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# Special Legal Relationships and Liability Issues in Relation to Evidence Handed over to A Forensic Expert by a Civil Court

Abstract

The paper takes a recent case as a starting point to examine how the disappearance of the object of examination from a forensic expert appointed by the trial court should be assessed in the light of civil law, civil procedure and constitutional law. The analysis will focus on the specific legal relationships and liabilities associated with the appointment of an expert. The theoretical conclusions on these issues are the starting point for the fundamental question, of constitutional importance, of whether a judgment can be based on an expert's opinion that was drawn up without the expert having returned the object of the examination although he should have done so. The study also attempts to answer this question.

**Keywords:** expert appointed by the court, object of examination, custodial liability, rule of law, evidentiary procedure, fair trial

## I The Topicality of the Issue

The present study and the theoretical conclusions it contains derive their topicality from a recent case concerning the invalidity of a will before the Metropolitan Court of Budapest, which was also tried before the Curia.[1] In this case, the court-appointed forensic chemist took the will (the only original example) from the court's safe for examination, and later reported that the will had been stolen from him by an unknown person and therefore could not be returned. The forensic expert, in his opinion presented in these circumstances, claimed that the will was forged because the printed text was put on paper after the testator's

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1 See the judgment No.21.P.25.192/2014/180-II (corrected by the order No.181) of the Metropolitan Court of Budapest dated 1st of September 2020, and the judgment No.Pfv.II.21.494/2021/7 of the Curia 18th of May 2022.

name had been written. The trial courts based their judgments on this expert opinion and, with the exception of the court of appeal, declared the will invalid. In the light of the above, it is useful to examine the nature of the legal relationships between the parties involved when an object or evidence is deposited to the court in connection with litigation or when the same object or evidence is handed over by the court to a forensic expert for examination. A further relevant issue is the question of who should be subject to what legal consequences if the object or evidence is not returned by the forensic expert. The focus of this study is primarily civil law, but it cannot ignore a broader analysis, as the legal consequences of the facts are at least cross-jurisdictional.

## II Special Legal Relationships

Following the chronological order of the events that are legally relevant and can be legally grasped, we can arrive, step by step, at the question of the nature of the legal relationship between the parties and the court when the former entrust to the latter, for the purpose of settling their dispute, the object that is at the centre of the litigation, in this case the will. A detailed examination of the antecedents of the legal relationship and then of its content will lead to an answer to the question.

## III Legal Relationship with a Notary

As a starting point, let us assume that, as is typical, the will is made available to the probate registrar or directly to the notary who is conducting the probate proceedings by the party interested in the validity of the will, and that the notary hands the document to the court after becoming aware that the party interested in the annulment of the will has filed an action for a declaration that the will is invalid. In addition, it is often the case that the will is found in the deceased's home or is made available to the authorities by the person entrusted by the testator with the safekeeping of the will (for example, a witness). The first event in all such cases is therefore when the will comes into the possession of the notary for the purposes of the probate proceedings, so that the legal relationship which arises from it should first be analysed in detail and then correctly assessed. Assuming that the person who handed over the will to the notary had a valid title to possession of the will, I will analyse only the legal relationship between him and the notary. The keeper of the will makes the document available to the notary to give effect to the testator's wishes, in other words, to enable the notary to transfer the estate to the heirs in accordance with the will. Starting from the legal status of the notary and taking account of their obligations in relation to the will, we can arrive at a conclusion as to what will be the legal title to the possession of the will by the notary. In a peculiar way, Act C of 2012 on the Criminal Code (hereinafter

the Btk.) provides the answer to the question of the legal status of notaries. Article 459(1)(11)(g) of the Btk. defines a notary as an official person. This means that they perform a public task, has special powers to do so and is subject to enhanced protection. It does not follow, of course, that notaries cannot be subject to civil law relationships in the course of or in connection with the performance of their public duties. In my view, one of these civil law relationships is where the keeper of the will delivers the document to the notary in order to enable the transfer of the estate in accordance with the testator's wishes to be carried out as a public task. For the purposes of the civil law classification of this relationship, the question of whether it is a pecuniary or non-pecuniary one must be of particular importance.

The holder of a will is obliged to hand over the document he or she has kept to a notary, since he or she has undertaken to give effect to the testator's will, but receives no consideration for doing so. The holder's action is clearly in the interests of the testator and of the persons named as heirs in the will. The notary's duty is to receive and preserve the will, to examine its form and content and then to transfer the estate on the basis of a valid and effective will, which is free from any defects. The notary is remunerated for this, but not by the person who hands over the will, but by the parties interested in the succession. Despite its special features, the legal relationship bears, at least incidentally, the characteristics of a deposit. As we have seen, in addition to the receipt and safekeeping of the will, the notary also has other obligations in relation to the document, but it is the deposit itself that serves to fulfil these duties.[2] In summary, it can be said that a notary in a public capacity obtains, by means of a deposit, the possession of the document which, if suitable, will serve as the basis for the transfer of the estate, meaning that the deposit is ancillary to the main service provided by the notary in his capacity.

## IV Relationship with the Court

In the event of a lawsuit being brought in the course of the probate proceedings to establish the invalidity of the will, the notary, as the depositary, will deposit the will with the court for the purpose of the lawsuit, and therefore acts as a depositor in this relationship (towards the court). In my view, however, it would be too restrictive to consider only the notary as the depositor in the context of the document being brought before the court. The transfer of the will to the court is in the legal interest of both the contesting party and the beneficiary, since both of them wish to have the dispute settled and, by becoming parties to the action, they themselves trigger the notary's action which brings the will into the possession of the court. In this sense, therefore, the parties themselves are present from the outset in the legal

[2] Compare: Vékás Lajos, Gárdos Péter (eds), *Kommentár a Polgári Törvénykönyvhöz* (second, revised edition, Wolters Kluwer Kft. 2018, Budapest), see the explanation of Section 6:360 of the Civil Code (Ptk.) by Gárdos Péter, according to which, „a letétnek lehet a szűken vett őrzésen túlmutató célja is: szolgálhatja egy jogügylet megvalósítását, vagy lehet biztosíték is". Translated into English: The deposit may have a purpose beyond custody in the narrow sense: it may serve to enforce a legal transaction, or it may be a security.

relationship between the notary and the court, at least as underlying depositors. It could even be said that when the will is handed over to the court, the obligation becomes multi-subject on the eligible side and a kind of joint and several relationship of the depositors is established.

It is typical that irreplaceable objects and documents of greater ideological or material value (such as wills) are placed in the court's vault. This also underlines the depositary nature of the legal relationship, since it shows that the court has a more stringent duty of custody than usual. This is fully consistent with the fact that the depositor's main obligation is to preserve and return the deposited property. The court's primary task is, of course, to adjudicate on the suit, the resulting deposit contract being ancillary to this.

## V Legal Relationship with the Forensic Expert

In actions for a declaration of invalidity of a will, it is common for the plaintiff to allege a ground for invalidity which requires a special expert, a document examination. In the light of the case law, most of the time the competence of a writing and document expert is required, but more recently, as the facts of the case show, there have also been examples of the involvement of a trace or chemistry expert. The question arises, therefore, as to the nature of the legal relationship between the court that holds the document in deposit for the purposes of the proceedings and the forensic expert appointed by the court, and whether there is any civil law relationship between the parties interested in providing evidence and the expert. Pursuant to Section 3(1) of Act XXIX of 2016 on Forensic Experts (hereinafter Act on Experts), the duty of a forensic expert is to assist in establishing the facts of the case by providing an expert opinion. Acting on the basis of an assignment from an authority or a mandate, a forensic expert is obliged to comply with the requirements of independence and impartiality when deciding specialist question and to formulate his/her expert opinion on the basis of the results of scientific and technical progress. On the basis of this legislation, the initial stage of the expert's activity in a specific case is the appointment as an official act or the mandate as a civil act, and the result is the expert opinion. This reveals a rather mixed and complex legal relationship. Given that Act V of 2013 on the Civil Code (Civil Code or Ptk.) considers the research contract as a sub-type of the contract to produce a work, on the basis that the product is the research report, it is perhaps not a mistake to measure the expert's work by the same yardstick.[3] Despite the fact that the law itself uses the word 'mandate' (which in Hungarian

[3] See in this context: Vékás, Gárdos (n 2), see the explanation of Section 6:253 of the Civil Code (Ptk.) by Gárdos Péter, according to which „a szerződés alapján a kutató köteles a kutatás jellegéhez kapcsolódó szellemi alkotást, például kutatási jelentést, más hasonló művet elkészíteni, az ilyen műre vonatkozó, a megengedett legszélesebb terjedelmű felhasználási jogot köteles a megrendelőnek átengedni". Translated into English: Under the contract, the researcher is obliged to produce an intellectual work related to the nature of the research, such as a research report or other similar work, and to assign to the client the right to use such work to the fullest extent permissible.

refers to an agency contract), it is not (completely) correct even in the case of a private expert, as in such a case we also expect the expert to provide a product, an expert opinion. Of course, the expert is also subject to the duty of care that is typical of a mandate (agency contract), but the whole of his or her task is still predominantly producing a work.

Having explored the legal content of the expert's (co-)operation, it is useful to examine who are the 'clients' of the contract to produce a work with the expert. According to the Ptk., this is the person who is obliged to accept the contractor's work and pay the contractor's fee. In the case of a private expert, no dilemma arises, so I will now examine the subjects of the contract in relation to the expert acting on the basis of a court appointment.

It seems appropriate to approach the question from the point of view of who is entitled to claim in the event of defective performance by the expert. In the light of the case-law, there are several forms of expert malpractice. Examples include when the expert goes beyond his or her scope of competence, is biased, takes a position on a point of law, gives a false opinion or his or her opinion is otherwise questionable.[4] The court takes the expert's opinion as a contractor's work from the expert, but does so also on behalf of the parties. According to the rules of evidence governing Hungarian procedural law, the party who has an interest in having the court accept the facts as true must prove the facts relevant to the case. If special expertise is necessary to establish such a fact, the party who has an interest in providing evidence must request the appointment of a forensic expert, otherwise he or she will suffer the legal consequences of the lack of evidence.[5] This does not mean, however, that the client of the contract to produce a work with the expert is exclusively that party. This is because the other party also has an interest in the expert's opinion justifying his or her position in the litigation; in other words, he or she expects the expert to provide a product with such content and in this sense is himself or herself also a client. So, on the client side, we see the court and the litigants, who are all entitled to assert claims against the expert based on defective performance, and do so, each according to their own specific criteria. The motivation of the parties in this respect does not require any particular explanation, but it is worth examining whether there is a case where the court does not act as a kind of mediator in enforcing the claim of one of the parties against the expert for defective performance, but itself acts as a 'complaining' client, for example by excluding the expert's opinion from evidence *ex officio*. The domestic procedural rules undoubtedly grant the court such a power, just think of Section 316 of Act CXXX of 2016 on the Code of Civil Procedure (Pp.), which deprives the expert opinion of its admissibility as evidence in the cases listed there.

At the same time, it can also be noted that the principle of the binding nature of the motion applies in the context of the expert opinion, which means that the court – except in the cases provided for in Section 316 of the Pp. – mostly forwards to the expert the concerns

4 See in detail Section 316 of the Pp.

5 See in this context in detail Section 265 of the Pp.

of the parties, at least those that the court itself agrees with.[6] Irrespective of this, it can be concluded from the scope of those entitled to raise qualitative objections that, in civil law terms, the contracting parties and the court are the clients of the contract to produce a work with the expert. Although the contract to produce a work is dominant, it is not the only legal relationship of a civil law nature that is established between the same actors. It is not uncommon for the expert to be forced to take the object held by the court temporarily in order to carry out the necessary examination for the preparation of the expert opinion. This will almost certainly be necessary in the case of expert examinations of wills or deeds, since these examinations are typically carried out with technical devices and equipment that cannot be transported to the site or can only be transported with considerable difficulty. The expert will take possession of the object of examination held in custody by the court for the purpose of fulfilling his/her main obligation as a contractor and will be obliged to return it at a later date, after the expert examination has been carried out. The special circumstances of the case therefore require that the object of the examination held in deposit by the court is temporarily removed from the depositary's possession, meaning that, in essence, the same sub-deposit as above is made, with the difference that the expert will not only be bound by the obligations arising from the deposit contract, but will also have to perform the contract to produce a work, and it is precisely for the latter purpose that they become a depositary. The legal framework of the expert's activity involving the examination of an object is therefore a contract to produce a work with deposit elements.[7] In my view, the depositors are those who are the clients of the contract to produce a work, namely the court and the litigants.

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[6] Compare this with Section 315 (1) of the Pp., according to which „ha a kirendelt szakértő szakvéleménye aggályos és az aggályosság a szakértő által adott felvilágosítás ellenére sem volt kiküszöbölhető, a bíróság indítványra új szakértőt rendel ki.". Translated into English: If the opinion of an officially appointed expert is inconclusive and the inconclusiveness could not be addressed despite the clarifications provided by the expert, the court shall, upon a motion, officially appoint a new expert. According to the wording of the law, this could be continued indefinitely by appointing another expert, but judicial practice has prevented this by stating that if the concerns of the expert opinion cannot be resolved by the appointment of a new expert or if the party does not request the appointment of a new expert, „a bíróságnak mellőznie kell a szakértői véleményt, és a szakkérdést, mint bizonyítatlant a bizonyításra kötelezett fél terhére kell értékelnie". Translated into English: the court shall disregard the expert's opinion and consider that the specialist question has remained unproven, with the disadvantages of this being suffered by the person who would have been obliged to provide evidence. See in this respect and in detail: *Igazságügyi szakértőkkel kapcsolatos szabályozás és feladatok, lehetséges eszközök az eljárás gyorsítása érdekében; bírósági általános igazgatási szekció* <https://birosag.hu/sites/default/files/2018-08/24_dok.pdf> accessed 15 December 2023.

[7] Case law confirms this. See, for example, the decision BH 2001. 424., where the acceptance of a car for repair creates a contract to produce a work which includes a deposit element. On this basis, and applying some analogy, the above proposition is, in my view, justified.

## VI Civil Law Aspects of the Loss of the Will by the Expert, Liability Issues

Having considered which civil law relationships arise between whom in the context of an action for a declaration of the invalidity of a will, it is useful to examine from the same perspective the case where the expert appointed by the court does not return the will and gives their expert opinion in such circumstances. It is noted above that the expert will be subject to a (sub)deposit contract upon taking possession of the object of the examination. Consequently, the expert is not only obliged to carry out the examination under the contract to produce a work, but also to keep, preserve and return the will. The nature and extent of the depositary's duty of safekeeping has been clearly established by jurisprudence and consistent case-law.

> Generally speaking, the depositor's conduct and actions should be aimed at ensuring that the depositor receives the property intact at the expiry of the deposit. Custody therefore means, on the one hand, preserving the physical condition of the deposited object and, on the other hand, maintaining the ownership of the deposited object. The exact content of the custody obligation is determined firstly by the characteristics and needs of the deposited object and secondly by the circumstances of the deposit. At the same time, however, the duty of safekeeping does not typically require active conduct, but it is sufficient to keep the object in appropriate conditions and to protect it from loss, damage or destruction.[8]

This gives rise to a strict custodial liability, meaning a liability based on an objective basis, since the Civil Code (Ptk.) defines both the obligation to preserve and the obligation to return as the conceptual elements of a deposit.[9] It can also be said that the obligation to keep is in the service of the obligation to return, meaning that it (the duty of safekeeping) must be measured against a very strict yardstick.

In the light of judicial practice and jurisprudence, it can also be said that the depositary is under a continuous duty of safekeeping, 'and that there is therefore a clear prohibition on any conduct that is not in accordance with the duty of safekeeping; in other words, which jeopardises the return of the depositor's property in its original state'.[10] Therefore, even if it is proved that the will was stolen from them, the expert has breached their contract by not ensuring the continued safekeeping of the object of the examination. In this sense, therefore, the theft does not constitute *force majeure* such as to give rise to the expert's exemption, in the light of the objective basis of liability for custody. The expert was holding

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[8] See in this context: Vékás, Gárdos (n 2), see the explanation of the Article 6:360 of the Civil Code (Ptk.) on 141. Translation by the author.

[9] For the meaning of custodial liability and its roots in Roman law, see Max Kaser, Rolf Knütel, Sebastian Lohsse, *Römisches Privatrecht* (22nd edition, CH Beck 2021) 271–277.

[10] Vékás, Gárdos (n 2), see the explanation to Article 3:361. of the Civil Code (Ptk.) by Gárdos Péter.

the object as a sub-depositary, so the question is whether they alone are responsible for its loss. As I have shown above, the will was also held by the court as a depositary and was deposited by it to the appointed expert. A closer look at this legal relationship reveals that the expert is in fact a vicarious agent, and therefore Section 6:148 of the Civil Code (Ptk.) applies. Provided that the court has lawfully used a vicarious agent, it is liable for their conduct as if it had acted itself. The question arises as to how, in the circumstances of a case, the question of the lawful or unlawful use of a vicarious agent is to be assessed. In my opinion, if in a case leading to the disappearance of the will (which is suspicious in itself), it can be proven that the guarantees of the rule of law were not applied around the appointment of the expert (for example, because the court appointed an expert named by one of the parties or did not ensure the presence of an official witness or the parties at the expert examination), then the unlawful involvement of the vicarious agent arises, which in turn gives rise to unlimited liability of the court for damages under Section 6:148(2) of the Ptk.[11] If there are no such circumstances, the court is liable according to the rules on the lawful use of a vicarious agent. In my opinion, there is no obstacle to a party bringing an action directly against the expert for the loss of the object of the examination, and the action may be brought not only on the basis of tort but also for breach of contract, since – as the above conclusion shows – the parties to the action are on the client and depositor side, also subject to the contract to produce a work with deposit elements, which is the framework of the expert's activities.

This is reinforced by the fact that the expert's fees are also advanced by one of the parties and are also borne by one of the parties, depending on the outcome of the proceedings.

However, the disappearance of the will is not only of importance for potential claims for damages and the subjects and extent of liability for damages, but also raises much more important issues for the rule of law, given the role of the will and the expert opinion in the litigation. The courts in the case that gave the actuality of the present study did not perceive any concerns and accepted the expert opinion as a basis for their judgment. They did so despite the fact that all the other evidence in the case (expert opinions on handwriting and documents, medical reports) confirmed that the will had been properly drawn up. I consider it a serious shortcoming that there is no specific provision in our current law requiring the forensic expert *expressis verbis* to return the object they have taken over for examination. However, the legislator is excused by the fact that the obligation to return is an obvious and self-evident requirement, and the case at hand is unprecedented, so

[11] In the context of the liability of judges and courts, including its historical context, see in detail: Schlachta Boglárka Lilla, 'A bírák és bírósági hivatalnokok felelősségéről szóló 1871. évi VIII. tc. képviselőházi vitája' in Miskolczi-Bodnár Péter (ed), *Jog és Állam* No. 42. (XXIII. National Conference of Doctoral Candidates in Law, KRE ÁJK 2022, Budapest) 207–215; Schlachta Boglárka Lilla, 'A bírói hivatás polgári kori történetének archivált forrásai és annotált bibliográfiája' in Miskolczi-Bodnár Péter (ed), *Jog és Állam* No. 29. (XXI. National Conference of Doctoral Candidates in Law, KRE ÁJK 2021, Budapest) 101–113; and Schlachta Boglárka Lilla, 'Szemelvények a Budapesti Ítélőtábla fegyelmi ügyeiből (1938–1944)' (2022) 20 (3) Jogtörténeti Szemle 46–54, DOI: https://doi.org/10.55051/JTSZ2022-3p46

there was probably no need for specific rules in this respect. The legal assessment of an expert opinion submitted without the return of the object of the examination can therefore only be approached by applying the auxiliary rules offered by the legal system. This is precisely the aim of the above civil law approach, which, in my view, leads to the following conclusions, which are also civil law in nature at this stage. The legal framework for the expert's operation involving the examination of an object is a contract to produce a work with deposit elements. Under the underlying deposit contract, the main obligation of the depositary, and hence the conceptual element of the deposit, is the safekeeping and return of the object. The forensic expert in the case did not comply with these requirements. The contract of deposit and the contract to produce a work form an indissoluble contractual unit, the consequence of which is that the breach of the main obligations arising from the contract of deposit becomes an irreparable legal defect in the product of the contract to produce the work. Since all this takes place within the judicial system, in the proceedings of the court exercising public authority, the court as the client has a duty of enforcement of the resulting claims against the expert as the contractor. The enforceable claims are of the nature of a warranty for material defects. According Section 6:159 of the Ptk., the repair, replacement and proportional reduction of the consideration (expert's fee) are out of the question, since the will cannot be replaced, and the reduction of the fee would also be inappropriate to remedy the problem. This leaves the right to cancel the contract as remedy for breach of warranty for material defects. The fact that the expert is unable to return the will is of course an obstacle to restoring the original situation, so it is perhaps more appropriate to assume the cancellation of the contract with immediate effect required from the court under Section 6:140(1) of the Ptk., second phrase, as a termination. In any case, it can be said that the exercise of this remedy by the court for breach of warranty for material defects can be combined with legal consequences, which already provide a solution even to the anomaly created by the disappearance of the will.

## VII Procedural Conclusions from the Civil Law Approach

It has been established above that the disappearance of the will, namely the fact that the expert, although they would be obliged to do so, is unable to return the document, leads to a performance of the contract by the expert which is suffering from an irreparable legal defect. But what exactly is this legal error in the language of civil procedure and why is it irremediable? In recent years, there have evolved a number of requirements for expert opinions. Most of these are implicitly included in the Pp. since, by attaching a legal consequence to the vague, contradictory or questionable nature of the expert opinion, it practically formulates the expectation that the expert opinion must be clear, uncontradicted and conclusive. In addition, reference should be made to the provisions of the Act on Experts, which are also relevant in this respect, as they set clear formal and substantive requirements

for the expert opinion.[12] However, the fact that the expert would be obliged to return the object of examination is not explicitly stated in any of the laws, but this requirement can only be derived indirectly from the provisions of the Act on Experts, according to which prior approval is required for the performance of an examination that entails the alteration or destruction of the object, meaning that, in principle, the examination cannot entail the alteration or destruction of the object, but the expert must return it in an undamaged state. However, in the case under study, the will disappeared from the expert's possession, yet the courts did not attach any significance to this fact, but based their judgment on the expert's opinion, thus recognising the expert's performance as in conformity with the contract, despite the fact that he did not return the will. The requirement for an expert opinion to be conclusive is constantly evolving in case law and jurisprudence. There is no example in the case law similar to the case at issue in the present study, and thus no decision of the higher courts that provides guidance on what a court wherein such a case arises should do. Consequently, in addition to the civil law conclusion above, we must apply the requirements hitherto established for an expert opinion in the light of the principles guaranteeing the rule of law in order to see what irreparable defect is involved in an expert opinion in connection with which the expert does not return the object of the examination. In my opinion, the loss of the examination object by the expert precludes repeatability (reproducibility and controllability), so the opinion cannot be credible (reliability); not only because the expert can only prove beyond reasonable doubt what they wrote in their opinion by the object of the examination; in other words, the fact that the latter cannot be found deprives the expert opinion of its essential support, thus reducing the expert's findings to mere statements. In my view, in order for an expert opinion to be considered credible under the rule of law, there must always be an objective, theoretical possibility of cross-checking. If, by its very nature, an expert examination entails the destruction (or alteration) of the object, particularly strict procedural guarantees must compensate for the resulting disadvantages. Mónika Nogel, a prominent researcher on the subject, explains,

> There are legal and professional rules on the handling of examination material. Legal requirements can be broadly divided into two groups. The first group includes requirements relating to the documentation of the origin of the examination material (e.g. inspection, search, seizure). These include rules for the proper handling of examination material to prevent loss and avoid mix-ups, requirements for documenting the handover to an expert, etc. These rules are also one of the safeguards to ensure that the expert opinion is reliable: if the expert bases their opinion on examination material of uncertain origin or obtained or handled in an unverifiable manner, the opinion cannot be considered reliable even if its content is correct. Proper documentation of relevant baseline data is essential for the examination, and the objectivity and proper documentation of the examination

[12] See in detail Articles 47–48 of the Act on Experts.

> is demonstrated by the fact that the given baseline data are processed and evaluated in the same way by experts with the appropriate skills. I think it is important to add to the above that, according to judicial practice, the traceability and verifiability on the part of the court and the parties is also an important requirement of the conclusiveness, because if the veracity of the data cannot be checked in any way, the expert opinion cannot be reliable and cannot be conclusive. Nor can an opinion be conclusive if its findings cannot be verified by the interested parties...[13]

This is also in line with the position of Árpád Erdei, according to whom 'an expert opinion must be factual, realistic, up-to-date, scientifically sound, reliable, in conformity with the results of science and the so-called natural rules of the profession, and verifiable (controllable)'.[14] The proliferation of the same views in the judiciary is best reflected in the summary opinion of the Curia's Case Law Analysis Group, 'Expert Evidence in Judicial Proceedings', issued in Budapest on 19 December 2014, which sets out the requirement of reliability and verifiability (controllability) of expert opinions.[15] Accordingly, if the veracity of the data cannot be checked in any way, the expert opinion cannot be reliable and cannot be conclusive.[16] The serious legal defect in the expert's performance, being the fact that the expert did not return the object of the examination, therefore results in the irreparable inconclusiveness of the expert opinion due to its uncontrollability, in the sense of civil procedure, meaning that such an expert opinion must be excluded from the scope of evidence. In the light of the above, it can be concluded that, in the case at hand, the courts made a fatal mistake from the point of view of the rule of law when they accepted the expert opinion as the basis for their judgment without criticism in the absence of the object of the examination. The final lesson of the contract law approach 'combined' with civil procedural law considerations is that, in the case at hand, there was a defective performance and the product is unsuitable for its intended use due to the legal defect, in that it is not an expert opinion but merely an argumentum ***ad hominem,*** an empty, personal slander that violates the authority of the administration of justice under the rule of law. With the

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[13] Nogel Mónika, *Az igazságügyi szakértői vélemények hitelt érdemlősége a büntetőeljárásban* (PhD thesis, 2018 Pécs) 245–246; see also in detail: Nogel Mónika, *A szakértői bizonyítás aktuális kérdései. Kézikönyv a szakértői tevékenységről és a szakvéleményről szakértőknek és jogászoknak* (HVG-ORAC 2020, Budapest). Translation by the author.

[14] See in detail: Erdei Árpád, *Tény és jog a szakvéleményben* (KJK 1987, Budapest).

[15] The present study focuses on the proceedings of ordinary courts, but the findings also apply, of course, to all official and arbitral proceedings in which an expert can be appointed. On the rules and specificities of arbitration, see for example: Boóc Ádám, *A választottbírósági ítéletek érvénytelenítése: Jogösszehasonlító elemzés és az új magyar szabályozás bemutatása* (Patrocinium 2018, Budapest) 272; and Boóc Ádám, 'Észrevételek a kereskedelmi választottbírósági ítéletek érvénytelenítéséről a közrendbe ütközés okán a magyar jogban' (2020) 75 (4) Jogtudományi Közlöny 165–173.

[16] See in detail: see page 162 of the summary opinion of the Curia's Case Law Analysis Group, 'A szakértői bizonyítás a bírósági eljárásban', dated on 19 December 2014, Budapest, under the subheading 'A követhetőség és az ellenőrizhetőség követelménye'.

above reasoning, I of course do not contest the court's right to discretion and evaluation of evidence, but I am arguing that an expert opinion without the object of examination cannot be evidence at all.

The German Federal Administrative Court recently handed down a landmark decision on this issue. It has ruled with general validity that an expert opinion that is in practice limited to a statement but does not contain either the facts on which the finding is based or the means of ascertaining those facts in a verifiable manner is materially defective and cannot be taken into account as evidence.[17]

## VIII Constitutional and Human Rights Considerations

The same result is obtained if the problem of a lost will is approached from a constitutional law perspective. In civil proceedings under the rule of law, a party interested in overturning an expert opinion may rely on a number of procedural means, but it is no exaggeration to say that all of these are effectively undermined by the absence of the object of the examination, since it becomes objectively impossible to check the veracity of the opinion and to prove against it. The starting point for the fundamental rights approach is Article XXVIII(1) of the Fundamental Law, which states that 'everyone shall have the right to have any indictment brought against him or her, or his or her rights and obligations in any court action, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act'. The right to a fair trial is the procedural, process-specific expression of the rule of law, a general expectation the precise content of which has been elaborated in recent decades by the European Court of Human Rights (ECtHR) and constitutional courts under the rule of law. As a consequence, the right to a fair trial includes a number of sub-rights or sub-requirements, but it is impossible to list them exhaustively, since both in the literature and in the practice of law, more and more new expectations are constantly being formulated, mostly in the context of specific violations of rights in individual cases. The right to a fair trial is thus also a constantly evolving and expanding abstract requirement for judicial and administrative procedures under the rule of law, which should, however, be directly enforced not only by the ECHR and the constitutional courts, but also by the constitutional institutions operating at lower levels, since the guarantee of fundamental rights – including the fairness of proceedings – cannot be independent of the adjudication of cases on the basis of specific law. The sub-justification of the right to a fair trial, which must be highlighted in the first place for the purposes of the case under examination, is the principle of equality of arms, and as part of this the possibility

[17] See in detail the decision GZ Ra 2016/19/0350 of the German Federal Administrative Court of 22 March 2017, in which the court clearly states the requirement of verifiability of the expert opinion, and also states that if a court or authority relies on an unverifiable expert opinion, this constitutes a serious omission in the investigation of the facts.

of proof and counter-proof. The right to an adversarial process is also worth mentioning. The requirement of equality of arms is essentially a fair balance between the parties, according to the case-law of the ECHR and the Constitutional Court of Hungary, and the right to an adversarial process requires that each party be given a reasonable opportunity to present its case and evidence. In the case at hand, it became objectively impossible for the party interested in overturning the expert's opinion to provide any counter-evidence to the expert's allegations, as the only possible starting point would have been the original will, which was not available because the expert did not return it. I am convinced that, in a fair procedure, only an expert opinion that is the result of a transparent, traceable and verifiable expert examination can be evidence. An essential condition for the fair acquisition of an expert opinion as evidence and a minimum requirement for the fairness of the expert procedure is that the forensic expert must return the object of the examination entrusted to them in the same condition as when they received it. Civil proceedings in which the expert is not required to do so cannot be fair. In my view, therefore, by basing their judgement without criticism of the opinion of the expert who did not return the object of the examination, the courts took a position that was blatantly contrary to the Fundamental Law.

As far as I know, there has never been a case like this before the European Court of Human Rights, as the disappearance of evidence, especially from a member of the judiciary, is an unprecedented event. However, looking at the case law in Strasbourg, it can be said that, like the constitutional courts, the ECHR treats the assessment of evidence as essentially a matter for national courts. At the same time, there has been a shift in the practice of the ECHR towards the guarantees of Article 6(1) of the Convention on the procedural treatment of evidence, in that if a piece of evidence is not obtained in the context of a fair trial, it cannot be considered as evidence. Indeed, the ECHR has ruled that the whole procedure, including the way in which the admissibility of evidence is decided, must be fair.[18] In my view, this kind of distinction, which I believe to be correct, is not yet, or only to a limited extent, characteristic of constitutional courts.

## IX A Right *in Rem* Approach

Just in case the above multi-pronged reasoning would not be sufficiently convincing, it is also useful to substantiate briefly, with arguments from a right *in rem* perspective, why the trial courts should have excluded the expert opinion without the object of examination from the scope of evidence. The starting point for answering the question from such a perspective is to explore the nature of the relationship *in rem* between the opinion and the object of examination.

[18] See for example the cases *Blucher v Czech Republic,* no. 58580/00, §52, ECHR 11 January 2005 and *Dombo Beheer B.V. v Netherlands,* no. 14448/88, § 32–34, ECHR 27. October 1993.

The object of examination and the expert opinion form an inseparable ideological unit of things and, in my view, are bound together by a kind of abstract accessory relationship. An expert opinion, as a main thing, is not fit for its intended use without the object of examination as an accessory (subordinate thing), in that it is not an expert opinion and cannot therefore be used as a basis for judgment.

## X *De Lege Ferenda*

The above raises the question as to how the court of first instance should have proceeded when the expert declared that he was unable to return the will entrusted to him. In my view, the legal institution of mistrial, as it is known in Anglo-Saxon law – primarily in criminal cases – can serve as a starting point and also as a solution to consider.[19] Of course, we cannot turn a blind eye to the differences between legal systems, so I am not advocating the adoption of the legal instrument without change, but the introduction of something similar in domestic law. Before elaborating on this, however, it is useful to examine what the trial judge should have done on the basis of the domestic legislation in force when the serious anomaly was detected, since borrowing legal institutions from foreign legal systems in order to keep the trial within the lawful framework is avoidable. It is undoubtedly an unprecedented and extraordinary event when the only evidence available in the course of a judicial procedure disappears, moreover from a public servant of justice. From this point onwards, not least because of the fundamental rights implications detailed above, the dispute goes beyond the scope of the individual case and the rule of law inevitably becomes a party to it. The response (and speed of response) of the actors of justice will determine whether Pandora's box opens or whether the rule of law is activated and its immune system is able to stop the killer disease attacking the cells in a timely manner. If, on one occasion only, a judicial verdict may be based on an expert's opinion that was drawn up without the expert having returned the object of the examination, although they should have done so, then anyone can be convicted on any trumped-up indictment, and all that is needed is an expert who, by their unverifiable and unsubstantiated statements, justifies the accusation. It hardly needs to be said that this is an evocation of dark historical times and unthinkable under the rule of law. It is precisely for this reason that the courts should have taken this long-term consequence into account when taking their position, which should have been nothing other than the immediate and unhesitating exclusion of the expert opinion from the evidence.

[19] See, for example, Article 62 of Chapter 15A of the North Carolina Code of Criminal Procedure on mistrial. This provides that a judge shall declare a mistrial, either on their own motion or upon request, if it becomes impossible to conduct the trial in accordance with law. US jurisprudence has extended the scope of the mistrial, which is usually also held when there is a serious procedural irregularity or misconduct in relation to an evidentiary matter. The legal consequence of a mistrial is to declare the proceedings null and void and to terminate them, and then to conduct them again legally, starting from the beginning.

Returning to the institution of the mistrial, which is now known in Anglo-Saxon law and can be regarded as a striking manifestation of the self-defence mechanism of the rule of law, it can be stated that it would not be incompatible with our domestic law to empower (and at the same time oblige) the judge in a trial to declare a so-called 'mistrial' in the event of certain conditions being met, but especially in the event of the rule of law being threatened. In this case, the judge could be entitled to ask for a binding and non-appealable preliminary guidance of a special panel on the procedure to be followed, as a further development of the Anglo-Saxon legal institution. Since there is a fundamental interest in reaching a final decision on a matter of major importance for the rule of law as soon as possible, the panel to be mandatorily involved by the court in such a case could consist of delegates from the Curia, the Constitutional Court and the Prosecutor General's Office. The participation of the Curia and the Constitutional Court does not require any particular explanation, while the involvement of the Prosecutor General's Office is justified by the already existing *amicus curiae* power of the body.[20]

## XI Summary

In the light of the above, and in accordance with the requirements of the rule of law and fair trial, the following conclusions can be drawn. If the expert does not return the object of the examination, although they would be obliged to do so, they cannot present their expert opinion, since they cannot perform in conformity with the contract, the expert opinion will not be fit for its intended use, meaning that it cannot be used as a basis for a judgment. If the expert nevertheless submits their opinion, the court hearing the case must immediately make it clear that the expert's opinion is excluded from evidence and must confirm this in its judgment. Since an unverifiable (uncontrollable) expert opinion cannot be evidence under the rule of law, the burden of the lack of evidence in such a case falls on the party who had an evidentiary interest in the expert's proceedings. The expert's liability for damages is twofold. In view of their strict liability of custody, the expert is liable to the owner (and depositor) of the object of the examination as a thing of pecuniary value for the loss, and, if they nevertheless submit their expert opinion and in it confirms the position of the party requesting the appointment of the expert, they are also liable to this party as the victim of the lack of evidence for which the expert is responsible.

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[20] In relation to the power of the Prosecutor General's Office as *amicus curiae*, see in detail Article 11(2)(j) of Act CLXIII of 2011 on the Prosecution Service, according to which the Prosecutor General may, in proceedings before the Curia, express their professional opinion on a question of law, representing the public interest, on their own initiative or at the request of any party, in order to unify the case law of the courts, even if the prosecutor does not participate in the proceedings. The Prosecutor General is obliged to express their professional opinion at the request of the Curia. The opinion of the Attorney General, which is not binding for the Curia, shall be communicated to the parties of the proceedings. See also: Aleku Mónika, *Közérdekvédelem az igazságszolgáltatásban. Az ügyész polgári jogi, polgári eljárásjogi és egyéb garanciális funkciója* (PhD thesis, 2022, Budapest) 237–246.

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