

PROBATIVE VALUE OF HIGHER FORENSIC MEDICAL BOARD'S OPINIONS

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Abstract

There are situations in which the judicial bodies need the opinion of an expert in order to ascertain, clarify or assess facts or circumstances that are important for finding out the truth.

Forensic expert examinations fall into a specific category relative to other types of examinations as they can be carried out only by forensic medical institutions subordinated to the Ministry of Health.

The supreme scientific authority in the field of forensic medicine is the Higher Forensic Medical Board attached to the "Mina Minovici" Forensic Medicine Institute in Bucharest.

The mission of this board is to verify, assess, analyse and endorse from a scientific point of view, upon the request of judicial bodies, the contents and conclusions of various forensic medical documents performed by other subordinate public institutions, authorised by law to carry out fact-finding and expert examinations.

This article aims at clarifying the probative value in criminal proceedings of the opinions issued by this supreme authority, because there have been and are situations in judicial practice in which higher probative value has been rendered to such opinions, as well as situations in which its conclusions have been disregarded in a reasoned manner.

Keywords: *forensic medical expert examinations, opinions, Higher Forensic Medical Board, probative value, the expert examination reports.*

1. Introduction

Evidence is any element of fact which serves to establish the existence or non-existence of a crime, to identify the person who committed it and to know the circumstances necessary for the fair settlement of the case and which contributes to finding out the truth in criminal proceedings [article 97, paragraph (1), Code of Criminal Procedure]. Moreover, according to paragraph (2) of the aforementioned article, evidence is obtained in criminal proceedings by the following means: statements of the suspect or defendant, statements of the injured person, statements of the civil party or the party incurring civil liability, statements of witnesses, documents, expert examination reports or fact-finding reports, minutes, photographs, material evidence and any evidence that is not prohibited by law.

We notice that the evidence expressly referred to in the Code of Criminal Procedure also includes the expert examination reports. The performance of an expert examination is ordered when the opinion of an expert is required as well in order to achieve ascertainment, clarification or assessment of facts or circumstances that are important for finding out the truth in a case.

2. Forensic medical examinations

The regime of these examinations is regulated by Government Ordinance no. 1/2000¹ regarding the

organisation of the activity and the operation of forensic medical institutions, as well as by the Regulation for the implementation of Government Ordinance no. 1/2000 regarding the organisation of the activity and the operation of forensic medical institutions, approved by Government Ordinance no. 774/2000². Forensic medical examinations are carried out on living persons, corpses, biological products and *corpora delicti* in order to establish the truth in cases of crimes against life, bodily integrity and health of persons, or in other situations provided by law.

Forensic medical examinations are performed within forensic medical institutions and other structures with responsibilities in the field of forensic medicine, subordinated to the Ministry of Health, namely: forensic medical practices, county forensic medical services, forensic medical institutes.

If the judicial body that orders the expert examination finds that the forensic medical examination is incomplete, an order may be issued either to hear the forensic doctor who performed the expert examination or to carry out an additional examination. Furthermore, the criminal investigation bodies or the courts may request the endorsement of the expert report by the forensic medical document endorsement and control boards which operate within the institutes of forensic medicine. These boards verify, assess, analyse and endorse from a scientific point of view the contents and conclusions of the various forensic medical documents performed by the county

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² Published in the Official Gazette, Part I, no. 459 of 19 September 2000.

forensic medical services³, as laid down by the provisions of article 19 of the Regulation for the implementation of Government Ordinance O.G. no. 1/2000. If the conclusions of the forensic medical expert examination are contradictory, the endorsement and control board rules thereon and may formulate certain clarifications or completions. Moreover, in the event that the conclusions of the medical documents cannot be endorsed, the endorsement and control board recommends their total or partial redo and puts forward proposals in this respect or its own conclusions. After obtaining the endorsement of this board, new forensic medical examinations may be requested by the hierarchically lower forensic medical units only if the endorsement and control board has expressly recommended it where new medical or investigative data has come up which did not exist as at the date of the previous expert examinations.⁴

3. Higher Forensic Medical Board's opinions

The supreme scientific authority in the field of forensic medicine is the Higher Forensic Medical Board attached to the "Mina Minovici" Forensic Medicine Institute in Bucharest. It is composed of several permanent members, namely: the general director and deputy director of the "Mina Minovici" National Institute of Medicine in Bucharest, the directors of forensic medical institutes in university medical centres, the heads of specialist departments within accredited faculties of university medical centres, the head of the morphopathology department at the "Carol Davila" University of Medicine in Bucharest and 4 consultant forensic doctors with specialist expertise, appointed at the proposal of the general director of the "Mina Minovici" National Institute of Forensic Medicine in Bucharest. The mission of this board is to verify, assess, analyse and endorse from a scientific point of view, upon the request of judicial bodies, the contents and conclusions of various forensic medical documents performed by other subordinate public institutions, authorised by law to carry out fact-finding and expert examinations. The Higher Forensic Medical Board can rule by verifying and endorsing from a scientific point of view also in the situations in which new expert medical examinations⁵ have been performed or opinions have

been issued by the endorsement and control boards having territorial jurisdiction.

If the Higher Forensic Medical Board finds the existence of contradictory conclusions between the first and the subsequent expert examination or other forensic medical documents, it may endorse, in whole or in part, the conclusions of either the former or the latter, and may formulate certain clarifications or completions. If the conclusions of the forensic documents cannot be endorsed, the Higher Forensic Medical Board recommends the total or partial redo of the works by putting forward proposals in this respect or own conclusions [article 27, paragraph (1) and paragraph (2) of the Regulation for the implementation of Government Ordinance no.1/2000⁶].

An important effect of the issuance of an opinion by the Higher Forensic Medical Board is the fact that the judicial bodies may not request the performance of other forensic medical examinations by the institutions that are hierarchically subordinated to it, unless new medical or investigative data has appeared.

Although it operates with the term of "opinion", where the Higher Forensic Medical Board may formulate its own conclusions and quash all other forensic medical documents drawn up by subordinated institutions and although the issuance of such an opinion results in the impossibility to carry out another expert examination, neither Government Ordinance no. 1/2000 regarding the organisation of the activity and the operation of forensic medical institutions, nor the Regulation implementing this ordinance makes any reference to the form of the opinions in question or to any mandatory information that should be included. The only regulatory act where we find a definition of this opinion is the Rules regarding the procedure for performing forensic medical examinations and other forensic medical documents⁷ which in article 9, letter e) stipulates that "*forensic medical opinion means the document prepared by the Higher Forensic Medicine Board, as well as by the medical document endorsement and control boards, upon the request of judicial bodies, whereby the contents and conclusions of forensic medical documents are approved and recommendations are made to carry out new expert examinations or own conclusions are formulated.*" However, these rules do not provide for the form of these opinions either. This legislative shortcoming has led to the (repeated) issuance by this Higher Forensic

³ Article 25 of Government Ordinance. no. 1/2000 stipulates that these endorsement and control boards examine and endorse: a) fact-finding or forensic medical expert examination documents performed by the county forensic medical services in cases where the criminal investigation bodies or courts consider the endorsement; b) documents of the new expert examinations performed by the county forensic medical services before being sent to the criminal investigation bodies or to the courts.

⁴ See in this respect the provisions of article 22 of the Regulation for the implementation of Government Ordinance no. 1/2000 regarding the organisation of the activity and the operation of forensic medical institutions.

⁵ It is ordered to carry out a new expert examination report in case deficiencies, omissions and/or contradictory issues are found in previous expert examinations, as well as in the situation where the forensic medical document endorsement and control board recommends a new expert examination. The conclusions of a new expert examination are prepared on the basis of previous forensic medical findings or examinations, of the evidence placed on the case file, of the specifics of the case, of the new evidence included in the case file, as well as of the objections raised by the judicial bodies.

⁶ Article 24, paragraph (1) and paragraph (2) of Government Ordinance no. 1/2000 stipulate provisions in the same regard.

⁷ Published in the Official Gazette no. 459 of 19 September 2000.

Medical Board of opinions that completely quashed the conclusions of previous medical documents (fact-finding reports, expert reports, new expert reports), without too much explanation and without a concrete objective-scientific review of the analysed situation. The issuance of such opinions has also led the European Court of Human Rights to hold that the provisions of article 2 of the European Convention on Human Rights have been violated by the Romanian state. Thus, in the case of *Eugenia Lazăr v. Romania* the Court held in paragraphs 83 to 84 that the *Higher Board failed to reproduce the questions to which it was supposed to answer, failed to describe the operations that were supposed to be carried out as part of its control and failed to specify the specific reasons on which it relied to reach its conclusions*. Moreover, it pointed out that in the situation where the obligation to state the reasons for forensic medical documents was incumbent only on the institutions in charge of preparing the first findings and expert reports, not on the control boards, such approval aimed at strengthening the credibility of opinions and the efficiency of the entire forensic expert examination system was useless, because they had the power to completely change the conclusions of the institutions concerned. The Court took the view that the obligation to state the reasons for scientific opinions was all the more important in the case at hand, as the formulation of such an opinion by the supreme national authority in the field prevented lower-ranking institutes from carrying out new expert examinations and supplementing those that had already been carried out.⁸

The issuance of such opinions has also created problems in judicial practice at the national level. Thus, there have been situations in which the criminal investigation bodies or even the courts have given higher probative value to this opinion and the reason was that the document was issued by the highest national authority in the field of forensic medical expert examinations. Other criminal investigation bodies and courts have disregarded the conclusions of these opinions in a reasoned manner, taking into account the provisions of article 103 of the Code of Criminal Procedure, which enshrines the principle of free assessment of evidence.

In agreement with the latter judicial bodies, we, too, consider that these opinions issued by the supreme authority in the field of forensic medical expert examinations do not have a higher probative value than the other scientific evidence examined in a case. Thus, the judicial bodies may uphold in a reasoned manner any of the conclusions of the expert reports carried out in a case, regardless of whether they have been endorsed or not by the Higher Forensic Medical Board and implicitly to disregard such opinions. The provisions of article 103, paragraph (1) of the Code of Criminal Procedure supports this point of view and

states that *the evidence does not have a value established beforehand by law and is subject to the free assessment of the judicial bodies following the evaluation of all the evidence examined in the case*. It follows from the aforementioned legal text that the assessment of evidence in criminal proceedings is governed by the principle of free assessment of evidence, according to which “judicial bodies have the right to freely assess both the value of each piece of evidence legally examined (relative to others) regardless of the procedural stage in which they are examined, as well as their credibility; the evidence does not have an a priori value established by the legislator, as its importance results from its assessment by the judicial bodies following the analysis of all the evidence legally and fairly examined in a case.”⁹

Furthermore, as already shown, there are situations in which these opinions issued by the Higher Forensic Medical Board are incomplete and vague, without an objective-scientific analysis of the situation on which it must rule and without a concrete statement of reasons for its conclusions. Thus, the judicial bodies have the obligation all the more so to assess in concrete terms the scientific value of each medical document in a case. We consider that only a detailed, scientifically proven report, containing a reasoned solution in relation to possible contradictions between the other documents issued by lower-ranking institutions and answering in a detailed and reasoned manner all questions asked by the judicial bodies, is likely to be used as evidence in criminal proceedings.

The jurisprudence of the European Court of Human Rights also supports this view. Thus, in the case of *Eugenia Lazăr v. Romania*, in paragraphs 77-80, the European court held that “the court that ruled in the last instance gave credence to the opinion delivered by the Higher Board - although the judges of first instance considered it incomplete and requested a new opinion - on the ground that this document emanated from the highest national authority in the field of forensic medical expert examinations and that the latter, in the circumstances of the case, was prevented by the special law governing the activity of forensic medical institutes from carrying out a new expert examination in the absence of new elements. It necessarily follows from the reasoning pursued by the latter court that a piece of evidence acquires probative force when a new element cannot be substituted for it or when it cannot be countered by another piece of evidence having the same scientific value. ***Such a conclusion is in total contradiction with the procedural obligation implicitly contained in article 2 of the Convention, which specifically requires national authorities to take measures to ensure the gathering of evidence capable of providing a full and accurate account of the facts and an objective analysis of clinical findings, in particular of the cause of death.*** Any deficiency in

⁸ Within the same meaning see ECHR, decision of 7 June 2011 in the case *Baldovin v. Romania*, paragraphs 23-26.

⁹ Mihail Udrouiu, *Procedură penală-Partea generală*, C.H.Beck Publishing House, Bucharest 2018, p. 318.

the investigation that weakens its ability to establish the cause of death or responsibility risks leading to the conclusion that it does not meet this standard (see, *mutatis mutandis*, *Slimani v. France*, no. 57671/00, § 32, ECHR 2004-IX (extracts); *McKerr v. United Kingdom*, no.28883/95, § 113, ECHR 2001-III and *Paul and Audrey Edwards* cited above, § 71). Admittedly, by virtue of the principle of the free assessment of evidence which governs Romanian criminal proceedings, courts can disregard a piece of evidence which does not appear to them to be credible or conclusive. Such a possibility remains nevertheless purely theoretical if the judicial authorities are prohibited from ordering the performance of an expert examination outside the network of forensic medical institutes authorised by law and whose opinions are the only ones admissible as evidence in the context of a criminal trial or to ask these institutes *to reconsider their conclusions when they appear to them as being incomplete or insufficiently clear to enable them to make an informed choice and help them to make their decision*. Whether the present case constitutes an isolated case or whether it reflects a current practice of the “Mina Minovici” forensic medical institute of avoiding requests made to it by the judicial authorities in order to obtain the information they need in order to make objectively founded decisions in full knowledge of the facts, the Court considers that the very existence in the national legislation of provisions authorising the forensic medical institutes having competence to deliver opinions that avoid the requests of the judicial authorities and thus refuse cooperating with them whenever the needs of the investigation so require is hardly compliant with the primary duty of the state to guarantee the right to life by putting in place an effective legal and administrative framework capable of establishing the cause of death of an individual who was under the responsibility of health professionals.”

Moreover, in the case *Baldovin v. Romania*, the European court concluded that the legislative framework established by the state to regulate the forensic medical activity did not have sufficient guarantees against arbitrariness to strengthen the trust of parties to proceedings in the act of justice and the credibility of the system as a whole.

Although the aforementioned cases were handled in 2010 and 2011 respectively, the Romanian state failed to fulfil its positive obligation to amend the legislative framework in accordance with the requirements of the jurisprudence of the European Court of Human Rights, therefore, the legislation applicable to these cases is currently the same.

The existence of a legal framework in the field of forensic medical expert examinations likely to allow the issuance of opinions by the supreme scientific authority in the field of forensic medicine which avoid the requests of judicial bodies and refuse cooperating with them whenever the needs of the investigation so

require may lead to the occurrence of situations in which the clarification or assessment of facts or circumstances that are important in seeking the truth becomes impossible, thus diverting the criminal proceedings from its purpose, namely that any person who has committed a crime should be punished according to their guilt and that no innocent person should be held criminally liable.

In such a situation, we take the view that the regulatory acts regulating the activity of forensic medicine should stipulate what form the opinions issued by the highest national authority in the field of forensic expert examinations should take and what their concrete contents should be so that the judicial bodies can make a clear choice in assessing the evidence and help them make the right decision. In this respect, we consider that since such opinion can include own conclusions which differ from the conclusions of previous medical acts subject to assessment, it should take the form of an expert examination report, as provided by article 178, paragraph 4 of the Code of Criminal Procedure, namely **introductory part**, which shows the judicial body that ordered the expert examination, the date when it was ordered, the last name and first name of the expert, the objectives to which the expert should answer, the date on which it was performed, the material on the basis of which the expert examination was performed, the proof of notification to the parties if they participated therein and gave explanations during the expert examination, the date of preparation of the expert examination report; **expository part**, which describes the expert examination operations, methods, programmes and the equipment used; **conclusions**, which answer the objectives set by the judicial bodies, as well as any other clarifications and findings resulting from the performance of the expert examination in connection with the objectives of the expert examination.

4. Conclusions

The criminal proceedings are governed by the principle of free assessment of evidence, which means that the evidence has no probative value established beforehand by the legislator and that there is no evidence that has the title of “queen”, regardless of the authority from which it emanates. Therefore, the opinions issued by the supreme scientific authority in the field of forensic medicine do not have a probative value higher than the other scientific evidence examined in a case. Consequently, the judicial bodies may uphold any of the conclusions of the expert examination reports carried out in a case in a reasoned manner, regardless of whether they have been endorsed or not by the Higher Forensic Medical Board and implicitly to disregard such opinion in a reasoned manner.

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