Does a judicial expert in Russian law enjoy immunity from civil liability or should he bear property responsibility for the quality of the conclusion prepared by him?

Um perito judicial em direito russo goza de imunidade de responsabilidade civil ou deve assumir a responsabilidade patrimonial pela qualidade da conclusão por ele preparada?

Zatonova Daria Yurievna

Abstract

Present article is devoted to the search for an answer to the question of whether a judicial expert in Russian law should bear civil (property) responsibility for drawing up an expert opinion that does not meet the requirements of the law, or the nature of the relations connecting him with the court, the procedural position of the expert and the specifics of the function performed by him, taking into account his social and individual competence determines the granting of immunity from bringing a forensic expert to property liability. In conclusion, Despite the above arguments in support of the existence of immunity, as well as the emerging approaches of Russian law enforcement practice, it seems that a forensic expert should be a subject of property liability both to the court, which has the right to refuse to pay remuneration or reduce its amount if it finds that the expert improperly fulfilled his duties to conduct an expert study, and before the parties to the court proceedings, who have the right to file an independent tort claim against him for recovery of damages caused.


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Resumo
O presente artigo é dedicado à busca de uma resposta à questão de saber se um perito judicial em direito russo deve assumir a responsabilidade civil (patrimonial) pela elaboração de uma perícia que não atenda aos requisitos da lei ou à natureza das relações a ligação ao tribunal, a posição processual do perito e as especificidades da função por ele desempenhada, tendo em conta a sua competência social e individual, determina a concessão de imunidade para responsabilizar o perito forense pela responsabilidade patrimonial. Em conclusão, apesar dos argumentos acima apresentados em apoio da existência de imunidade, bem como das abordagens emergentes da prática russa de aplicação da lei, parece que um perito forense deveria ser sujeito de responsabilidade patrimonial tanto perante o tribunal, que tem o direito de recusar o pagamento da remuneração ou reduzir o seu valor se constatar que o perito cumpriu indevidamente os seus deveres de realização de perícia, e perante as partes no processo judicial, que têm o direito de intentar contra ele uma ação ilícita independente para recuperação dos danos causados.


Introduction

Foreign countries approach the question of whether an expert should bear civil liability for the quality of the conclusion prepared by him in different ways. In some jurisdictions (for example, the UK before 2011, the USA, Australia), experts enjoy immunity from civil liability, other jurisdictions allow the involvement of an expert in civil liability, which, as a rule, is tort for example, Germany the UK after 2011 (Markesinis and Unberath, 2002). At the same time, the approaches of the same State to the issues of expert responsibility often change over time, which can be illustrated by the example of the abolition of the immunity of an expert that existed in the UK for more than 400 years as a result of the 2011 decision of the House of Lords in the Jones v Kaney case (Schermers & Blokker, 2011).

Although the problems of immunity of a forensic expert from liability have never been discussed before in the Russian doctrine, the immunity of a forensic expert is not fixed at the legislative level (Alexandrovich, 2020), and moreover, the principle of general tort is in effect, according to which any harm, including harm caused by a forensic expert, is subject to compensation in full, an analysis of Russian judicial practice shows that in the overwhelming
majority of cases the courts come to the conclusion that despite the defect of the conclusion prepared by the forensic expert, the remuneration of an expert agreed upon when appointing an expert examination cannot be reduced, especially since a complete refusal to pay it is impossible, and an independent claim filed against an expert for compensation for damages caused by him to the party of the court proceedings is not subject to satisfaction (Maggs et al., 2015). The reasons for such law enforcement practice require a more detailed study, and determine the relevance of this study.

Methods

The methodological basis of the study was the modern achievements of the theory of cognition. In the course of the research, a whole complex of research methods was used, including such methods as: the general philosophical method, the theoretical method, the dialectical method, the system method, the method of analysis and synthesis, the method of observation, the method of analogy. Among the applied methods of cognition of the external and internal forms of various phenomena of the right reality: formal-logical, method and method of comparative jurisprudence. To obtain information about the opinions of forensic experts, their assessments of social phenomena, and to clarify the state of their group and individual consciousness on the problems of the study, the method of sociological survey was used.

Results

Most of the courts, including the Supreme Court of the Russian Federation, support the legal position formulated in the precedent Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation (Definition of the Judicial Board for Civil Cases of the Supreme Court of the Russian Federation dated 14.05.2019 No. 16-KG 19-3.) in April 5, 2011 No. 15659/10 that payment of conditional remuneration to an expert cannot be refused, since "payment of remuneration to an expert is not made dependent on the compliance or non-compliance of an expert opinion with the requirements, presented by the court" (Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation dated 05.04.2011 No. 15659/10 in case No. A08-8887/2009-30).

Judicial practice also proceeds from the fact that the recognition of the conclusion of a forensic expert as inadequate evidence and the appointment of a second forensic examination
in this regard does not exclude the attribution to the parties of the costs incurred for the initial examination (Resolution of the FAS of the North Kazakhstan Region dated 13.12.2012 in case no. A32-1805/2011, Resolution of the FAS UP to 25.02.2015 No. F03-251/2015 in case No. A73-4790/2013, Resolution of the FAS VSO dated 24.11.2016 No. F02-6767/2016 in case No. A33-11257/2012.). Thus, no matter how paradoxical it may sound, Russian law enforcement practice indicates that no matter what a bad conclusion an expert has presented, he is guaranteed the payment of a conditional remuneration. Such a position puts experts in a kind of privileged position, which Russian law does not grant to any other kind of income-generating activity and indicates that de facto in modern Russian civil and arbitration proceedings (Vasileva, 2013), judicial experts enjoy immunity from bringing to property liability.

The sociological research conducted in this work allowed us to come to the conclusion that experts fully support law enforcement practice and do not consider it necessary to fix the relevant rules at the legislative level, even though the Russian legal system is not precedent-based and is focused more on compliance with legally established regulations, rather than on law enforcement practice. To study the opinion of experts, a sociological survey was prepared, consisting of two groups of questions. The first group of questions was to provide the opinion of judicial experts on whether they support the existing practice or consider it necessary to consolidate the relevant rules at the legislative level. The second group of questions was reduced to the opinion of forensic experts on the reasons for the difference in conclusions.

In order to confirm in practice the partial conclusions made during this work, the study was conducted a sociological survey of judicial experts preparing opinions on arbitration and criminal disputes working in Moscow and St. Petersburg. During the study, all respondents were divided into focus groups depending on the place of work and the direction of work (Table 1), the number of respondents in each group was the same (15 people).

<table>
<thead>
<tr>
<th>Focus Group</th>
<th>The place of the expert's activity and the direction of the examinations carried out</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Moscow, criminal proceedings</td>
</tr>
<tr>
<td>2</td>
<td>Moscow, arbitration proceedings</td>
</tr>
<tr>
<td>3</td>
<td>St. Petersburg, criminal proceedings</td>
</tr>
<tr>
<td>4</td>
<td>St. Petersburg, arbitration proceedings</td>
</tr>
</tbody>
</table>

Table 1. Determination of focus groups of forensic experts on the basis of the place of activity and the direction of the examinations carried out
Source: Authors findings

Let's look at the diagrams for each specific research question, on the basis of which we will add the initial questions to the tables.
Does a judicial expert in Russian law enjoy immunity from civil liability or should he bear property responsibility for the quality of the conclusion prepared by him?

Table 2. Description of question №1
Source: Authors findings

<table>
<thead>
<tr>
<th>Question</th>
<th>Response options</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do you support the existing practice, the existing practice, or do you</td>
<td>- I fully support</td>
</tr>
<tr>
<td>consider it necessary to consolidate the relevant rules on guaranteed</td>
<td>- no, I do not support it is necessary to legalize the rule on remuneration</td>
</tr>
<tr>
<td>payment of conditional remuneration at the legislative level?</td>
<td>- I find it difficult to answer</td>
</tr>
</tbody>
</table>

Presented data on 4 focus groups is formed at the place of activity and the direction of the examinations carried out (Figure 1.).

![Figure 1 – Diagram of the opinion of forensic experts on law enforcement practice](image)

Source: prepared by the author

Based on the data given in the diagram, it can be seen that regardless of which city or in which direction the forensic expert carries out his activities, he will support the law enforcement practice for the payment of remuneration. The next question was the question of why there may be a difference between the conclusions in the framework of the trial.

Table 3. Question №2
Source: Authors findings

<table>
<thead>
<tr>
<th>Question</th>
<th>Response options</th>
</tr>
</thead>
<tbody>
<tr>
<td>For what reason can there be a difference between the conclusions in</td>
<td>- lack of social competence of the expert;</td>
</tr>
<tr>
<td>the framework of the trial?</td>
<td>- reasons beyond the expert's control;</td>
</tr>
</tbody>
</table>

We will present data on 4 focus groups formed at the place of activity and the direction of the examinations carried out (Figure 2).
Does a judicial expert in Russian law enjoy immunity from civil liability or should he bear property responsibility for the quality of the conclusion prepared by him?

Based on the data given in the diagram, it can be seen that almost all the experts interviewed agree that the reason for the difference in expert opinions within the same process is the lack of social competence of the expert.

This makes it relevant to investigate the reasons for such an actual granting of immunity to an expert from civil liability, to identify those theoretical and practical arguments that are implicitly - in the absence of doctrinal developments and regulatory prescriptions – are the basis for decisions taken by Russian courts on this issue.

**Discussion**

To find answers to these questions, it seems necessary to turn to the experience of those states in which for many years forensic experts have been protected by immunity from any property claims against them - first of all the UK, where for more than 400 years (until the abolition of the immunity of a forensic expert in 2011 by a decision of the House of Lords in the case Jones v. Kaney) there was a detailed doctrine of immunity of a forensic expert from bringing to property liability.

Let us consider successively the arguments expressed in the Jones v. Kaney case in support of the immunity of experts, in order to determine whether these arguments "work" in relation to the Russian legal system (of course, taking into account all the differences in the
legal regulation of the status of a forensic expert in the Russian Federation on the one hand, and the UK and other states on the other).

(1) The first argument justifying the immunity of an expert is reduced to the "aversive effect" that would have on the participants in the process, in particular experts, the risk of lawsuits about behavior in the process. The establishment of immunity, it seems, was a reaction to a real (or rather, alleged) tendency on the part of the party dissatisfied with the outcome of the trial (or the defendant in the criminal process) to accuse those who testified against them of slander. In this sense, immunity initially extended to all participants in the process and represented absolute immunity against libel claims.

In common law countries, it is generally recognized that a witness has absolute inviolability (immunity) regarding what they were told in court. Otherwise, if the witness did not have immunity against the claim, he would not be able to fulfill his only duty before the court – to tell the truth – for fear of possible consequences in the form of a lawsuit from a party that his testimony does not suit. Since in the UK it is considered that an expert is a kind of kind of witness, it seems quite logical to conclude that the immunity against the claim granted to witnesses extends to experts.

The validity of the existence of the expert's immunity was questioned, primarily because the judges in the Jones v. Kaney case saw "a significant difference between expert witnesses and witnesses of fact", consisting in the fact that the expert assumes obligations to the client under the contract for remuneration, while the witness of the fact, obviously, does not has a similar motive for testifying. From these positions, the status of an expert is closer not to a witness of the fact, but to a representative who also assumes the duties of representing the client's interests under an agreement with the client for remuneration. And the immunity of barristers against the claim was revoked even earlier in the case of Arthur Hall and Simons (Arthur et al., 2000). In this sense, there were grounds for raising the question of whether the immunity of experts against the claim should be valid in the UK.

It should be noted that after the Jones v. Kaney case, a lawsuit can be filed against the so-called friendly experts, but not against the expert of the opposite party (inverse experts). The courts in the UK are unanimous in the opinion that civil lawsuits against experts of the opposite party are not allowed, because the inverse experts are protected by immunity from the claim provided to witnesses of the fact. The Adverse experts do not have any professional duties towards the opposite party, and therefore there is no basis for a claim for violation of these duties (Schanzenbach & Sitkoff, 2020).
A similar approach can be found in US law. Thus, the U.S. Supreme Court in 1983 in the case of Briscoe v. La Hue recognized the effect of the immunity of witnesses of fact, indicating that the immunity of witnesses is a long-established principle of American law. After that, the courts followed the path of expanding the validity of witness immunity. It was extended to witness statements given during the preliminary hearing of the case; to experts appointed by the court; to experts against the claim of the opposite party. In 1989, the Washington Supreme Court in Bruce v. Byrne – Stevens & Assoc. Engineers, Inc. For the first time, I addressed the issue of immunity of friendly experts. Then the court granted the friendly expert immunity from the lawsuit, using the same arguments that were the basis for decisions regarding witnesses, experts appointed by the court, and experts of the opposite party. However, then the approach to the immunity of friendly experts began to change. In 1992, the California Court of Appeals, in the case of Mattco Forge v. Arthur Young & Co., concluded that immunity no longer protects friendly experts. Subsequently, a number of other courts of various states came to a similar conclusion about the non-proliferation of immunity to friendly experts.

In the Russian legal system, where the investigative, and not adversarial (as in the countries of Anglo-Saxon law) model of the appointment of expertise is implemented, the problem of the presence or absence of immunity of a friendly expert for obvious reasons does not arise, because only an expert appointed by the court, who is not bound by any substantive legal relations with the parties to the case under consideration.

But this does not remove the severity of the problem of civil liability of an expert appointed by the court. As we have just seen, both in the UK and in the USA, the cancellation of the immunity of a friendly expert did not affect the immunity that experts appointed by the court continue to use. Does this mean that in the Russian Federation, where a forensic expert is always appointed by the court, he should enjoy immunity from being held liable for property liability?

It seems that immunity can potentially justify the very function performed by the expert. The expert, being a carrier of special knowledge, presents to the customer (whether it is a court or another customer of an expert study) no more than his professional opinion on the issue under consideration, which may also be of a probabilistic nature. The fear of future responsibility for the professional judgment expressed may limit the expert in the freedom of its formulation and even lead to a refusal to provide this service to the court, which will negatively affect the interests of justice (Rhode, 2003).
(2) The second argument (the so-called "divided loyalty" argument) in support of expert immunity has its roots in the opposition of two types of expert duties: duties to the court and duties to the client. In the countries of Anglo-Saxon law, as is known, there is an adversarial model of appointment of expertise, according to which the expert is appointed not by the court, but by the parties who conclude a contract with the expert and pay for his services.

From this point of view, it would seem that if a party enters into a civil contract with an expert, then the expert has obligations to the client from the concluded contract, first of all, the duty of care for the interests of the client (duty of care), which means that the client has the right to sue the expert out of negligence if the expert violates the duty of care about the interests of the client arising from the concluded contract. But this can potentially lead to the fact that the expert, fearing the possibility of bringing a lawsuit against him in the future, will in the vast majority of cases act guided by the interests of the client, thereby neglecting his duty to the court, which is to tell the truth even when it is not in the interests of the client. That is why, prior to the Jones v. Kaney case, it was believed that the expert had immunity from civil liability, and therefore the possibility of a claim against him by a dissatisfied client was excluded. Thus, immunity was granted to the expert so that he could fulfill his "highest duty" to the court, even if it was not in the interests of the client (Lippmann, 2020).

In the Russian legal system, there can be no question of two opposing duties of an expert – duties to the court and duties to the client – because the expert has no other duties than duties to the court, therefore, at first glance, the argument "about shared loyalty" does not matter for Russian law (Mikkelson, 1998). Meanwhile, under Russian law, the parties are not deprived of the right to submit to the court the conclusion of a pre-trial expert in support of their own position, in some cases the law predetermines the mandatory participation of an expert in a particular area of special knowledge at the pre-trial stage of the development of a dispute about law (Ivkovic, 2007).

The question arises: in a situation where a pre-trial examination was conducted, and then a forensic examination, which came to conclusions significantly different from the conclusions of the pre-trial expert, is the party to the case, which was in contractual legal relations with the pre-trial expert, entitled to recover from the latter losses caused by poor-quality pre-trial examination? It seems that in Russian law there are neither legal nor political-legal grounds for granting non-judicial experts immunity from bringing a claim by the person who acted as the customer of the expert study. The specifics of the function performed by the holders of special knowledge may justify the consolidation of the immunity of a judicial
expert, but it is not capable of acting as a reason for granting immunity to an extra-judicial expert.

(3) The third argument in support of the expert's immunity is reduced to an extremely undesirable risk for justice of an out-of-court review of an already resolved case. The absence of the expert's immunity threatens the appearance of so-called "side" claims, during consideration of which the evidentiary value of the expert's opinion would be checked over and over again, and the case would in fact be reviewed repeatedly for the same circumstances, bypassing the court of appeal.

In Russian law, the problem of the inadmissibility of side processes is also raised. So, according to p. 11 Resolution of the Plenum of the Supreme Court of the Russian Federation dated 24.02.2005 No. 3 "On judicial practice in cases of protection of the honor and dignity of citizens, as well as the business reputation of citizens and legal entities" in the event that the information about which the dispute arose was reported during the consideration of another case by the persons involved in it, as well as witnesses in respect of the persons involved in the case were evidence in this case and were evaluated by the court when making a decision, they cannot be challenged in the manner provided for by art. 152 of the Civil Code of the Russian Federation, since the norms of the CPC of the Russian Federation and the CPC of the Russian Federation establish a special procedure for the study and evaluation of these proofs. Such a requirement, in essence, is a requirement for a re-judicial assessment of this information, including a re-evaluation of evidence in previously considered cases." In other words, the position of the Supreme Court boils down to the inadmissibility of side processes in which a person who participated in the case and believes that information that does not correspond to reality has been disseminated against him would refute a court decision that has entered into legal force, in which the evidence was assessed by the court as reliable. Let it be implicit, but, in fact, these clarifications fix nothing more than immunity from prosecution (immunity from libel claims in the process), provided precisely because of the danger of side processes.

If we abstract from the arguments in support of immunity discussed in the Jones v. Kaney case and reflect on why Russian judicial practice adheres, at first glance, to the absolutely paradoxical position that the work of a forensic expert must be paid in any case, even if his conclusion was recognized as inadmissible evidence by virtue of defects made by the expert, one can single out another argument justifying the granting of immunity to the forensic expert. It consists in the fact that the refusal to pay the stipulated remuneration always affects the property status of the expert. Whenever the fate of the property claims of any
participant in legal relations is decided, he must be guaranteed judicial protection of his rights. This means that the expert must have a procedural opportunity to defend his right to receive payment, proving that the research he has performed is of high quality. But the expert is not a person participating in the case under Russian law, he does not bear the burden of proving the correctness of his conclusions, which means that his property claim for payment does not have procedural forms of judicial protection. That is why the Russian courts consider it necessary to grant the judicial expert immunity, the effect of which creates guarantees that the expert will receive remuneration.

Conclusions

Despite the above arguments in support of the existence of immunity, as well as the emerging approaches of Russian law enforcement practice, it seems that a forensic expert should be a subject of property liability both to the court, which has the right to refuse to pay remuneration or reduce its amount if it finds that the expert improperly fulfilled his duties to conduct an expert study, and before the parties to the court proceedings, who have the right to file an independent tort claim against him for recovery of damages caused.

In our opinion, neither the function of providing professional judgment, which presupposes discretion in its expression, nor the presumption of proper performance of duties by an expert, nor the need to provide an expert with freedom of expression of professional opinion without fear of being subjected to property claims by dissatisfied participants in the process, nor the extremely undesirable risk for the interests of justice of an out-of-court review of the case can serve as a basis for granting judicial the expert is immune from property liability. This is confirmed by the operation of the principle of general tort in Russian law (Article 1064 of the Civil Code of the Russian Federation), according to which any harm, including harm caused by procedural activity, is subject to compensation, since any harm is assumed to be unlawful. The principle of general tort can be perceived as a universal provision on compensation for any damage caused, which is characterized by extreme abstraction, and includes compensation for damage caused by the actions of a forensic expert. A judicial expert should not be immune from the application to him by the court considering the case and evaluating the result of the work carried out by him, measures of limited civil liability in the form of refusal to pay/reduce the amount of remuneration due to the expert as a reaction to the improper performance by the expert of duties existing in relation to the court. The recognition of the possibility of refusing to pay/reducing the amount of remuneration due to
the expert meets the interests of the administration of justice much more than the full immunity of the expert from bringing to property liability, which does not allow the court to stop the unfair actions of the forensic expert who evades the proper performance of the duties assigned to him.

The need to guarantee judicial protection of the property rights of an expert in the event of grounds for refusal to pay/reduce the amount of remuneration justifies giving him a full set of procedural rights of a person participating in the case when resolving this issue: the issue of refusal to pay/ decrease the amount of remuneration is subject to consideration at a court hearing with the participation of a forensic expert to provide him with the opportunity to defend the quality of the compiled they need an expert opinion.

In result, the failure of a forensic expert to fulfill his duties to the court may potentially cause the parties to the proceedings both harm, expressed in real damage and lost profits, and purely economic losses, which are subject to compensation in full if the following conditions are met: (a) the expert's fault in the form of intent or gross negligence, (b) the causal relationship between the actions of the forensic expert and the occurrence of harm or economic losses to the victim, (c) preliminary - in a case in which the examination is ordered by the court – the court's finding of improper performance by the expert of the duties assigned to him.

Thus, immunity can protect a forensic expert from being held liable for property liability only if the court has recognized his conclusion as admissible and reliable evidence. Otherwise, the expert should be liable in case of non-fulfillment of his obligations to submit an expert opinion of appropriate quality both to the court as the customer of the expert study and to the parties to the case who could have suffered losses as a result of the expert's actions.

Reference


Definition of the Judicial Board for Civil Cases of the Supreme Court of the Russian Federation dated 14.05.2019, No. 16-KG 19-3.
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