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BOOK REVIEW

FORENSIC EVALUATION IN THEORY AND PRACTICE OF MEDICAL LAW

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1. In the introduction to the monograph, the author emphasized her general attitude towards the expertise: the expertise activities are not a standard profession but, performed in a common and organized way, they acquire such capacities. It was further stated that earlier definitions of professionalism classified doctors in the group of elite professions, whereas today the information on health and disease is available to anyone who has access to the Internet, which is why the definition of professionalism has changed and adjusted to the consumer's access to health care. Considering the above, we came to a definition that the medical profession means a set of values, behaviours and attitudes underlying the public trust in doctors. From this definition, the theory and case practice of medical law derived two key concepts: *medical due diligence* in terms of professional standards and *medical error* (both concepts are highlighted by the author).

2. The structure of this monograph consists of four parts, four broader thematic units that are subdivided into chapters. The title of the first part is "The Basics of Forensic Evaluation". The first part consists of six chapters. The second part is dedicated to the ethics of forensic evaluation, with no chapters in its structure. There is no chapter either in the third part, entitled Court Practice of Expertise. The subject of the fourth part comprises forensic evaluation characteristic of the medical law. This thematic unit is presented through six chapters.

3. The first chapter of the broader topic of standard forensic evaluation examines the approach to medical law. Throughout the monograph, the author

applies the scientific methodology that is initiated straightforward by defining the basic concepts. First, it was explained that the approach to medical law was characterized by the treatment and protection of the individual from the point of view of human rights. Medical law has access to humane protected assets such as life, bodily integrity, health, self-determination (autonomy) and personal dignity. Hence, medical law is defined as a set of legal norms that regulate medical activity, determine the characteristics of persons who perform the activity and the relationship towards the users of their services, which includes regulations on medicines and medical devices. This definition has also explained the term in the title of the monograph. Finally, it was specified that the forensic evaluation in the monograph was explicated from the aspect of construing the principles and rules of medical law in the spirit of civil law, and to a lesser extent, bearing in mind the criminal and administrative law. The final lines of the first chapter discuss the issues of demarcation between medical law and forensic medicine, as well as the relationship between medical law and medical ethics.

4. The main legal sources on expertise are presented in the second chapter of the first part. The national laws on the subject of expertise and important bylaws of the Republic of Serbia, Croatia and Hungary were discussed, as well as the laws on the subject of expertise of the Republic Srpska and the Federation of Bosnia and Herzegovina. The regulations of those countries on expertise were taken as the basis for further presentations. Among the international general deeds, the provisions have been analyzed of the Guide on the role of expert appointed by a court in judicial proceedings. The mentioned Guide was adopted by the Council of Europe.

5. Procedural and substantive aspects of expertise according to domestic regulations and regulations of neighbouring countries are analyzed in the third chapter, as part of the topic – Basics of forensic evaluation. Following these regulations, the notion of an expert can be observed in the broader and narrower sense of the word. In the broader sense, an expert is any person possessing particular professional knowledge on matters regarding a particular professional field, according to such person's education or experience, whereas in a narrower sense, an expert is a person who delivers his professional and particular knowledge as an expertise before the court of law, in the capacity of his main and/or secondary occupation, as well as before administrative bodies, individuals, companies and institutions. In contrast to the notion of an expert grasped in this way, under Anglo-Saxon law, an expert appears in court as a type of a professional witness. Considerations of the regulations of neighbouring countries on the subject of expertise led the reader to the conclusion that all these regulations provided for mandatory liability insurance of experts against damage caused to third parties. The regulations of the neighbouring countries stipulate that the expert is obliged to conclude a contract on mandatory liability insurance to cover damages inflicted upon a third party before

their appointment. In this chapter, it is especially emphasized that the expert is obliged to act with the due diligence and that the exercise of the due diligence shall be assessed in each individual case. In that way, the monograph explains the essence of an expert's mistake or omission, which is covered by the contract on mandatory insurance against liability for damage caused to a third party. Moreover, only the compulsory liability insurance is analyzed in a separate section. The said section of the regulations on expertise of the neighbouring countries has also analysed the issues of the minimum sum insured, types of insured loss, scope of risks covered by insurance and insurance supervision. The analysis is completed by the remark that the competent ministry is authorized by the laws of neighbouring countries to monitor whether the court expert holds a compulsorily insurance policy for the entire period for which he has been appointed.

6. The topic of the basics of forensic evaluation is observed from the point of view of the public law. Namely, the focus of the fourth chapter was on public law elements of carrying out the evaluation. Within the public law elements of expertise, domestic regulations and those of the neighbouring countries as regards the matter of oath given by experts, the register of experts, the position of experts in relation to other procedural entities and the supervision of the work of experts are presented. Regarding the issue of supervision over the work of experts, the author's estimation was that the regulations of Serbia are lacking the number of provisions on such supervision and that they should be revised as defined in this chapter.

7. The fifth chapter, a medical doctor as a court expert, is one of the most important chapters within the topic of the first part of the monograph on the basics of forensic evaluation. Studying the comparative case law, the author assessed that a doctor as a court expert has a vital role in court, regardless of the legal system in question. In civil matters, including the case law of the European Court of Human Rights, as noted in this chapter, a medical expert is much more likely to appear in connection with the damage compensation due to traffic accidents, and less often in civil matters caused by medical liability in therapeutic, surgical or general medicine incidents. The laws regulate the content and essential elements of the expert report of a medical expert, as stated in this chapter, but before the medical court expert makes any expertise towards the person he shall examine for the forensic purposes, the expert doctor shall undertake to read out the task to such person, as has been formulated in the court decision. Furthermore, it was specified that, formulating the expertise, the doctor, as a court expert, is guided by his knowledge, experience and abilities. It was underlined that a doctor as a court expert should remain professionally independent even if the previous diagnosis of the same person's illness was signed by his out-of-court mentor (e.g. at a university clinic) or a reputable medical specialist, an insurance assessor. Commenting on a specific case from the case law of the European Court of Human Rights, the author concluded that forensic evaluation

played a crucial role in the outcome of the said lawsuit, and in a comment on another case of the same court it was concluded that suspicion of impartiality was established because of the collegiality and a mentoring relation. In that chapter, a review was made of the case law in Serbia. On that occasion, it was pointed out that in relation to the vertical of forensic evaluation, there is a difference between criminal and civil cases. Namely, it was explained that in criminal cases the vertical is obeyed, in terms of forensic evaluation, i.e. third-level forensic evaluation can be considered final expertise, since the Medical Faculty of the University of Belgrade has formed a Forensic Board comprised of professors of several specialties. In civil matters, obtaining the opinion of another expert does not represent a higher level expertise, as specified in this chapter. In civil matters in the judicial practice of Serbia, as underlined in this chapter, it is evident that there is a harmonization of the opinions of the two experts, which the court will assess within all presented evidence and established facts. Furthermore, as pointed out in this chapter, changes have taken place in Anglo-Saxon court practice in the sense that the court may refuse to accept an expert when proposed by a party, and appoint the court's own expert instead, because expertise of an expert proposed by a party is not deemed scientifically valid. After the presentation on the changes in the Anglo-Saxon court practice, the monograph gave us another brief overview of the court practice in Serbia. To this effect, cited were only the legal rules regulating the proposing of experts under the law on the subject-matter of experts and under the law on the subject-matter of civil proceedings. Finally, the chapter on the doctor as a court expert is rounded off with an overview of his legal position, with an emphasis on the statement that a distinction should be made between private expertise, legal expertise or a service expertise for another authority.

8. The responsibility of a court expert is discussed in the sixth, final chapter that deals with the topic of basics of forensic evaluation. One of the basic theses of this chapter is that a private expert is liable to his client on the basis of a contract, whereas a court expert is liable in tort. It is specified that, as a rule, fair and conscientious expertise is required from the court, but the expert's finding and opinion is the result of a contemplation procedure, so no one can be accused of mental deficiencies, especially if the subject matter of evaluation is not of an exact nature, as often happens in medicine. If the finding and opinion includes contradictions or inconsistencies, or is not well-founded, the Court does not appear to blame an expert for this or see it as grounds of false expert testimony, but neglects such expertise. In the final wording of this chapter, presented are various case law solutions that address the issue of court expertise, whereupon it was concluded that the case law in Serbia is scarce as regards this issue and that this calls for a review of legal solutions.

9. After the topic of the basics of forensic evaluation, which was presented in the previous items of six chapters, the author decided to dedicate the second part

of the monograph to the topic of the ethics of forensic evaluation. The starting point was considerations of the doctrine of medical ethics (deontology), which is more or less incorporated into medical codes. The final thesis in this part of the monograph pointed out that the regulations on medical activity are increasingly taking over the rules of medical ethics and turning them into medical legal rules.

10. The case law on expertise is presented as the third topic of this monograph. As the concept and development of case law are clarified, the classic issue of case law as one of the sources of law was initiated. With this in view, communicated was the wording of some recent papers of local authors, who recently studied the issue. Thereupon, the statement was presented that the case law is of a firm attitude that doctors and medical staff are subject to judicial control. The main thing in this statement is the following: judicial control does not aim to hinder the freedom of members of the medical profession, which is in the interest of the patient, but only insists on respecting valid medical professional standards and conscientious treatment, due care. It is further specified that the measure of due care is determined by the courts in their judgments, whereby the case law has introduced a legal criteria into medical practice. Most of the pages of the text in the third part of the monograph are primarily dedicated to the general attitude of the case law on the topic of expertise. Numerous examples of court evaluations were presented by experts from almost all professions and occupations, with the aim of shedding the light on court practice in Serbia. As for the case law view on expertise in Serbia, it is illustrated by a number of interesting examples. Inter alia, there is a civil dispute within the case law of Serbia, in which the first-instance court resolved, among other things, the issue of the narrow specialty of the forensic expert. Specifically, the plaintiff sustained a contusion of the left ear with a traumatic eruption of the eardrum, stating that this resulted in a decrease in the plaintiff's general life activity of 3%, and the first instance court appointed a forensic expert specializing in cytology and pathology. It turned out in the ongoing procedure that the first-instance court was wrong, that is, it was necessary to appoint an expert Otorhinolaryngologist. In this way, in the repeated procedure before the first instance court, the original mistake of the court in choosing the specialty of the forensic expert has been rectified.

11. The fourth thematic unit, that is the fourth part of the monograph, includes the issues of court expertise specific to the field of medical law. In the scope of this topic, the expertise of medical errors was selected for the first chapter. It was pointed out, first of, all that the problem of initiating legal proceedings against doctors and healthcare institutions is becoming more common in developed countries and/or that case law is moving in the direction of patient protection and the most efficient compensation system. A concrete example for this was presented. The associated doctors and insurers in the United States have demanded that Congress limit the amount of compensation for non-pecuniary damages awarded in favour

of injured patients. The result of this was such a development of insurance practice where the injured party, instead of filing a claim before a court of law, just needed to complete a standard form, and the Insurer would in their special procedure and assisted by a medical expert and a default scale, assess the indemnity to the claimant. By applying the scientific methodology in this Chapter, the concept of medical standard is fine-tuned as follows: medical standard represents a state of natural sciences and medical experience required to achieve the goal of medical treatment that has been confirmed in practice. The medical standard is manifested through the harmonization of rules according to certain procedures that should be followed by all doctors. Furthermore, the medical standard is not a constant quantity with an equal value at all times, in all places and under all circumstances. As stated in this Chapter, most of the medical standards refer to diagnostic procedures. Medical protocols and guidelines describe standards to be followed by doctors in providing healthcare. The doctor owes the patient the care required by the doctor's profession. As regards the medical standard and medical error, this Chapter presents the tasks of medical experts when examining a medical error. The first task is to clarify to the court the medical state of fact. This clarification of the medical state of fact relies upon the facts already established by the court. The second task includes assessing whether the procedure of the defendant doctor is in accordance with the applicable medical standard or deviates from this standard. To provide answer to this question, the forensic expert would have to check in advance whether the records kept with the court have complete data, complete medical documentation, laboratory analyzes, etc. The third task considers the situation when the forensic expert establishes that the procedure followed by the defendant doctor does not correspond to the medical standard. In this situation, the expert needs to assess whether the action of the defendant doctor caused damage to the patient's health and/or whether such damage would have occurred even if the medical standard had been obeyed. In other words, this Chapter underlines that the courts are firmly of the opinion that an expert must be guided by what needed to be done in a given situation, and not by what is usual in practice. Therefore, in court disputes against doctors and healthcare institutions, the court's dependence on the findings and opinion of a forensic expert is greater than in other disputes that include experts of other professions and occupations.

12. Within the topic of forensic evaluation, especially in the field of medical law, the second chapter discusses the expertise in the diagnosis of errors. First, the concepts of making diagnosis and diagnostic errors are defined. The diagnosis is a short medical conclusion about the essence of the disease and the patient's condition. Diagnostic error includes all irregularities in diagnostic testing. Considered in this way, the diagnostic error includes not only the test result but also the errors made while reaching the result. It is especially interesting for insurance practice to explain the general causes of diagnostic error. In this regard, it has been said that doctors

suffer from the preconceptions, prejudice, ego and vanity, tendency to excessive pessimism or optimism, inability to think constructively, lack of imagination for differential diagnosis, efforts to make a particularly interesting diagnosis, inability to enter the world of the patient's ideas and to bring his way of expression under medical categories. Moreover, examples of forensic evaluation of diagnostic errors in comparative and local case law are presented. From the case law, the largest number of diagnostic errors was recorded in the services of radiologists in connection with reading mammography images, as well as in cases of doctors' lack of training to work on medical equipment, apparatus and devices. It is particularly difficult for a forensic expert when the symptoms and signs of the disease bring about several different diagnoses, at least two of which cannot be completely ruled out.

13. In the monograph, a special attention is paid to the professional secret of the forensic expert. The issue was addressed in the third chapter, on the topic of forensic evaluation specific to the medical law. It was emphasized that keeping the professional secret on a part of a forensic expert and a doctor was for a long time considered a moral obligation. Today, this is a legal obligation. In this chapter, it was pointed out that the adoption of the 1950 European Convention on Human Rights and Biomedicine triggered an important source of this change in the mindset. That convention entered into force in the international community in September 1953, and was ratified by Serbia as well. The Convention stipulated that everyone had the right to respect of his private life in connection with the data on his health, as well as the right to know about any data on his own health that have been collected. Simultaneously, professional secret is deemed to include everything that the forensic expert found out while performing his professional activity or expertise before the court of law, not only what was entrusted to him, but also what he may have seen, heard or understood by chance. Violation of the professional secret by a forensic expert is illustrated in numerous examples in this chapter.

14. Expertise in the field of drugs comprises the subject-matter of the fourth chapter. According to the author's findings, damage to personal property caused by drugs and other pharmaceutical products is not uncommon, especially if we consider the foreign case law. An expert pharmacist has knowledge and experience about the effect of drugs and other agents and on their side effects in the human body. Many doctors are basically trained to use drugs, but doctors do not possess specialized knowledge of drugs and their kinetic and adverse reactions as do pharmacist or of statistical and other data on epidemiological and adverse reactions that may be included. Only pharmacists possess such specialized knowledge. An expert pharmacist before the court of law may be asked about the following: are there any contraindications for the administration of certain pharmacological agents; whether a warning has been given about the harmful effects of drugs; whether there is an interaction with other drugs; whether illicit substances, etc. were used. An expert

pharmacist provides the court with scientific evidence of causality and tries to rule out alternative explanations for what is happening in practice in the subject-matter of the expertise. It can be proven, though, that the specialist knowledge of pharmacists is crucial for the court, as well as the skills of their professional communication.

15. A special type of expertise is the one in the field of psychiatric damages. This type of expertise is discussed about in the fifth chapter of the fourth part of the monograph. From this chapter, the reader could conclude that psychiatric damages are based on post-traumatic stress disorder (PTSD). The author found that PTSD entered the medical literature in 1959 through the work of Dr. A. Cardiner. By definition, PTSD is a type of psychiatric disorder that occurs as a result of a strong and striking stressful event, in such a way that the event or an occurrence left or leave psychological consequences on the patient. By studying the psychological consequences of former fighters of the Second World War, the Korean War, etc., the PTSD has been explained in literature. Judicial practice in Serbia has recognized the right to compensation for PTSD in a large number of cases. On that occasion, the author presented the following attitude: according to our current legal theory and practice, the statute of limitations for claiming compensation for non-pecuniary damage begins to run from the date when certain types of non-pecuniary damages took the form of final diagnosis. If such statutes of limitation were to be applied, it was stated in this chapter, the claims of all persons would fall under the statute of limitations as regards compensation for non-pecuniary damage following torture during the NATO aggression, if their doctors diagnosed PTSD. The author suggested that the beginning of the statute of limitations for claims for compensation for non-pecuniary damages due to PTSD should not be calculated from the final diagnosis of the condition of such type for non-pecuniary damage, as it has been so far. The monograph proposes that the highest court in Serbia change its position for PTSD patients so that the statute of limitations for claims for compensation for PTSD shall begin to run from the first symptoms of PTSD.

16. The sixth chapter that deals with the topic of forensic expertise primarily in the field of medical law considered the evaluation within the activity of medical chambers. Although the last chapter of this monograph, it is not the least for the work of the Medical Chamber in Serbia – moreover, it introduces a completely new topic. Nevertheless, expertise within the work of medical chambers is a well-known topic in comparative medical law. Namely, in the second half of the 20th century, the number of lawsuits against doctors and healthcare institutions increased significantly in developed countries, leading to an increase in premiums under liability insurance for doctors and health care institutions, according to the author. Medical chambers are organizations of the medical class, but they at the same time have a public-law character, so they are invited to deal with the patients dissatisfied with treatment delivered by doctors and healthcare institutions. In this chapter, the author presented

only German experience with expertise in the work of medical chambers from the 1970s. In German medical chambers, there were two types of commissions; the first type consisted of settlement commissions, and the second type was the expert commissions. The procedure before the first one included the examination of the basis of the dispute between the patient and the doctor and/or healthcare institution. It was considered whether the doctor made a mistake. The notion of error included not only wrong diagnosis and therapeutic measures, but also shortcomings in the organization and delimitation of responsibilities among physicians. The procedure could have ended with a proposal to the insurer to compensate the patient or with a proposal of settlement between the patient and the Insurer. Before the expert's committee of the medical chamber, as an expert body, the basis of the dispute was examined, but also the conditions for the attachment of liability of the doctor or healthcare institution. Before this committee as well, the focus was on the medical expertise of the medical error that the patient pointed out. This allows the insurer and the patient to decide for themselves whether the claim for damages has been reasonable. The end of this procedure could have been achieved by settlement, but also otherwise. In other words, the dissatisfied party could bring the dispute before the court of law and resolve the dispute in such a way. In any case, the focus of both committees at the medical chambers was on the evaluation of the medical error and the views of those experts were particularly important. This is because the courts have rarely pronounced verdicts that are contrary to the attitudes of the committees of medical chambers, the author concluded, emphasizing her research of expertise within the medical chambers of Germany.

17. After a thorough elaboration of four thematic units through twelve chapters, the monograph finally comprises a conclusion, extensive literature and an index of terms. In the conclusion, it was pointed out that there was an increase in the number of forensic evaluation, but that increase is not accompanied by an increased quality of the evaluation. The subject of forensic evaluation is to determine and assess the physical or mental condition of a person in connection with the consequences of incidents in criminal and civil law. In order for the finding and opinion of a forensic expert to become a real judicial instrument, the court of law needs to distinguish factual from legal issues when setting a task for the expert, as stressed in the conclusion. The obligation of the court of law is to check and examine the forensic evaluation, independently and critically; this, however, practically comes down to the control of persuasiveness. Furthermore, the conclusion specifies that the forensic evaluation is a very complex part of the litigation, calling for cooperation between all participants in that litigation so as to reach a fair verdict. That is why the forensic expert should be aware of his responsibility, since it was noted in the case law that courts are less likely to pass judgments contrary to the findings and opinion of the forensic expert.

18. This monograph can be useful to both lawyers and doctors. Lawyers and doctors employed in insurance industry will benefit from it much, because there are thirty places in the monograph that deal with the individual insurance institutes, comment on court disputes originating from insurance and/or present the findings and opinions of forensic experts. Moreover, the monograph will be a useful read for lawyers, judges, prosecutors, forensic and other experts, as well as employees in the judiciary and health sectors. For the first time in Serbia, the subject of forensic expertise is presented from the point of view of the theory of medical law, foreign and local case law. The presentation relies upon positive regulations and proposals for amendments to these regulations have been measured and expertly formulated. The author is one of the pioneers in studying the medical law. After publishing the textbooks, a series of studies, essays and articles on the subject of medical law, it was only logical that she set out to produce this successful monograph.

Translated by: ***Bojana Papović***