the justification why the chosen method is adequate to the case at hand. In the first place, however, the court reviews if the opinion corresponds to the evidence thesis as included in the evidentiary ruling and exhaustively analyses the questions requiring specialist knowledge (Sieńko, 2020). It must be pointed out that the court is not obliged to strive for a situation in which the parties are convinced by the submitted opinion. It is sufficient that the opinion is convincing to the court, assessing whether the expert witness has removed the doubts reported by a party, naturally, within the limits of the factual basis necessary for resolution (I ACa 376/17, 2017).

Besides, "expert opinion should contain justification formulated in an accessible and understandable way also to persons without specialist knowledge" (II UKN 60/99, 1999; I ACa 456/17, 2000). The expert's conclusions expressed in the opinion should be unambiguous and definite. A view was also expressed in case-law that the expert witness's duty is complied with when the expert points to a probability level if, on account of non-establishment of all relevant facts or the current state of knowledge, it is impossible to provide a categorical judgement (II CR 470/72, 1972; II PR 481/65, 1966). As signalled above, the court is not bound by the expert opinion and should evaluate such document as any other piece of evidence. Uncritical acceptance of the expert opinion as basis for resolution would constitute an illegal authorization of the case's resolution by the expert witness rather than by the court (II UKN 399/99, 2000). The court may not base its findings solely on the conclusion of an expert opinion but should verify correctness of the particular elements contributing to the accuracy of such final conclusions (I CSK 688/18, 2020).

In this context, it is worth adding that in the USA, as a result of practice of the American Supreme so called Daubert standard has developed, according to which a method or scientific theory must satisfy four criteria to become evidence before the court, namely:

1) it must be verifiable in itself and have been subject to review (falsification criterion);
2) it must be described and evaluated in specialist literature (criterion of review and publication);

3) it must represent a known or predictable level of errors observed in its application and have controlling scientific standards (criterion of diagnostic value and standardization);
4) it must achieve general acceptance of specialists in a given discipline (acceptance criterion) – auxiliary criterion (Szczepaniec, 2019, p. 189; cf. justification of the judgment Daubert v. Merrell Dow Pharmaceuticals, 1993, p. 600).

As can be seen, this refers to the problem of admissibility of admitting a new theory or practice which has not yet become generally accepted. The so called Daubert standard replaced a previous standard deriving from the case Frye v. United States (1923). Previously, review of an opinion submitted by an expert witness in a civil matter was inconsiderable. Courts relied on the qualifications of expert witnesses and simply accepted their findings as true. The new standard imposed on the court an obligation to review the opinion according to different criteria, including workmanship (Green & Sanders, 2014, pp. 1058-1059, 1094).

As signalled, a necessary component of an expert opinion is the justification, which allows to evaluate the logicality and regularity of conclusions and convinces as a logical whole without entering the sphere of specialist knowledge. The lack of a skilful justification of the final conclusions precludes assessment of the opinion's probative value. If, in compensation matters for value impairment of residential properties located within airports' RUAs, expert witnesses fail to justify the valuation results, the court receives only the valuation result without a required commentary specifying the economic sense and justification of the calculated difference in value. This is especially manifest in the courts' attempts to use expert opinions in the justifications of judgments, since such opinions do not properly grasp the sense of "market stigmatization in RUAs,", which means that experts do not refer to the purpose of evaluation in the context of the needs and intended effects of the intervention in the form of establishing a RUA, or to the function of compensations for an effective implementation of the objectives of such intervention.

Mistakes identified at the specific stages of evidentiary proceedings point to a discrepancy between the matter for which the expert witness should be appointed, the matter for which the expert witness is actually appointed (contents of the evidence thesis), what the expert witness calculates (unclear thesis, arbitrariness of the assumptions behind valuation and calculations), what the expert witness deems to have concluded and how the court understood the results submitted by the expert witness. Key importance, apart

from the court's proper findings of law and fact, attaches to appropriate and precise formulation of the evidence thesis.

A remedy for the above problems is to be so called private expertise. Preparation of such "model" opinions has vital practical significance since it could improve the quality of information provided to courts about the situation and conditions of operation of local housing markets, especially as regards the defectively portrayed stigmatization. On the other hand, in the light of the above, it must be pointed out that so called private opinions do not work out in disputes concerning RUAs owing to the missing application of the professional standard. In the context of RUA cases, it would be difficult to expect valuers to cite the latest publications in the area of economy, law or other disciplines since they should have, in the first place, their professional standard reflecting the most adequate state of knowledge, and in the case of RUAs this professional standard is the Methodology Workbook. On the other hand, so called private expertise, instead of facilitating resolution of the dispute, becomes fallible when not prepared in reliance on the latest practical achievements, the current state of knowledge and the Guidance Book.

CONCLUSION

In summary, every time when resolution of a given question requires "specialist" information, i.e. reaching beyond general knowledge of an average individual, it is necessary to appoint an expert witness. In the Polish legal system expert witnesses are appointed by the court ex officio or upon a party's request. The court specifies the scope of the expert's tasks. The expert witness's role is auxiliary to the judicial system (Wiśniewska-Śliwińska & Marcinkowski, 2011, p. 34). The purpose of an expert opinion is to support proper evaluation of the collected material when specialist information is needed. However, evidence in the form of expert opinion cannot be a source of factual material in the case or, all the more so, basis for the ascertainment of the circumstances subject to the expert witness's assessment.

On the other hand, a "private" opinion produced by a party is a private document in the civil process, however, it is not a piece of evidence replacing an opinion of judicial experts prepared upon the court's instruction – therefore, it is not the evidence of circumstances requiring specialist information. It must be emphasized that "private" opinion may constitute a serious argument for the need to admit a supplementary expert opinion or opinion of other expert witnesses if its conclusions contradict the obtained judicial opinion. "Private" opinions are most often prepared by persons whose professional qualifications and special abilities do not differ significantly from

judicial experts. In fact, their authors are often persons entered on the list of expert witnesses. As a result, such opinions should matter in the assessment of evidence material and provide an impulse to challenge the obtained judicial opinion.

In practice, doubts arise about the quality of taking evidence in the form of expert opinion since Polish courts base their findings exclusively or predominantly on the conclusions of expert opinions, without verifying correctness of the specific elements contributing to the accuracy of the opinion's final conclusions (in foreign literature, such attitude of the judge is referred to as „junk science"). In the light of the above, the courts, following the American Daubert standard should consider, on the basis of definite criteria, whether or not a given opinion may be a piece of evidence in the case.

In compensation matters for value impairment of residential properties located in airports' RUAs, courts, in isolation from the objections raised by the defendant, Art. 129(2) ELA and provisions of the specific local legislative act (in reference to the specific property), formulate evidence theses in which the triggering event is specified incorrectly, unclear or multithreaded. Moreover, the courts exceed their powers since specification of the harmful event is the task of the adjudicating panel, and the role of the valuer is solely to assess the extent of the possible impact of that event on the property's value. The courts, however, shift the burden of searching for the harmful event to the expert witness. On top of that, in a vast majority of cases the courts do not include in their evidence theses the date of the property's condition, which implies a delegation of the obligation to specify that date to the valuer. Such practice must be considered incorrect and posing procedural shortcomings since in the evidentiary proceedings the court formulating the thesis should set both the date of the property's condition and its factual condition to the date of establishing the RUA).

Finally, it is worth mentioning that between the science and the expert witness there are professional associations, and in the case of valuers we have to do with standardization of valuation procedures. That standardization should ensure the expert witnesses' access to the best practices, which have been already verified in terms of the latest achievements and the current state of knowledge. It is important to understand how important the role of such standardization is since without standardization an expert witness must be aware of the fact that the opinion will be subjected to other standards, for instance, the discussed Daubert standard requiring very extensive knowledge in a given area.

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REFERENCES

Aircraft Noise. Blog about Damages for Aircraft Noise – the Restricted Use Area around the Lech Wałęsa Airport in Gdańsk (2020). Online, Retrieved on 02/12/2020, from: https://www.halas-lotniczy.pl.

Cempura, A., & Kasolik, A. (2016). *Metodyka sporządzania pism procesowych w sprawach karnych, cywilnych, gospodarczych i administracyjnych*. Wolters Kluwer Poland, LEX online (LEX/el.). Retrieved on 02/12/2020.

Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579, 593 (1993).

Demendecki, T. (2012). Komentarz do art. 278 k.p.c. In: A. Jakubecki (Ed.) *Kodeks postępowania cywilnego. Komentarz* (pp. 362, 364). Warszawa: C.H. BECK.

Dzierżanowska, J., & Studzińska, J. (2019). Komentarz do niektórych przepisów Kodeksu postępowania cywilnego. In: J. Dzierżanowska, & J. Studzińska (Eds.), *Biegli w postępowaniu sądowym cywilnym i karnym. Praktyczne omówienie regulacji z orzecznictwem*. Wolters Kluwer Poland, LEX online (LEX/el.), Retrieved on 02/12/2020.

Ereciński, T. (2016). Komentarz do art. 278 k.p.c. In: T. Ereciński (Ed.), *Kodeks postępowania cywilnego. Komentarz. Tom II. Postępowanie rozpoznawcze, wyd. V*. Wolters Kluwer, LEX online (LEX el.). Retrieved on 02/12/2020.

Frye v. United States, 293 F. 1013 D.C. Cir. (1923).

Green, M. D., & Sanders, J. (2014). Admissibility versus Sufficiency: Controlling the Quality of Expert Witness Testimony. *Wake Forest University Legal Studies Paper*, 50, 1057-1094.

Habdas, M. (2020a). Odszkodowania dla właścicieli nieruchomości zlokalizowanych w obszarach ograniczonego użytkowania dla lotnisk – wyzwania dotyczące prawidłowego ustalenia zakresu odpowiedzialności

odszkodowawczej i podlegającej kompensacji szkody – część 1. *Przegląd Sądowy*, 5, 7-31.

Habdas, M. (2020b). Odszkodowania dla właścicieli nieruchomości zlokalizowanych w obszarach ograniczonego użytkowania dla lotnisk – wyzwania dotyczące prawidłowego ustalenia zakresu odpowiedzialności odszkodowawczej i podlegającej kompensacji szkody – część 2. *Przegląd Sądowy*, 6, 28-54.

Habdas, M., & Konowalczuk, J. (2018). Cele i warunki skutecznej interwencji państwa w obszarach ograniczonego użytkowania portów lotniczych. *World of Real Estate Journal (Świat Nieruchomości)*, 105, 5-16. https://doi.org/10.14659/WOREJ.2018.105.001.

Judgment of the Court of Appeal in Białystok of 28 May 2020 (I Aga 124/19, LEX No. 3045093).

Judgment of the Court of Appeal in Gdańsk of 10 January 2014 (III AUa 697/13, LEX No. 1428020).

Judgment of the Court of Appeal in Katowice of 23 November 2016 (I ACa 501/16, LEX No. 3040838).

Judgment of the Court of Appeal in Łódź of 25 October 2013 (I ACa 543/13, LEX No. 1394240).

Judgment of the Court of Appeal in Łódź of 28 September 2017 (I ACa 376/17, LEX No. 2471792).

Judgment of the Court of Appeal in Poznań of 17 October 2017 (I ACa 456/17, LEX No. 2662000).

Judgment of the Supreme Court of 05 February1974 (III KR 371/73, OSNKW 1974/6/117, LEX No. 18790).

Judgment of the Supreme Court of 06 December 2019 (V CSK 206/19, LEX No. 2770252).

Judgment of the Supreme Court of 10 February 2000 (II UKN 399/99, OSNP 2001/15/497, LEX No. 48120).

Judgment of the Supreme Court of 11 March 2020 (I CSK 688/18, LEX No. 2977456).

Judgment of the Supreme Court of 12 September 2000 (I PKN 10/00, OSNP 2002/7/156).

Judgment of the Supreme Court of 13 September 1979 (IV CR 281/79, OSNC/1-2/36, LEX No. 2422).

Judgment of the Supreme Court of 15 November 2000 (IV CKN 1383/00, LEX No. 52544).

Judgment of the Supreme Court of 15 November 2002 (V CKN 1354/00, LEX No. 77046).

Judgment of the Supreme Court of 18 January 1966 (II PR 481/65, LEX No. 5927).

Judgment of the Supreme Court of 18 July 1975 (I CR 331/75, LEX No. 7729).

Judgment of the Supreme Court of 19 December 2006 (V CSK 360/06, LEX No. 238973).

Judgment of the Supreme Court of 20 January 1989 (II CR 310/88, LEX No. 8940).

Judgment of the Supreme Court of 21 April 1951 (C 25/51, OSNC 1952/2/43, LEX No. 160157).

Judgment of the Supreme Court of 29 July 1999 (II UKN 60/99, OSNP 2000/22/831, LEX No. 43669).

Judgment of the Supreme Court of 29 September 1956 (III CR 121/56, OSNCK 1958/1/16).

Judgment of the Supreme Court of 6 May 1985 (I KR 105/85, LEX No. 17683).

Judgment of the Supreme Court of 7 November 2000 (I CKN 1170/98, OSNC 2001/4/64).

Judgment of the Supreme Court of 8 June 2001 (I PKN 468/00, OSNP 2003/8/197).

Judgment of the Supreme Court of 8 November 1976 (I CR 374/76, OSNC 1977/10/187, LEX No. 2109).

Judgment of the Supreme Court of 9 November 1972 (II CR 470/72, LEX No. 7180).

Jurs, A. W. (2012). Balancing Legal Process with Scientific Expertise: Expert Witness Methodology in Five Nations and Suggestions for Reform of Post-Daubert U.S. Reliability Determinations. *Marquette Law Review*, 95(4), 1386-1389.

Kołakowski, K. (2016). Komentarz do art. 278 k.p.c. In: K. Piasecki (Ed.), *Kodeks postępowania cywilnego. Komentarz do artykułów 1-50514. Tom I* (pp. 1096, 1098, 1107-1108). Warszawa: C.H. BECK.

Małkowska, A., & Uhruska, M. (2018). Uwarunkowania instytucjonalne działalności zawodowej rzeczoznawcy majątkowego - stan obecny I pożądane kierunki zmian. *World of Real Estate Journal (Świat Nieruchomości),* 105, 23-34. https://doi.org/10.14659/WOREJ.2018.105.003.

Nowak, M. (2017). Wątpliwości związane z odpowiedzialnością prawną biegłego sądowego w świetle znowelizowanego art. 233 § 4A k.k. *Zeszyty Prawnicze*, 17(2), 75-202.

Rauh, G. (2016). The Importance of Expert Witnesses in Germany. *Managing Intellectual Property*, 32(263), 34-44.

Report from the I stage of the research. Methodology of assessing damage. Report from the nationwide research of courts' evidence theses in RUA compensation matters, Cracow University of Economics, Cracow 2020, ed. J. Konowalczuk, authors of chapters: J. Konowalczuk, M. Habdas, K. Kamińska, J. Bryła, M. Tomecki, reviewed unpublished manuscript.

Sieńko, M. (2020). Komentarz do art. 278 k.p.c. In: M. Manowska (Ed.), *Kodeks postępowania cywilnego. Komentarz. Tom I*. LEX online (LEX el.). Retrieved on 02/12/2020.

Szczepaniec, M. (2019). Dowód naukowy w postępowaniu karnym. *Zeszyty Prawnicze,* 19(2), 187-197.

Timmerbeil, S. (2003). The Role of Witnessess in German and U.S. *Civil Litigation, Annual Survey of International & Comparative Law*, 9(1), 177-179.

Turczyn, A. (2020). Komentarz do art. 278 k.p.c. In: M. O. Piaskowska (Ed.), *Kodeks postępowania cywilnego. Postępowanie procesowe. Komentarz*. Wolters Kluwer Poland, LEX online (LEX/el.). Retrieved on 02/12/2020.

Widła, T. (2020). Odpowiedzialność biegłego za wydanie nieprawidłowej opinii - glosa do wyroku s. apel. z dnia 29 listopada 2019 r., V ACa 266/18 (Glosa 2020/2/128-134). LEX online (LEX/el.). Retrieved on 02/12/2020.

Wiśniewska-Śliwińska, H., & Marcinkowski, J. T. (2011). Biegły sądowy - tryb powoływania wymagania, obowiązki. *Orzecznictwo Lekarskie*, 8(1), 33-29.

Wiśniewski, T. (2013). *Przebieg procesu cywilnego.* LEX online (LEX/el.). Retrieved on 02/12/2020.

Wolf, Ch., & Zeibig, N. (Eds.) (2015). *Evidence in Civil Law - Germany* (p. 47). LEX Locals, Maribor: Institute for Local Self-Government and Public Procurement Maribor.