Civil & Legal Sciences

Patryn, J Civil Legal Sci 2015, 4:3
http://dx.doi.org/10.4172/2169-0170.1000155

Case Report Open Access

Legal and Formal Specification of Psychiatry Expert Witnesses Responsibilities in Case of Partial Incapacitation, Predicative Problems and Proposed Solutions

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Abstract

The article aims at presenting formal and legal problems associated with not certificating partial incapacitation by psychiatry expert witnesses. Legal problems associated with not issuing such certificates will be presented on the basis of a decision of the District Committee Adjudicating on Medical Events of which the author is a member. The problem of psychiatry expert witnesses in issuing opinions will be presented from a different perspective than the one seen contemporarily, namely, a big dose of criticism of the involvement of psychiatrists in limiting individuals' sense of subjectivity and the possibility of deciding on one's own. The latest example of this is a strongly criticized by the legal profession Act on proceedings against mentally disturbed persons who pose a threat to the life, health or sexual freedom of others and other reports where such a person is deprived of his rights via court at the request of a psychiatry expert witness. The study will present a situation based on one of the Committees' decisions where the absence of a request for partial incapacitation from the psychiatry expert witness addressed to the court caused many formal and legal complications. Described legal and procedural problems are worthy of a presentation, analysis and drawing certain conclusions. The presented situation is an example illustrating low legal awareness of psychiatrists, or even their ignorance of certain legal principles connected to the possibility of making declarations of intent by a person who is not capable of making them and legal consequences resulting from those declarations. The summary will contain a definition of legal incapacitation, presentation of an amendment on witness experts and a project on determining specific forms of representation in case of legal capacity deprivation.

Keywords: Psychiatrist expert witness; Law; Opinions; Judgment

Introduction

Currently in Poland there is approximately 2 thousand psychiatrists, 25% of which cooperate with the legal system. From the beginning of 2012 until now, the courts of Poland benefited from the help of psychiatry expert witnesses in 1698 cases [1]. Data prove that the institution of court expert (physician's whose medical expertise is necessary and desired to assess the health status of a person in specific court proceedings) is important, essential and often the only in cases relating to legal liability. A significant number of cases, their nature, complexity and the need for expertise place the psychiatrist (an expert witness) in an essential position. However, the method of being appointed for a psychiatry expert witness and the responsibilities of this position are not based on additionally acquired knowledge nor specific vocational aptitude but solely on possessing a specialization (in psychiatry). This is the same in case of appointing any expert witness, and it turns out quite problematic, as psychiatrists have substantially more responsibility (defined as giving specific opinions-judgments) than other experts (e.g. from history of art). The main thesis of this article is a statement that insufficient knowledge of expert psychiatrists on relevant legislation causes various legal problems in proceedings and jurisdiction. Relating to the issue of legal basis for the participation of an expert in a process, it is necessary to determine the legal basis for the appointment of such an expert. Chapter 6 Art. 157 §1 of the Act of 27 July 2001 on the Law on Common Courts Organization titled Court Experts states that the Chairman of the regional court designates court experts and keeps a list thereof [2]. Paragraph 2 which explicitly refers to the legal basis for the appointment of experts states that the Minister of Justice specifies, by regulation, the procedure for designating the court experts, for the performance of their duties, and for the dismissal of court experts from their function [2]. In relation to § 2 of the Act it is essential to cite the Ordinance of the Minister of Justice of 24 January 2005 on expert witnesses the President (of the Court) leads Medical Expert Witness Listings – by individual branches of science, technology, arts, crafts and other skills. The President of the Court also leads expert witness lists on cards established for each expert and those lists include the experts address and the date to which he was appointed to and other data on the specialization [3]. Currently, appointing an expert is defined by formal procedures, where in addition to general requirements (specialization in psychiatry) there are no other special requirements-criteria. A psychiatrist (expert) is appointed by the above mentioned legislature to assess the health of a person directed by the court and after examination he/she issues an opinion (judgment). This opinion is frequently the basic evidence in a case, thus its importance is obvious [4]. Opinions apply to the health situation of the examined person and what is strictly connected to it - liability, frequently the opinion is key to issuing a specific verdict. An example of the importance of it is the insanity defense where the insane can be exempted from full criminal punishment. In practice this signifies that a person could not recognize his act as a crime, nor recognize its meaning or manage his behavior due to a mental illness leading to retardation or insanity [5]. Such a person is then isolated, however not in prison but in an appropriate place (usually in a psychiatric hospital),

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Received May 15, 2015; **Accepted** September 24, 2015; **Published** September 30, 2015

Citation: Patryn R (2015) Legal and Formal Specification of Psychiatry Expert Witnesses Responsibilities in Case of Partial Incapacitation, Predicative Problems and Proposed Solutions. J Civil Legal Sci 4: 155. doi:10.4172/2169-0170.1000155

naturally in closed conditions, frequently with treatment and specific therapy. Judicial decisions made by experts found wide acceptance and due attention in the verdicts of courts of general jurisdiction and as may be cited, an expert witness is a person , who possesses theoretical or practical knowledge as an appraiser in a particular field, usually confirmed by a document [6-8]. Also extrajudicial jurisprudence, such as District Committee Adjudicating on Medical Events, has among their legal basis the possibility of asking for an expert's opinion [9]. This is specified in art. 67 pt 7 of the Act according to which committees are functioning [10]. If ascertaining circumstances which have an important influence for making a judgment requires special knowledge, the district committee consults an adequate expert from the list which has been already mentioned in article 32, paragraph 2, or a regional consultant in medicine, pharmacy or other field having application in healthcare [10]. From the literal point of view it is not quite clear that it regards an expert witness (strictly defined) but such a function can also be fulfilled by regional consultants, who are often one and the same.

Case Description

A problematic case, which was an inspiration for this analysis, was considered during three meetings of the Commission. The applicant, a 60 year old man from a city on the East of the country, asked the Committee to determine whether a medical event occurred in issuing a medical opinion by expert witnesses in psychiatry at the request of a District Court in an therapeutic entity X [11]. The applicant believed that the issued opinion (unjust, in his judgment) may be treated as a diagnosis in the understanding of article 67a of the Act of 6 November 2008 on Patient's Rights and the Ombudsman for Patients' Rights and therefore can be recognized as a medical event (incorrect diagnosis). The proponent's reasoning in this case was that since the expert psychiatrists are both employees of a therapeutic entity X that in itself can legally make such a diagnosis (by the employed doctors), which according to the proponent was a medical event and was incorrect, in effect led the applicant to the impairment of financial assets (loss of work due to this opinion) and non-pecuniary losses such as loss of honor and dignity by being diagnosed as insane. The Commission had a documentation of the case – the applicant's extensive medical documentation and attached documentation consisting of a collection of emotional polemics written in a formal tone with many different institutions; the Voivod, Courts, Prosecutor's Office, the chairman of the Commission. The polemics concerned the common law, which according to the applicant was inappropriate, the legal principles of the Commission's work (e.g. with a request for exclusion of the whole adjudicating panel), criticism of the Prosecutor's Office, Courts', Bar Association's work and the work of many others the amount of which is impossible to enumerate. The presented documentation included a series of letters between the courts and psychiatrists (opinions) and psychiatric hospitals, which at the courts' behalf (about 10 criminal and civil cases) diagnosed the applicant stating various disorders and deviations from accepted norms (sometimes bigger sometimes smaller, depending on the time period). It was an extensive set of documents mainly from psychiatrists (opinions, certificates, descriptions) and from psychiatric hospitals (or psychiatric wards) where the applicant stayed for observation. During the hearing, the applicant warned everyone that he "was not insane" and that this case and a number of others were a conspiracy or a deliberate action of his enemies (he called them a - clique); physicians, neighbors and others (police, prosecutor, judge). The applicant took the stance of "his" legal qualification of the existing event – the issuing of the judicial-medical opinion (in his opinion – harmful) which he treated as a medical event. The opinion related to the applicant's direct involvement in chicken theft and the court ordered it because he did not want to assign legal powers to the mentioned event (i.e. starting the case once again, as it turns out probably for the third time). The court received an opinion from the sued therapeutic entity, which included various mental disorders of the applicant concerning his rational overview of the situation and its translation into reality, which in turn resulted in the rejection of the motion. During the meeting the applicant in a very emotional manner (for approximately 40 minutes, which was interrupted by the Chairman) talked about his long-term problems with the law, physicians, neighbors, incited TV and various other circumstances which occurred during his life. The Commission decided that it would not ask for documentation from the medical entities, because the matter did not require it. In the course of the case, asked by members of the Commission (including an expert psychiatrist) why he believed that the opinion issued on the basis of separate regulations was a medical event, the applicant answered citing misinterpreted legal regulations (some Act, some paragraph 10 on the basis of the Code of Administrative Procedure "I have a right to an attorney, etc.), changed the subject or suggested that the questions are deliberately misleading and a member of the Committee asking them has a specified intent of confusing him. After senseless polemics and multiple attempts to clarify correct legal basis for a medical event, the Chairman decided to end the meeting and make appropriate judgment. The Committee concluded that the "the sued opinion was issued by psychiatrists (as expert witnesses) who were also employees of an therapeutic entity in P. The opinion concerned criminal proceedings and not medical benefits provided by the entity. The applicant was not being treated and no (other) medical benefits were being provided by the sued medical entity thus it is impossible to speak of a medical event occurrence". The legal basis for referring the applicant for a psychiatric evaluation by the court to determine his level of sanity in the proceeding, in the criminal case, from the very beginning was not the subject of the Committee's proceedings. The legal basis for referring by specific institutions (the court) for being opinionated is not included in the range of situations determined as a medical event. It is a different category of benefits, which is not the subject of the Committees assessment. However the meeting took place, that described above, the previous one (1st term) and what is most surprising, a third one also occurred (the so called complaint on the application of the law), which is an extraordinary situation concerning the legal procedure relating to the Committee's work (mainly based on the norms contained in the Civil Code).

Discussion

The described case could cost the taxpayers as much as 6 000 PLN, a lot of work (and nerves) the Members of the Committee to determine what was known from the very beginning that this case could not have been qualified as a medical event. The question of whether this formal course of affairs of an application made by a mentally imbalanced person (rationalization disorder, persecution mania, barratry) be avoided. The answer is affirmative- provided, however, that the psychiatrists who examined and diagnosed the applicant possess basic knowledge of legal principles. None of the experts submitted a motion to the court for partial incapacitation, which would result in lack of legal capacity (effectiveness) of the wills made by the applicant in the form of applications, pleading, motions etc. The case, knowing the scale of psychiatric evaluations commissioned by the courts, committees and other institutions does not seem to be an exceptional one [12]. In the described case, the expert witnesses lacked basic legal knowledge on various outcomes of leaving a mentally ill person (or with specific

disorders) with possibilities of issuing legal statements and the legal force of such statements [13]. Issuing statements of will such as applications, pleading, motions is connected to giving them a formal way and treating them as if they were issued by a same person, fully aware and with a rational discernment. A conscious person bringing a matter to stance, has a specific intention which is important for that person (e.g. the desire to obtain compensation) and is aware of the consequences that such an application has; both practical (futility and waste of public funds) and formal-legal. This is a procedure of correspondence, pleads, making appointments and taking the time of the people involved who are legally appointed to deal with such matters (sometimes a large group of individuals). In the formal and legal issues, the described case exhausted the 3 principles of the right to appeal before the Committee (the third date for the hearing is a legal tender called an appeal to overturn the verdict as unlawful). The applicant through a series of complains managed to exhaust the entire legal procedure to receive the information that no medical event occurred and that he will not receive compensation, additionally the paid money will be forfeited on account of the case (as is the case of lack of medical events). A reasonable solution referring to practical and legal measures, would be making an motion to the court for partial incapacitation from one of the many psychiatrists (psychiatry expert witnesses) who examined the applicant. This is not what happened in this situation, why? It turns out that the problem, which has been already signaled is little legal knowledge or lack of knowledge on certain legal and formal rules among psychiatry expert witnesses. This problem has been touched upon in specialist literature. According to Bartosz łoza "in choosing the experts, it is important for the court that they have a specialization in psychiatry, however a psychiatry expert witness should also have judicial and clinical experience" [14]. Piotr Radziwiłłowicz states that undertaking the problem of jurisdiction issues, it is essential to indicate the need for a more clear and specific regulation of legal provisions concerning witness expert appointments and the control of their work. To date, some forensic-psychiatric opinions remain out of any control on the basis of merits [15]. Jerzy Pobocha suggests an introduction of a Code of Ethics for Psychiatry Expert Witnesses, where one of its points would assume that the "expert would be obliged to know elementary principles and rules of law and his role and place in the legal case, because ignorance of the essence of the judicial process can cause the expert unnecessary emotions and effect his decision-making process"[16]. Analyzing literature, it appears that the signaled problem has a broader dimension, as information on this subject can be found in all over the world "the law requires from the expert to make a "thick line" or, if you will a certain categoricity of statements. This paradigm obliges the expert to change the mindset from typically medical to medico-legal. In particular, this applies to determining the capacity to make cognizant and unhampered decisions and expressing a free will. A person is either capable of that or not"[17]. The postulated rule is also analyzed by Paul Appelbaum- the President of the American Academy of Forensic Psychiatry and the Law "the exercise of judicial opinions requires from the expert, apart from specialization and clinical knowledge, having knowledge of law and other forensic sciences and appropriate experience" [18]. The quoted institution of the so-called incapacitation is a legal regulation, which was missing in the case described above, i.e. none of the psychiatric expert witnesses, probably not knowing about its outcome, or nor realizing its practical significance in this case, did file such a request. Analytical legal classification and the description of this rule may constitute a body of knowledge which is worth to assimilate and consider for use in certain circumstances [19]. According to Art.12 of the Civil Code, people under the age of thirteen and those incapacitated have no legal capacity [20]. In practice this means that people of age-incapacitated do not have legal capacity to undertake legal actions such as declaration of intent which involves the expression of the desire to change certain legal relationships (take their case to court). Legal action is based on receiving and submitting declarations of intent, which are to establish, amend or terminate a legal relationship. It is a natural and legally determined possibility of independent creation of one's own legal situation understood as acquisition of certain rights and incurring certain liabilities. Article 13 concerns the situation of a person who for any reason cannot control their conduct understood as the expression of effective statements of intent namely a person who has attained thirteen years of age may be fully incapacitated, if he is incapable of controlling his own behavior due to mental illness, mental retardation or another kind of mental disorder in particular alcoholism or drug addiction (Guardian shall be established) [20]. The following article, article 14 of the Civil Code states that a juridical act carried out by a person who has no capacity for judicial acts shall be invalid. According to article 15, minors who have attained thirteen years of age as well as partially incapacitated persons shall have limited capacity for juridical acts [20]. Key, when it comes to this study and its practical application is article 16 of the Civil Code, which states (…) § 1. A person who has attained majority may be partially incapacitated due to mental illness, mental retardation or another kind of mental disorder, in particular alcoholism or drug addiction, if that person's state does not justify full incapacitation yet he requires assistance in managing his affairs. § 2. Curatorship shall be established for a person who is partially incapacitated (partial, meaning e.g. representing the person in various institutions). The mentioned article is a priority when it comes to the impossibility of making effective declarations of intent on various issues to various institutions by a person who has been incapacitated. Such a person is not "left on his own" in terms of effective representation he or she may act through his legal representatives, namely a curator. The curator is responsible for conducting the affairs of such a person and he is the one who decides on juridical acts related to that person, their practical sense or its lack and many other formal issues.

Conclusion

Making the main conclusion it is essential to mentioned two important postulates of current legislation. The Council of Ministers in March 2014 adopted guidelines for the draft of the Act on Expert Witnesses. The main assumption of which is contained in the postulate that the expert should be a specialist in his field with an emphasis on specialist knowledge and professional competence. It states that:

a. Expert witness shall be granted legal protection as that granted to public officials (while fulfilling duties).

b. The title of "expert witness" will only be given to those registered on the list of experts and allowed only during the execution of duties.

c. Expert witness must show no record of intentional crime or willful fiscal offense.

d. Expert witness will be called up by the president of the regional court for a five-year term. There is to be an electronic version of the expert list.

e. A very important postulate is that candidates for expert witnesses should exhibit unquestionable professional qualifications, confirmed by opinions of the professional self-government bodies or associations of persons practicing a particular profession, and the president can appoint an appropriate committee, which would provide

an opinion on the candidate's professional background.

The possibility of issuing opinions by the so called ad hoc experts-those who have specialist knowledge but are not on the expert list maintained by presidents of regional courts are also foreseen [21]. In terms of incapacitation a legislative change is also to be introduced, which analyzing the project, may directly contribute to the legal qualification of the cases involving people whose sanity associated with the possibility of making declarations of intent that cause legal consequences, raise certain doubts. Provisions of the Civil Code concerning incapacitation are to be repealed due to the Convention on the Rights of Persons with Disabilities. They are to be replaced by the so called forms of support, which will not automatically and comprehensively interfere in the ability to act [22]. Instead of incapacitation, four forms of care will be introduced. First – assistance that is to be solely based on support. Second is a representative aid – the help of a guardian in specific activities. The dependents will however have full legal capacity. The third form will be based on co-deciding. The dependents will make their own decisions and the guardian will approve or disapprove them. The last form of care is a complete representation [22]. Analyzing the project concerning the so-called forms of care it seems to be reasonable and may in a significant manner, limit the participation and the intention of participation in juridical acts of mentally ill people who are not aware of the undertaken actions (points 3 and 4). In the light of the example and the described situation related to the institution of an expert witness it seems to be a reasonable argument to conclude as the main postulate a greater knowledge (assimilation)of the legal principles, truncated (limiting them to rules governing the criminal, civil and medical law) that are necessary for proper qualification of the cases and process issues, which are closely connected to them.

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9. Patients' Rights and Patients' Rights Ombudsman
10. (2008) Act on Patients' Rights and Patients' Rights Ombudsman (Dz.U. No 52, item 417).
11. Sensitive data such as the name and address of the applicant, the name of the medical entity and other details allowing applicant's identification have been withheld a binding privacy policy.
12. The Common Court in a civil case has a procedural simplification in the form of article 82 of the Civil Code which is still applicable although it is to be crossed out.
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Citation: Patryn R (2015) Legal and Formal Specification of Psychiatry Expert Witnesses Responsibilities in Case of Partial Incapacitation, Predicative Problems and Proposed Solutions. J Civil Legal Sci 4: 155. doi:10.4172/2169-0170.1000155