Abstract:

The dissertation deals with the problem of proving by expert opinion in civil court proceedings. The scientific goal of the thesis is to present a legal analysis of expert evidence in civil court proceedings and inherently related problematic theoretical and application aspects, which relate in different ways both to the persons of the parties and to the experts, and last but not least to the court as an instance a unit which decides the dispute between the parties with the help of an expert opinion. The main working hypothesis of the dissertation thesis is the fact that the valid legal regulation of expert evidence in civil court proceedings is in many respects obsolete and inadequate conditions, which in turn brings to the practice a number of problematic moments, some of which are liable to endanger and the overall interest in a fair decision on the matter itself.

The task of a historic passage was primarily to define the questions that continually reappeared over time and whose resolution authors and legal practice approached in different ways at different times. One typical example is the institute of the expert witness, in that this institute was first embedded in the rules of civil procedure of Austro-Hungary, was abandoned under socialist law and has been resuscitated in connection with the preparation of the Rules of Civil Procedure. It is the same situation with the issue of using the knowledge of the court to consider specialised situations or the issue of the suitability, or otherwise, of determining expert institutions (previously expert committees), when the issue of the responsibility placed on such entities for compiling an expert report is continually on the table. Finally, with respect to economic proceedings, alternatives to expert reports which are less demanding on time and finance are continually being sought, whether in the form of privileging expert views in simpler cases or the option of submitting own expert reports. From the perspective of the system concept, it is important to arrive at other significant facts as part of a historical excursus, from the perspective of subsequent interpretation, i.e. that Czech legal regulation of the taking of expert evidence has long drawn on lists regulated by the state in determining expert entities, when the jurisdiction of the courts is limited to some extent should they wish to appoint an expert or expert institution other than an entity which complies with the state-determined criteria. This is interesting to note primarily from the perspective that a certain degree of mistrust in the consideration of judges is deep-rooted, even though they are eventually the people that are responsible for deciding the case itself and it is therefore necessary to answer the question of why they are not provided with a greater degree of discretion when taking the individual characteristics of each case into consideration.

As for the question of looking for the boundary of “expert knowledge” that, when crossed, is requiring of an expert report, the paper arrived at the conclusion that it would seem highly impractical to determine a pre-defined boundary, for example using the boundary of secondary school (baccalaureate) level education, etc. In such case, the question of going beyond such a boundary would have to be subjected to the taking of evidence, which might again be requiring of expert knowledge which the court does not have. Moreover, the resolution of this question should unambiguously fall within the broader framework of the principle of free consideration of evidence, when primarily the judge is the one who must know how to assess, in the specific case, whether he/she is still able to decide the case without the appointment of an expert or whether the court would partly take on the role of the expert by doing so. Czech legal regulation at present is clear on this issue and does not permit the use of expert knowledge by the judge. When considering foreign legal regulation, however, we can find that this strict stance is not embedded. It is certainly possible to consider embedding this possibility, although the rules for its usage would have to be precisely laid down. First and foremost, the parties should always have the opportunity to express an opinion on the use of this alternative and, when appropriate, to ask for the compilation of a proper expert report. At the same time, it would appear appropriate to apply this mechanism to panel cases of matters which are very specific in terms of expertise, when it can be supposed that the judge will, over time, have a command of ever-recurring expert procedures or evaluations and, at the same time, consideration of the possibility of use is regulated by “panel discretion”.

Another question which repeatedly appears is that of the possibility, or otherwise, of the expert to respond to legal questions as part of expert activities. Here it is necessary to focus primarily on the sense of the opinion generally accepted to date, which draws on the fact that only the court is authorised to deal with legal questions. This stance should primarily apply to a directly-applicable substantive standard within the scope of specific proceedings. If, however, we are dealing with an individual sub-question which is significant for the overall decision in the case, it is in the author's view necessary to expect that a strict division of legal and factual questions will be impossible and that it will be necessary to accept that "mixed questions" will be answered, which the court will, after they have been answered, evaluate together with the other evidence in the case according to the principle of the free consideration of evidence. Such development is very clearly unstoppable with regard to the rising demands of the legal order, inter alia, for example, in tax issues, and it will be required to re-evaluate the concept established until now, a task which certain foreign authors and courts are now addressing.

From the perspective of general issues of taking of expert evidence, this summary should certainly not forget the institute of the expert witness. As indicated above, the question of the need for this institute has been variable in the Czech legal environment over time. Nonetheless, as foreign legal regulation has shown, this institute should certainly be re-introduced to our legal regulation, in that we can primarily draw on the fact that there is a combination of two factors involved in terms of a person having expertise, i.e. being present at a certain situation, when he/she is therefore an irreplaceable person, and the fact that he/she is able to expertly interpret the event experienced as a result of his/her expertise. For that matter, this situation is typical within the bounds of the Czech legal order for the verbal examination of a doctor as part of detention proceedings, when the court generally bases its decision on whether detention is still permissible on the testimony of the doctor, who describes the conditions of the detainee from the time of his/her admission to the time of the decision, together with a subsequent probable prognosis. This is practically a matter of filing a simplified expert report in an official record. Finally, it will be appropriate to consider the possible return of this institute from the perspective of the future concept of the private expert report. If it were possible to submit this as documentary evidence in the future, it would be appropriate to allow the compiler to be heard as a witness/expert, as indicated in the paper by the foreign literature specified.

The expert hierarchy is entirely inappropriate from the perspective of existing legal regulation, as are the rules for the possibility of appointing a specific expert entity. First and foremost, as indicated above, the system does not provide the judge with the opportunity to deviate in any way from strict statutory regulation, does not provide him/her with any chance of considering the suitability of an individual approach to the case at issue. The problem therefore lies in the obligation to appoint a pre-registered expert from the lists and once the conditions for the possibility of appointing an expert ad hoc have been met, he/she may be appointed. We can certainly assume a greater degree of "legal awareness" among experts who are registered in lists, for example regarding the particulars of the expert report, the position of the expert in proceedings, etc. However, it is a question of whether such attributes should prevail over, for example, a higher level of expertise in an expert in a specific area and whether therefore the decision to take the risk with a person not registered as a consequence of lacking knowledge of procedural regulations of expert law should be left to the judge him/herself, in line with the example of foreign regulation. For that matter, as the notional starting point of the Rules of Civil Procedure under consideration state, the law must trust the judge to be able to choose the best solution for the onward course of proceedings in a specific procedural situation and not tie him/her down with casuistry that attempt to deal with every conceivable situation. For that matter, even the very best procedural regulation will not bring what is expected in society of the civil justice system without quality judicial personnel (not only judges, but the other people involved in the enforcement of justice). The issue of selecting a suitable "type of entity" is simultaneously associated with confidence in the judge. Unfortunately, existing legal regulation regulates the existence of the expert institutions registered in Division I of the Register of Expert Institutions, whereby their existence is entirely unsystematic. Such entities do not provide any guarantee of the higher quality of expert compilation of an expert report,

neither is it possible to precisely determine the specific person who would personally guarantee the compilation of the report. This is akin to writing a blank cheque, with no certain outcome. Unfortunately, even the legal regulation of a new act on experts under preparation continues to count on this type of entity. However, only scientific centres, such as hospitals, research laboratories, etc., should have realistic justification within the system, in that, even if appointed, a single individual should be appointed by the court in advance as being responsible for the compilation of the report.

Another important question which is dealt with in the paper is that of the extent of the evidentiary initiative of the court in contentious proceedings, in which primary responsibility for contending and subsequently proving facts should lie with the parties to the proceedings, and not the court. As can be seen, for example, in new Slovak legislation, maintaining the opportunity to commission the compilation of an expert report based on the court's own consideration, without the corresponding procedural proposal of the parties to the proceedings, is no longer entirely automatic. However, existing Czech legal regulation provides the court this opportunity in Section 120 (2) of the Rules of Civil Procedure and such maintenance can evidently also be expected in the newly-prepared Rules of Civil Procedure. The approach which the Rules of Civil Procedure have chosen in this area can be considered correct, for the following reasons. First and foremost, if Section 127a of the Rules of Civil Procedure is no longer maintained, the resolution of the specialised issue of appointing an expert, if required, will invariably be in the hands of the court, meaning that the maximum involvement of the parties to the proceedings will be in contending certain facts and proposing that evidence be produced by way of expert report. However, the parties to the proceedings will no longer have the opportunity to themselves prove a specialised issue by way of private expert report. The question of whether, if a party to the proceedings has contended a certain fact, but not proposed the compilation of an expert report to prove it, it should be sanctioned for such passivity is therefore contentious. Here it must clearly be stated that not, when it is necessary to repeatedly tend towards the conclusion of Rechberger, who makes reference to the fact that consideration of the need for evidence proposed so far to be supplemented lies to a large extent with the judge. Since consideration of the need to appoint an expert is a matter for the judge, the court also has the sole right to appoint and choose experts. Finally, as the factual aim of the Rules of Civil Procedure also state in connection with ascertaining the factual situation, the activity of the court ensuing from the "material conducting of proceedings" must be applied in a subsidiary manner. Without the active role of a judge who is provided sufficient space by legal regulation, the intended purpose of civil procedure cannot be achieved.

Another key question from the perspective of a conceptual perception of an adversarial legal system within the bounds of contentious proceedings is that of determining the facts for the possibility of expert examination and the possible own degree of evidentiary inventiveness of the expert. The existing Czech legislation of the rules of civil procedure does not currently regulate this issue in any more detail. German legal regulation, which might be used as a model, draws on the fact that the court, in its resolution, determines the facts from which the expert may not deviate. In such case, no variant compilation of a report or own treatment of the facts by the expert comes into consideration. If the court is not convinced of the unambiguous nature of facts, it should inform the expert to compile such expert alternatives which descriptively take all factual possibilities into consideration. The expert should also proceed in this way if the court does not impose a variant resolution, but the uncertainty of the facts makes different conclusions possible. He/she should not therefore compile the variant which, from the perspective of factual conclusions, would appear to him/her to be the most likely. Under German regulation, the situation might also arise in which the court empowers the expert to conduct his/her own investigation. In such case, however, under no circumstances may the expert investigation fall below the boundary of the required use of expertise – below the boundary of the facts necessarily considered by the expert. If the expert were to investigate him/herself beyond the facts submitted by the court, or beyond the scope of authorisation, this could be unlawful evidence. We can certainly identify with the German principles specified above, with a few minor exceptions. First and foremost, any crossing of the framework laid down by the court by the actual expert examination should not automatically be unlawful

evidence. Such procedure would evidently not even comply with the existing progressive development of the adversarial principle, when the current form of realistic application of the adversarial principle with the establishment of the obligation of truth and completeness, and material conducting, approaches the inquisitorial system and, by contrast, the inquisitorial system, with emphasis on the required activity of the parties to the proceedings ensuing from their coaction, has moved towards the adversarial system. Therefore, insisting absolutely that the expert does not go beyond the commission of the court need not be entirely beneficial; on the contrary, it appears appropriate, if the expert takes other facts into consideration, to a reasonable extent, which have not yet been brought to proceedings, and in doing so this does not lead to unreasonable prolongation of his/her expert investigation with regard to the economics and length of proceedings, to state such facts and to leave it to the discretion of the court how to evaluate them. The adversarial system should of course be aimed at preventing prolongation of the process, but by considering unconfirmed facts that are obviously set out in the report there is no further prolongation of the process, which clearly means that interest in material truth prevails over accelerating the process that can be achieved through the adversarial system and the responsibility of the parties.

One of the most commonly mentioned topics in the sphere of the taking of expert evidence in recent years is undoubtedly the possibility which parties to the proceedings have to compile their own expert report and subsequently submit this to the court. This opportunity was provided to parties to proceedings by an amendment to the Rules of Civil Procedure made by Act No 218/2011 amending Act No 549/1991 on court fees, as amended, and other related acts. The success of this institute itself is seen in the fact that two parallel legislative proposals of the Ministry of Justice at present, specifically a new act on experts and the new material focus of the rules of civil procedure, no longer count on this institute; the new act on experts does permit this possibility, but only with the consent of all parties to the proceedings, which might not be too frequently used in the future. It can therefore be summarised that the concept of the “court-approved expert” appointed exclusively by the court should continue to apply. However, the question remains of the way in which applicatory practice will now deal with the submission of “private" reports, which from now on should again have the weight of mere documentary evidence, and should be approached in this way. First and foremost, this question is significant from the perspective that such evidence cannot be entirely ignored when considering evidence and the court should invariably treat such submitted evidence with care. If foreign templates are to be followed, a private report should mainly take on the role of initiator of the need for the compilation of a court-approved expert report or of the corrector of a court-approved report as compelling the court to proceed with a more detailed explanation or supplementation of the submitted court-approved report. In this regard we can again see as highly beneficial the material aim of the rules of civil procedure, which evidently counts on the re-introduction of the institute of witness/expert. Although prior regulation used the witness/expert mainly for testimony on facts which he/she had the chance to perceive as a result of his/her expertise, meaning that it was a combination of the qualities of witness and expert - Rechberger, for example, recommends this institute now precisely for the hearing of private experts who were not direct witnesses of the relevant incident, but had the opportunity to examine certain specialised facts based on the commission of one of the parties to the proceedings - the court should also have the opportunity to hear such persons. The courts, therefore, would have the opportunity to summon the compiler of documentary evidence/expert evidence, ascertain the required specialised facts by hearing him/her and subsequently consider the commissioning of a court-approved report. At the same time, this institute makes it possible to, for example, examine a court-approved expert and compiler of documentary evidence at one hearing, which could be of undoubted benefit from the perspective of efficiency. Finally, by enabling the mere examination of the compiler, it is not even possible to rule out that the parties would accept a fact as non-contentious and that further taking of evidence would no longer be required.

Finally, in the closing summary, we should not forget the area of evaluating an expert report. It must be said here, and kept continually in mind, that an expert report is an exceptional means of evidence, since the very appointment of an expert shows that the court is to a certain extent admitting its professional lack of competence in the matter. Although the court should approach the evaluation of expert reports

with critical impartiality and assess them in accordance with the principle of the free assessment of evidence, and therefore according to their considerations, meaning each piece of evidence separately and all evidence in mutual context, it should not lose sight of the boundaries of its own expertise. It is precisely when crossing this boundary in assessing expert reports that a problem arises, mainly in their assessment from the perspective of material correctness. It can be supposed that for certain types of expert reports, for example in the area of medicine, it is practically impossible for a judge to discover incompleteness of content or contradiction of content. Nonetheless, the use of a report may not depend on whether the judge is able to check the accuracy of scientific theory, its specific application, etc. If this were to be the condition and the judge were capable of this, he/she would have had no need to appoint an expert at all. The paper therefore marks out the fundamental areas of checking an expert report which, in terms of the accuracy of content in certain specialised areas (disciplines and branches), must necessarily be limited to a check of plausibility, i.e. detecting evident discrepancies and the logic of the conclusions made. The assessment of an expert report is invariably the responsibility of each judge and it would not therefore appear appropriate to regulate material in a strictly legislative way; on the contrary, free consideration within the bounds of assessing evidence would seem to be the most appropriate approach, when it is at the same time necessary to accept the fact that expert reports cannot be checked in full from the perspective of content since such an approach would devalue their use at all.

The introduction to the paper submitted tasked itself with dealing with expert issues which have long been unresolved or contentious. However, it would be foolish to suppose that the approach or the conclusions made herein will automatically become conclusions that will be unambiguously accepted and will not over time be subjected to criticism and relativized. Such conclusions have not even been successfully accepted by the very best procedural experts for decades. Nonetheless, the paper aimed to take a stance on these issues, primarily using a comparison with related legal orders, meaning Austrian, German and Swiss legal regulation. Here it can be supposed that sources of inspiration were submitted, for example in the area of defining the factual task of an expert report, in the issue of the evidentiary inventiveness of the parties to the proceedings and the court, in the issue of the possible use of the court's own knowledge and in other areas. This is certainly an appropriate time to be evaluating the conclusions of this paper, a time at which the preparation of entirely new rules of civil procedure and of an entirely new act on experts is underway. It is important to add, however, that the synergy and reciprocal supplementation of both legal regulations is entirely necessary to ensure that the new regulation of taking evidence can work. At this time, though, the impression is rather that both sets of regulations are being prepared by entirely different teams of experts that are not taking the necessity for such synergy into consideration at all. A fine example of the unharmonised concept is also found in the differing approach to the question of the private expert report, when each regulation prefers a different solution, at a time of almost identical submission. Some questions which would undoubtedly be worthy of more detailed consideration are dealt with by the new act on experts in a way which is entirely without concept and which contradicts the functioning of quality foreign regulation. This is primarily the question of dealing with the hierarchy of the expert system and a practical expression of distrust in judges, who will not be allowed to choose any expert for an expert examination, only those generated by the system. However, the rules of civil procedure will thereafter be unable to remove such an entirely fundamental conceptual solution and although it can be said that it is covering all areas that are deserving of new legislative regulation very nicely and carefully as part of the factual aim, it will probably be deformed in advance and limited by previously-taken professional regulation. In terms of the question of hierarchy, it is also necessary to plead the possibility of appointing experts other than those registered as a result of the fact that there will be an acute shortage of experts in forthcoming years because most of the current experts were named in the 1970s and 1980s, meaning that a gerontological problem of a shortage of official experts will absolutely have to be resolved using external experts.

The taking of expert evidence will certainly continue to develop in general, and not only in civil proceedings. In light of the rising complexity of expert issues and the complexity of the legal order, we can already see certain signs of the need to re-evaluate the admissibility of commissioning and compiling

legal and factual expert questions, or mixed questions, and it will evidently be unavoidable in the future within the bounds of assessing an expert report to tend rather towards checking formalities and checking the consistency and logic of the conclusions drawn since, with the development of science in each individual discipline, it will not be possible to approach the examination of scientific source documents and the checking of their application in more detail.