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## The Role of an Expert Witness Psychologist in the Examination of a Child Pursuant to Article 185a and 185b of the Code of Criminal Procedure – the Evaluation of Legal Regulations<sup>1</sup>

### Abstract

The Article describes the role of an expert witness psychologist in the examination of an aggrieved minor and a minor witness carried out pursuant to Articles 185a and 185b of the Code of Criminal Procedure. The role is presented within the context of selected aspects connected with the activities of an expert witness psychologist at the examining of a child in criminal procedure. Shortages in current solutions have also been noted. Furthermore, as regards the said shortages, *de lege ferenda* postulates were formed.

**Keywords:** child psychologist, expert witness psychologist, examination of a minor, aggrieved minor, minor witness, criminal procedure.

### Introduction

There is no doubt that amongst expert witnesses of various specialties, an expert witness psychologist has a key role in a Polish criminal procedure<sup>2</sup>. This

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<sup>1</sup> Tłumaczenie tekstu artykułu zostało opracowane przez: “Uniprojekt” Projektowanie i Tłumaczenia Grupa Grzegorz, ul. Dąbrowskiego 4, 42-200 Częstochowa.

<sup>2</sup> K. Eichstaedt, [in:] *Metodyka pracy biegłego psychiatry, psychologa oraz seksuologa w sprawach karnych nieletnich oraz wykroczeń* [Work Methodology of an Expert Witness Psychiatrist, Psychologist, and Sexologist in Criminal Cases Involving Minors and Misdemeanours], eds. K. Eichstaedt, P. Gałęcki, A. Depko, Warsaw 2017, p. 92.

role is especially important during the examination of a minor which is settled by Articles 185a and 185b of the Code of Criminal Procedure (hereinafter: CCP)<sup>3</sup>. Participation of an expert witness psychologist in this procedural activity is obligatory and the role involves giving an opinion about the mental and emotional condition of a child<sup>4</sup>. However, these are not the only tasks which are faced by a psychologist participating in the examination of a child.

The purpose of this article is an analysis and evaluation of legal regulations governing the examination of a child. It will be carried out within a context of a role that should be played by a psychologist in such proceedings. Under the Code of Criminal Procedure, the analysis will be limited to Articles 185a and 185b of the Code of Criminal Procedure. The said provisions settle a specific nature of examining a child. There is no doubt that the legal nature of examination is influenced by other provisions of the Code of Criminal Procedure, thus influencing the perception of the role of an expert witness psychologist in the examination of a child. However, their analysis and evaluation would go beyond the frameworks of this article.

## 1. Legal regulations concerning the examination of an aggrieved minor and a minor witness

Article 185a (examination of an aggrieved minor), and Article 185b (examination of a minor witness) of the Code of Criminal Procedure settle the manner of examining a minor with the participation of an expert witness psychologist<sup>5</sup>.

Pursuant to Article 185a of the Code of Criminal Procedure, in cases concerning crimes with violence or unlawful threat, or cases defined in chapters XXIII (“Crimes against freedom”), XXV (“Crimes against sexual freedom and decency”), and XXVI (“Crimes against family and custody”), the aggrieved party who is under 15 years of age at the time of examination (limitation of age)<sup>6</sup> shall be examined

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<sup>3</sup> Act of 6 June 1997 – Code of Criminal Procedure (unified text of the Official Journal of Laws of the Republic of Poland [Dz. U.] of 1997, no. 89, item 555, the Official Journal of Laws of the Republic of Poland [Dz. U.] of 2020, item 30).

<sup>4</sup> *Code of Criminal Procedure. Volume II. Comments to Articles 167–296*, eds. R. Stefański, S. Zabłocki, published in: WKP 2019, www.sip.lex.pl [access: 24.02.2021].

<sup>5</sup> As noted by A. Kusior: “An expert witness is a specialist in a given field, an expert, an individual called by an authorised procedural body to assess or observe certain circumstances, learning, evaluation or explanation of which requires special knowledge, and to give their opinion following observations or assessments. Accepting the function of an expert witness in a criminal case is obligatory”, R. Kusior, *Udział biegłego psychologa w przesłuchaniu dziecka [The Participation of an Expert Witness Psychologist in the Examination of a Child]*, “Prokuratura i Prawo” [“Prosecutor’s Office and Law”] 2010, no. 4, p. 45.

<sup>6</sup> K. Eichstaedt, [in:] *Metodyka pracy biegłego psychiatry, psychologa oraz seksuologa w sprawach karnych nieletnich oraz wykroczeń [Work Methodology of an Expert Witness Psychiatrist, Psychologist, and Sexologist in Criminal Cases Involving Minors and Misdemeanours]*, eds. K. Eichstaedt, P. Galecki, A. Depko, Warsaw 2017, p. 155.

as a witness only if their testimony may be of significance for the case settlement (e.g. testimony of an aggrieved party should contribute to the determination of a perpetrator of a forbidden act and its circumstances<sup>7</sup>), and there may only be one examination, unless there are essential circumstances explanation of which requires re-examination, or if this is demanded by a defendant who had no defence counsel during first examination of an aggrieved party (§ 1). Such examination is carried out by a court at a hearing participated by an expert witness psychologist immediately of the request receipt, not later however than within 14 days. However, the absence of a psychologist at such examination prevents the court from carrying out the examination<sup>8</sup>.

Such examination may be participated by a prosecutor, defence counsel, and representative of an aggrieved party. Furthermore, an individual stipulated in Article 51 § 2 of the Code of Criminal Procedure (i.e., statutory representative or a person in the care of whom is the aggrieved party if the aggrieved party is a minor or partially or completely incapacitated person) or an adult indicated by an aggrieved party, referred to in § 1, is also entitled to be present at the examination should it not limit the freedom of speech of the examined individual. If the defendant notified upon this procedure has no defence counsel of choice, the court appoints a defence counsel (§ 2). This provision also defines that at the main hearing, the voice and image recording from the examination is played, and the report of examination is read.

It has to be also noted that in cases involving the aforesaid crimes, an aggrieved minor, who at the time of examination is 15 years or age, is examined in the same conditions as an aggrieved party who at the time of examination has not yet turned 15 years of age should there be a justified concern that examination pursuant to another manner could harm their mental condition. In such an event provisions of Article 185c shall not be applied (§ 4).

The above legal regulation has been supplemented by legal norms arising from Article 185b of the Code of Criminal Procedure concerning the examination of minor witnesses<sup>9</sup>. In the light of this provision, the examination of a minor witness who at the time of examination is under 15 years of age shall be carried out by the court with the participation of an expert witness psychologist under terms and conditions defined in Article 185a § 1–3 should:

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<sup>7</sup> A. Orzechowska, K. Eichstaedt, P. Gałęcki, *Udział biegłego psychologa w przesłuchaniu świadka w świetle polskiego prawa karnego* [The Participation of an Expert Witness Psychologist in the Examination of a Witness in the light of Polish Criminal Law], "Psychiatr.Pol.ONLINE FIRST", no. 178:1–13, p. 6.

<sup>8</sup> A. Orzechowska, K. Eichstaedt, P. Gałęcki, *Participation...*, op. cit., p. 6; K. Eichstaedt, [in:] *Work Methodology...*, op. cit., p. 157.

<sup>9</sup> M. Kurowski, *Comments to Article 185b of the Code of Criminal Procedure*, [in:] eds. D. Świecki, B. Augustyniak, K. Eichstaedt, *Code of Criminal Procedure. Volume I. Updated comment*, published in: LEX/el. 2020, www.sip.lex.pl [access: 8.02.2021].

- 1) the conducted criminal proceedings regard crimes with violence or unlawful threat or crimes defined in chapters XXV (“Crimes against sexual freedom and decency”), and XXVI (“Crimes against family and custody”) of the Criminal Code;
- 2) witness testimony could be of significance for the case settlement (§ 1)<sup>10</sup>.

On the other hand, in cases concerning the aforesaid crimes, a minor witness who at the time of examination turned 15 years of age is examined pursuant to Article 177§1a (i.e. using technical equipment which makes it possible to conduct such procedure at distance, transmitting image and sound live. Proceedings before the court in the place of stay of a witness must be participated by a court referendary, judge assistant, or an officer employed by the court in which jurisdiction stays the witness) if there is a justified concern that the direct presence of a defendant during examination could bring discomfort to the testimony of a witness or could have a negative impact on their mental condition (§ 2).

The above legal regulation regards mainly two institutions: examination of an aggrieved party or examination of a witness. The common denominator for these institutions is the fact that their object is the participation of a minor in a procedural examination. As a consequence, irrespective of undoubtful differences from differentiation between the procedural position of an aggrieved party and procedural position of a witness, the mentioned common denominator justifies the participation of an expert witness psychologist in such a procedural activity as well as perceiving the role of a psychologist in its entirety.

Moreover, it has to be noted that the aforesaid regulations of criminal procedure do not define the principles and course of the child examination<sup>11</sup>, or they do not define the role of an expert witness psychologist at the examination of the minor. The matter is additionally complicated by the provisions of an Act on the profession of the psychologist and the professional self-government of psychologists (hereinafter: A.P.P.)<sup>12</sup>, which, as correctly defined by L.J. Żukowski, are a classical example of the so called “dead law”<sup>13</sup>. The issue is the fact that the Act is formally binding, but it is ineffective<sup>14</sup>.

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<sup>10</sup> A. Orzechowska, K. Eichsteaedt, P. Gałecki, *Participation...*, op. cit., p. 7.

<sup>11</sup> A. Antoniak-Drożdż, *Przesłuchanie dziecka w procesie karnym – uwagi praktyczne [The Examination of a Child in Criminal Procedure – Practical Notes]*, “Prokuratura i Prawo” [“Prosecutor’s Office and Law”] 2006, no. 6, p. 46.

<sup>12</sup> Act of 8 June 2001 on the profession of the psychologist and the professional self-government of the psychologists (the unified text of the Official Journal of Laws of the Republic of Poland [Dz. U.] of 2001, no. 73, item 763, the Official Journal of Laws of the Republic of Poland [Dz. U.] of 2019, item 1026).

<sup>13</sup> L.J. Żukowski, *Zawód psychologa w ochronie zdrowia [The Profession of a Psychologist and Healthcare]*, Warsaw 2017, p. 14. It should be noted that “Z. Kmiecik differentiates three factors which determine the effectiveness of administrative and legal regulations: 1) functional, 2) organizational, and 3) environmental”. [...] “The analysis of the wording of the Act on the profession of the psychologist and its effects makes it possible to make a conclusion that all the three factors failed”, L.J. Żukowski, *The Profession...*, op. cit., p. 15 and the referenced literature.

<sup>14</sup> L.J. Żukowski, *The Profession of...*, op. cit., p. 14.

## 2. The significance of an expert witness psychologist

It is underlined in the literature that the main goal of the above presented regulations in the Code is to ensure appropriate conditions to make testimony by a witness, as well as to protect the child against another harm<sup>15</sup>. Each of these two elements is a determinant of a role which a psychologist should have during examination.

In the aspect of a role of an expert witness psychologist connected with ensuring appropriate conditions for the examination of a minor, the attention should be drawn to the Regulation of the Minister of Justice on the manner of preparation of examination conducted pursuant to Article 185a-185c of the Code of Criminal Procedure (hereinafter: the Regulation). Pursuant to §3(1) of the Regulation, already before the examination, an expert witness psychologist carries out an initial talk with a witness in the examination room to make contact, determine individual needs of the witness, and to lower the anxiety level, if needed.

On the other hand, as regards the role of an expert witness psychologist connected with the protection against secondary victimization, it must be indicated that such protection is expressed not only by care for a safe examination of a minor participated by a psychologist, but also by considering a minor's interest prior to and after testimony<sup>16</sup>. For example, A. Gadomska-Radel indicates a wide and narrow significance of prevention against secondary victimization<sup>17</sup>. In a wide meaning, prevention against secondary victimization means prevention against another, similar violation of rights of a given victim<sup>18</sup>. On the other hand, a narrow approach to secondary victimization is expressed in the prevention of insti-

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<sup>15</sup> J. Lipovsky, P. Stern, *Przygotowanie dziecka do roli świadka w sądzie – podejście interdyscyplinarne* [Preparation of a Child to the Role of a Witness at Court – Interdisciplinary Approach], „Dziecko Krzywdzone” [“Aggrieved Child”] 2004, no. 6, p. 19, K. Chmielewska, *Ochrona przesłuchiwanym dzieci* [Protection of Examined Children], Warsaw 2013, p. 9, <https://brpd.gov.pl/2013/11/06/ochrona-przesluchiwanym-dzieci/> [access: 4.02.2021]; P. Czarniecki, *Pokrzywdzony jako źródło dowodowe w postępowaniu karnym* [Aggrieved Party as the Source of Evidence in Criminal Procedure], “Zeszyty Naukowe Uniwersytetu Rzeszowskiego. Seria Prawnicza” [“Scientific Notebooks of the University of Rzeszów. Legal Series”] 2019, notebook no. 105, p. 31; A. Łakomy, *Przesłuchanie małoletniego w świetle nowelizacji kodeksu postępowania karnego* [Examining of a Minor in the Light of Novelization of the Code of Criminal Procedure], “Ius Novum” 2016, no. 1, p. 43–44.

<sup>16</sup> A. Budzyńska, *Ochrona małoletnich pokrzywdzonych przestępstwem w procedurach karnych. Perspektywa psychologiczna* [Protection of Minors Aggrieved by Crimes in Criminal Procedures. Psychological Perspective], [in:] eds. A. Budzyńska, O. Trocha, L. Mazowiecka, *Dziecko uczestniczące w postępowaniu karnym* [Child Participating in Criminal Procedure], Warsaw 2015, p. 41.

<sup>17</sup> A. Gadomska-Radel, *Przesłuchanie dziecka jako ofiary i świadka przestępstwa w procesie karnym* [The Examination of a Child as a Victim and as a Witness of a Crime in Criminal Proceedings], Warsaw 2015, p. 160.

<sup>18</sup> Ibidem.

tutional victimization of victims due to inadequate activities of judicial authorities and cooperating institutions, which guarantee respect for the integrity of a victim and their needs, as well as treatment with dignity<sup>19</sup>. Moreover, secondary victimization may be both of formal and informal nature<sup>20</sup>. It is also noticed in literature that secondary harm can be experienced due to various factors, e.g., reaction of the nearest surrounding or friends/colleagues from school/ work place<sup>21</sup>. Therefore, as properly pointed out by A.Gadomska-Radel,

[...] preventing secondary victimization of those aggrieved by a crime, thus exposing them to new or deepened damage due to health impairment resulting from the crime, irrespective of the fact if it was caused by the perpetrator or prosecuting authority, is built in the purposes of criminal proceedings<sup>22</sup>.

In the context of an expert witness psychologist, it must be noted that the examination of a minor in criminal procedure is very difficult<sup>23</sup> and requires extensive knowledge about child's development in all its aspects<sup>24</sup>, as well as thorough preparation by procedural bodies (court, prosecutor's office, or the police) which carry out such procedural activity<sup>25</sup>.

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<sup>19</sup> Ibidem, p. 160–161.

<sup>20</sup> K. Chmielewska, *Protection...*, op. cit., p. 14.

<sup>21</sup> Ibidem.

<sup>22</sup> A. Gadomska-Radel, *The Examination...*, op. cit., p. 160 and the referenced literature. What is more, as pointed out by C. Kulesza: "Functions of standards of criminal procedure understood as the entirety of criminal law standards are goals which must be obtained towards the parties to the proceedings, other participants of criminal proceedings, the justice system itself and society", [in:] C. Kulesza, *Comments to Article 2 of the Code of Criminal Procedure*, [in:] ed. K. Dudka, *Code of Criminal Procedure*, ed. II, published in: WKP 2020, www.sip.lex.pl [access: 8.02.2021].

<sup>23</sup> K. Szczehowicz, *Ochrona małoletniego świadka w postępowaniu karnym – wybrane aspekty* [*Protection of a Minor Witness in Criminal Proceedings – Selected Aspects*], „Studia Prawnoustrojowe” [“The Constitutional and Legal Studies”] 2020, no. 49, p. 317.

<sup>24</sup> D. Smolarek-Kędziołek, *Przesłuchanie dziecka w charakterze świadka w postępowaniu karnym – wybrane aspekty prawne i psychologiczne* [*The Examination of a Child as a Witness in Criminal Procedure – Selected Legal and Psychological Aspects*], „Krytyka Prawa” 2015, vol.7, p. 454, and the referenced literature. “From the point of view of procedural activities carried out with the participation of minor witnesses, periodization made by T. Hanausk is worth paying attention to. [...] “According to this division, the stages of a child's development considered at the examination were defined in three periods of age: pre-school (3–7 years old), school (7–12 years old), and adolescence (12–18 years old)”, D. Smolarek-Kędziołek, *Examination...*, op. cit., p. 454; A. Stein, *Widzę, że się boisz* [*I see you are afraid*], „Psychologia dziecka” [“Child's Psychology”] 2020, no. 3, p. 35; E. Gruza, *Psychologia sądowa dla prawników* [*Court Psychology for Lawyers*], Warsaw 2012, p. 137 et al.

<sup>25</sup> M. Kornak, *Małoletni jako świadek w procesie karnym* [*Minor as a Witness in Criminal Procedure*], Warsaw 2009, p. 120 et al.; K. Szczehowicz, *Protection...*, op. cit., p. 317; A. Budzyńska, *Protection...*, op. cit., p. 52. The author, who is a court psychologist fairly states that: “Both the lawyers who carry out procedural activities with the participation of minors as well as expert witnesses should be prepared to do so. They should have knowledge on the development and on the clinical psychology of a child, know the principles of making contact with them and the examination techniques, as well as be characterized by empathy and patience”, p. 52.

What is more, it must be noted that in the provisions of a Code of Criminal Procedure no term “child examination” is used<sup>26</sup>, but only the following expressions: “the examination of an aggrieved party under 15 years of age” (Article 185a of the Code of Criminal Procedure) or “the examination of a witness under 15 years of age” (Article 185b of the Code of Criminal Procedure). Using the terms “an aggrieved party” or “a minor” in these provisions is coherent with the terminology of criminal procedure. However, it seems that these provisions lack the word “child” which may hinder noticing a specific nature of the examination they refer to. It may indirectly influence not completely appropriate perception of the role of an expert witness psychologist.

In the meantime, procedural bodies which carry out such procedural activity should consider that they deal with the developing psyche of a young human being<sup>27</sup>, a person, who is especially prone to suggestions of others, e.g. parent, teacher, or authority which carries out the examination. A child<sup>28</sup> is a specific witness, who does not understand the criminal procedure it participates in, and what is even worse, a child often feels guilty of the legal situation<sup>29</sup>. Furthermore, as fairly pointed out by A. Gadomska-Radel:

Depending on the level of development, a child has different ability of perception, remembering, or recalling certain events, and ordering observed phenomena in a logic entirety<sup>30</sup>.

Therefore, a child should be protected in particular during examination, which brings stress and negative experiences<sup>31</sup>. From the psychological point of view, ensuring effective protection for minors harmed by a crime covers all actions protecting the child against secondary victimization<sup>32</sup>. An examination is a special form of interpersonal communication, in which on one side there is a person carrying out examination, who represents authorities (e.g. court, prosecutor), evaluates the examined party and observes their behaviour, and on the other side,

<sup>26</sup> V. Kwiatkowska-Darul, *Przesłuchanie dziecka w polskiej procedurze karnej – zagadnienia ogólne* [The Examination of a Child in Polish Criminal Procedure - General Issues], p. 1 (article in a form 145–228–1-SM (1).PDF – 11.02.2021); D. Smolarek-Kędziorek, *The Examination...*, op. cit., p. 460–461.

<sup>27</sup> A. Gadomska-Radel, *The Examination...*, op. cit., p. 159.

<sup>28</sup> Pursuant to Article 2 of the Act of 6 January 2020 on the Ombudsman for Children (the unified text of the Official Journal of Laws of the Republic of Poland [Dz. U.] of 2000, no. 6, item 69, the Official Journal of Laws of the Republic of Poland [Dz. U.] of 2020, item 141) “1. Under the Act, a child is every human being from conception until adulthood. 2. Reaching the adult age is defined by a separate provisions”.

<sup>29</sup> O. Trocha, *Ochrona małoletniego pokrzywdzonego w postępowaniu karnym Perspektywa prawna* [Protection of an Aggrieved Minor in Criminal Procedure. Legal Perspective], [in:] eds. A. Budzyńska, O. Trocha, L. Mazowiecka, *Dziecko uczestniczące w postępowaniu karnym* [Child Participating in Criminal Procedure], Warsaw 2015, p. 11.

<sup>30</sup> A. Gadomska-Radel, *The Examination...*, op. cit., p. 159.

<sup>31</sup> K. Szczechowicz, *Protection...*, op. cit., p. 317; E. Gruza, *Psychology...*, op. cit., p. 137.

<sup>32</sup> A. Budzyńska, *Protection...*, op. cit., p. 41.

there is a child who is often aggrieved by the crime<sup>33</sup>. There is no doubt that a psychologist plays a key role in this demanding activity<sup>34</sup>, who is a court expert witness, thus a person with special information that is of significance for the case settlement. An expert witness psychologist should protect the child against negative emotional effects connected with participation in the examination<sup>35</sup>. The role of such an expert witness psychologist is not only active participation in the procedural activity and a psychological assessment of the aggrieved person/witness, but mainly appropriate preparation and support for a child during examination<sup>36</sup>. It is also very important that an expert witness psychologist should provide the judge with information obtained about a child when preparing the child for examination<sup>37</sup>. This, in particular, involves the manner of making the questions, the possibility to respond to questions by a child, and indicating tips for carrying out procedural activities with the participation of a child, depending on the age<sup>38</sup>.

### 3. Child psychologist

Analysing the role of an expert witness psychologist, it seems grounded to make a question whether an expert witness psychologist, referred to in Articles 185a and 185b of the Code of Criminal Procedure, should be or even has to be a psychologist who only deals with the issue of examining children in order to properly protect the child who participates criminal procedure. What are thus requirements which should be met by a psychologist who becomes an expert witness during a minor examination?

First of all, it must be noted that the Act on the profession of the psychologist does not use the term “child psychologist” or “children psychology”. Pursuant to Article 3 of the Act on the profession of the psychologist, the profession of a psychologist can be carried out by a person who meets the requirements defined by the Act. On the other hand, pursuant to Article 7 of the Act on the profession of the psychologist, the right to carry out the profession of a psychologist is granted at the entry on the list of psychologists kept by the District Chamber of Psychologists. The administrative law defines such entry as the entry fulfilling

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<sup>33</sup> Ibidem.

<sup>34</sup> L.J. Żukowski, *Zawód psychologa w ochronie zdrowia. Reglamentacja prawnoadministracyjna* [The Profession of a Psychologist and Healthcare. Legal and Administrative Regulation], Warsaw 2017, p. 3 et seq.

<sup>35</sup> A. Budzyńska, *Protection...*, op. cit., p. 54.

<sup>36</sup> A. Budzyńska, *Psycholog w roli biegłego sądowego* [Psychologist as an Expert Witness], „Dziecko krzywdzone” [“Aggrieved Child”] 2007, no. 4, p. 2.

<sup>37</sup> How to organize the examination of a child pursuant to Article 185a and Article 185b of the Code of Criminal Procedure jak-zorganizowac-przesluchanie-dziecka-w-trybie-art.-185a-i-185b-kpk.pdf [access: 11.02.2021].

<sup>38</sup> Ibidem.

the administrative act, which means that it is preceded by issuing an appropriate decision in a given matter<sup>39</sup>. As a result, as mentioned by L.J. Żukowski,

the right to carry out the profession of a psychologist is only given at making the entry and must be preceded by the existence of a relevant resolution which nature (positive or negative) depends on prerequisites defined in Article 8(1)(1–4) of the Act on the profession of the psychologist<sup>40</sup>.

On the other hand, in the light of Article 8(1) of the Act on the profession of the psychologist, only a person who meets all of the following conditions is entered into the list of psychologists:

a person obtained a Master's diploma at a Polish University or obtained education abroad which is considered equally valid in the Republic of Poland,

- 1) a person has full capacity to perform acts in law,
- 2) a person uses spoken and written Polish at a level necessary to perform the profession of a psychologist,
- 3) a person completed a post-graduate professional internship under the supervision of a psychologist who has the right to carry out the profession, who is liable for professional activities of the intern psychologist.

Entry to the list of psychologists is made by the Counsel of the District Chamber of Psychologists at the request of an applicant. The list is kept by the District Chamber of Psychologists competent for the applicant's place of residence. The basis for entry is the resolution of the Counsel of the Regional Chamber of Psychologists (Article 8(3) of the Act on the profession of the psychologist).

On the other hand, pursuant to Article 20 of the Act on the profession of the psychologist, members of the self-government of psychologists are subject to disciplinary liability for: 1) culpable violation of professional obligations, 2) activities which contradict the ethics principles defined in the Code of Professional Ethics, referred to in Article 40(3), 3) repeated avoidance of paying membership subscription fees. On the other hand, only in Article 61 of the Act on the profession of the psychologist, the law maker provided a criminal liability for such persons who provide psychological services without the right to carry out the profession of a psychologist.

Secondly, the Ethical Code of Psychologists of the Polish Psychologists' Association (hereinafter: PPA)<sup>41</sup> also does not define a child, in particular definitions of protection for minors against negative emotional effects connected with an examination in criminal procedure. In article 2. "General Principles", in item 4.1., a general clause is presented according to which

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<sup>39</sup> L.J. Żukowski, *Profession...*, op. cit., p. 18 and the referenced literature.

<sup>40</sup> Ibidem.

<sup>41</sup> <http://www.ptp.org.pl/modules.php?name=News&file=article&sid=768T> [access: 18.02.2021] – Ethical Code of a Psychologist was approved by a General Meeting of Delegates of the Psychologists' Association on 2 December 2018.

a psychologist acts respecting human rights and human dignity, appreciating the unique value of every person. They respect the right of a recipient to autonomy and subjectivity and to intimacy and confidentiality.

The document does not provide for any professional liability for violation of professional obligations by psychologists. Only Article 7 “Liability” defines, amongst others, that

A psychologist is aware of special responsibility arising from the specific nature of the carried out profession. The responsibility is mainly to recipients, but also to society and professional environment (item 7.1).

It should also be noted that Article 233§ 4 and 4a of the Criminal Code (hereinafter: CC)<sup>42</sup> settles criminal liability of expert witnesses (thus an expert witness psychologist as well), experts, or translators for intended and unintended drawing up of a false opinion, expertise, or translation which are to be used as evidence in proceedings carried out under the Act<sup>43</sup>. At the same time,

According to Budyn-Kulik, the expert witness who presents an opinion, which is not false but is developed not in compliance with good practices, and which is faulty, etc., could be held criminally liable under other provisions, which directly do not define the behaviour of an expert as a criminal one. [...] it may be liability under Article 239 if the expert witness draws up an opinion that does not contain untrue wording but if they intentionally present misinformation. If an expert witness is a state officer, they may be liable under Article 231 of the Criminal Code, and in the case a person who exercises public function accepted personal or financial benefit or their promise for improperly drawing up an opinion, they may be liable under Article 228 of the Criminal Code. The behaviour of an expert may also fulfil the criteria of a crime under Article 234 of the Criminal Code (false accusation) and 236 of the Criminal Code (concealing the evidence of innocence)” – Budyn-Kulik, *Kilka uwag [Few Comments]*, p. 30<sup>44</sup>.

It must also be underlined that pursuant to Article 197 § 1 of the Code of Criminal Procedure the expert witness psychologist makes an oath of the following wording:

Being aware of the significance of my words and liability under provisions of law, I solemnly promise that I will perform my duties with diligence and impartially.

The wording of the above oath indicates that they are held legally and morally liable for the planned and executed diagnostic tests as well as for diagnostic tools used, and for the tests which they failed to plan or execute<sup>45</sup>. This means liability

<sup>42</sup> Act of 6 June 1997 – Code of Criminal Procedure (unified text of the Official Journal of Laws of the Republic of Poland [Dz. U.] of 1997, no. 88, item 553, the Official Journal of Laws of the Republic of Poland [Dz. U.] of 2020, item 1444).

<sup>43</sup> K. Eichstaedt, [in:] *Work Methodology...*, op. cit., p. 93–93.

<sup>44</sup> M. Mozgawa, [in:], *Criminal Code. Updated comment, published in: LEX/el. 2021 and the referenced literature*, eds. M. Mozgawa, M. Budyn-Kulik, P. Kozłowska-Kalisz, M. Kulik, www.sip.lex.pl [access: 19.02.2021].

<sup>45</sup> W. Poznaniak, [in:] J. Brzeźniński, B. Chyrowicz, M. Toeplitz-Winiewska, W. Poznaniak, *Etyka zawodu psychologa [The Ethics of the Profession of a Psychologist]*, Warsaw 2008, p. 298.

for said and written words as well as for those which were intentionally omitted, which were not said or written but should be<sup>46</sup>. In literature it is underlined that observing the principles of liability for a word means that

psychological opinion must be communicative, must clearly and precisely respond to the questions of the court, should be only based on collected diagnostic data, and terms which mark or stigmatize a person socially must be avoided<sup>47</sup>.

## Summary

The carried out analysis allowed for proving that the presence of an expert witness psychologist during the examination of a child in criminal procedure is essential. On the one hand, their actions are directed to ensuring maximum protection for a minor against secondary victimization, both prior to making the testimony as well as directly after the examination. On the other hand, they pursue the assessment of the credibility of a child's testimony and the evaluation of the possibility of its participation in further procedural activities. An expert witness psychologist has a role of an assistant to a procedural body at the same time, providing special information, as well as they assist the procedural body in carrying out the examination of a minor in an appropriate and safe manner. Therefore, when selecting expert witness psychologists to participate in procedural activities, special criteria should be applied. I agree with the thesis presented in a monograph titled: "Ekspertyza sądowa. Zagadnienia wybrane" ["Court Expertise. Selected Topics"], under scientific edition of M. Kała, D. Wilk, J. Wójcikiewicz, according to which

[...] the competences of an expert to participate in a given case should be assessed by their specialization in psychology and professional experience, as well as knowledge on basic legal provisions in the field the opinion is drawn up<sup>48</sup>.

*De lege ferenda* should be considered:

- 1) introduction to criminal procedure in addition to an expert psychologist, obligatory participation of a psychologist, whose task would be to prepare the child for examination, accompanying the child during the examination and ensuring psychological support directly after making the testimony,  
or
- 2) development of a separate legal act which settles the procedure of examining children with the participation of an expert witness psychologist and a psychologist in criminal procedure.

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<sup>46</sup> Ibidem.

<sup>47</sup> Ibidem, p. 299 and the referenced psychology.

<sup>48</sup> *Ekspertyza sądowa. Zagadnienia wybrane [Court Expertise. Selected Topics]*, eds. M. Kała, D. Wilk, J. Wójcikiewicz, Warsaw 2017, p. 764.

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## **Rola biegłego psychologa przy przesłuchaniu dziecka w trybie art. 195a i art. 185b k.p.k. – ocena regulacji prawnej**

### **Streszczenie**

Artykuł nakreśla rolę biegłego psychologa w przesłuchaniu małoletniego pokrzywdzonego i małoletniego świadka przeprowadzonym w trybie art. 185a i art. 185b *Kodeksu postępowania karnego*. Rola ta ukazana jest w kontekście wybranych zagadnień związanych z aktywnością biegłego psychologa przy przesłuchaniu dziecka w procedurze karnej. Zasygnalizowano również niedostatki w obecnie funkcjonujących w tym zakresie rozwiązaniach. Ponadto, w kontekście tych niedostatków, sformułowano postulaty *de lege ferenda*.

**Słowa kluczowe:** psycholog dziecięcy, biegły psycholog, przesłuchanie małoletniego, małoletni pokrzywdzony, małoletni świadek, procedura karna.