

Seminarul profesional
Interpretarea criminalistică și medico-legală a unor elemente materiale

**PERSONAL AND MATERIAL EVIDENCES IN CRIMINAL PROCEDURE,
WITH PARTICULAR ATTENTION TO ROAD TRAFFIC CRASHES**

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Árpád BUDAHÁZI*

Abstract: *Lawfully collected and credible evidences are indispensable in judging criminal cases by the court, whether to establish criminal liability of the defendant, to decide over acquittance or to eventually terminate the procedure. Courts may refer to five means of criminal evidence (the testimony of the witness, the expert opinion, physical evidence, documents and pleadings of the defendant) in Hungary, out of which three means shall be considered as personal evidences (the testimony of the witness, the expert opinion, the pleadings of the defendant), while the remaining two result in material evidences (physical evidence, documents). Specification of evidences is of taxative nature, namely, no other means of evidence can be recognised than those assigned in the statutory provision on criminal proceedings (Act XIX of 1998 on criminal proceedings). If we focus on criminal offenses against traffic regulations we may state that both personal and material evidences play a rather significant role in the evidentiary procedures. This study shall analyse the specific means of evidence for the aspects of the statutory regulations on causing a road accident and shall explore the circumstances of the authorities' consideration to secure just outcomes of the procedure.*

Keywords: *evidences, criminal procedure, testimony, reconstruction*

1. Preliminary thoughts

It is the common characteristic of offenses against traffic regulations that – in accordance with their legislative evolution – the Criminal Code (Act C of 2012 on the Criminal Code) invokes the criminal liability of those breaching traffic regulations originating from the rules of professional duty. Originally, the provisions of traffic regulations have been specified amongst the rules on professional duty, thus, traditionally traffic regulations were considered as special rules of professional duty ‘that required state permission in accordance with certain conditions’ (Major, 2009, p 358). Primarily, this study aims to focus on the criminal procedural and criminalistics aspects of the offense of causing a road accident, defined in Section 235 (1) of the Criminal Code as ‘Any person who causes grievous bodily injury to another person or persons by violation of traffic regulations through negligence’.

2. Significance of the on-site survey for offenses against traffic regulations

The on-sites survey (inspection) is one of the evidentiary procedures expressly stipulated in the criminal procedural act aiming to gather proof of evidence. During this procedure, the participants observe and record the state and actualities of the site and the other circumstances, they search for proof of evidence related to the eventual crime, they detect changes and alterations and puzzle their correlations, keeping the formalities (procedural guarantees) expressly stipulated by the law. (Tremmel – Fenyvesi – Herke, 2005, pp 299-300) The aim of the inspection is the unambiguous and true recording of the facts found on the spot, furthermore, the gathering and recording of evidence. (Farkas – Róth, 2012, p 161) Significance of the inspection is well represented by the fact that approximately 60-70% of criminal actions are the so-called on-the-spot criminal offenses, where the conduction of inspection is statutory. (Fenyvesi, 2014, p 154) Generally, the inspection is completed in the course of the investigation, principally at the beginning, however, it is often the inspection that starts the criminal procedure in cases there is no time to formally initiate the investigation prior to the on-site survey.

For example, the results of the on-site survey may answer the basic question whether there was a breach of traffic regulation or not. Besides, through the inspection the perpetrator or the circle of perpetrators may be determined or even expressly defined, moreover, it exposes what other measures shall be necessary in the course of further investigation and evidentiary procedure. Movement of the vehicles effected by the accident, the factors effecting the recognition of the participants, weather, visibility, road conditions, causation or the lack of cause and effect are circumstances to be clarified. (Bíró, 2010, p 243) The records taken at the on-site survey may be used by the court as documental evidence. Other proof of evidence, substantial remains, etc. tracked down during the inspection shall be considered as material evidence. Actually, the on-site survey aims to track down and gather such evidence yet unknown to the authorities. (Tóth, 1999, p 150) In deemed, an expert may be involved in the inspection, for example, if the authority orders the expert to determine the speed of the vehicle prior to the crash. Eventual eye witnesses must be detected during the on-site survey. Records must be taken on the eye witnesses, their residence and the issues of visibility of the accident must be clarified.' (Bíró, 2010, p 241)

3. The testimony of the witness

As for most of the cases the testimonies of the witnesses have great significance in the offense of causing a road accident. On the one hand, the testimony of injured party, and the eye witnesses and other person with the knowledge of the facts to be proven on the other hand may either assist or eventually hinder the investigation. It is the generally approved principle of criminalistics related to witnesses that examination of the material circumstances of the witnesses' cognition is one of the most significant element in the evaluation of the personal evidence. (Katona, 1986, pp 97-98) The eye witness might be mistaking, the injured

party may withhold important information. Consequently, the possibility of phony or fabricated statements must always be thought of, especially if authorities discover fundamental or repetitious contradictions in the partial evidences. (Dobos, 1988, p 25) Such actions may originate in the witness's misunderstanding of the scene described in the testimony due to the fact that he did not precisely see the hitting of the walking person because it was dark and his vision is weak. (Bócz, 2008, p 79) Anyhow, experience proves that the self-confidence of the witnesses is often far from being solid at the time of the criminal offense, and any eventual innocent positive response, a simple 'all right' said by the investigator might increase it significantly. The witness's self-influence later increases his awareness to remember facts he was not sure before. (Elek, 2008, p 69) In order to secure that investigator's accidental or deliberate influence can not distort the testimony of the witness it necessary that the witness should present his statement coherently in his own words, nevertheless, the adequate questions must be addressed to assist the witness to fill up the part he has missed out from his testimony, to testify on facts he has originally missed to mention, furthermore, to motivate the witness to reveal his observations regarding his knowledge on the information he has deliberately withheld. (Nagy, 1966, p 324) The investigation must aim to acquire an uninfluenced, honest and true testimony.

4. Testimony of the defendant

While witnesses bear criminal liability for giving false testimony (offense of perjury) the injured party shall not face such consequences, the injured may only be accused of false accusation, conducted if the injured falsely accuses another person with the perpetration of a crime. Consequently, the defendant's testimony must always be taken with a grain of salt, yet, it is still one of the most important evidential means since the perpetrator of the offense should have the most information regarding the conducted criminal action. Similarly to witnesses, the perpetrator channels his knowledge of facts to the authority through his statements included in the testimony that are necessary to determine the state of facts of the debated issue (criminal act) and to finally adjudicate the case. (Bócz – Finszter, 2008, p 171) Nevertheless, thorough examination should secure that he is possibly telling the truth and his eventual lies are revealed. At the end, the court shall decide whether the defendant is trustworthy or not, his statements can be used as credible evidence. The possibility to control the testimony in the course of the investigation assists proper adjudication of the court. (Budaházi, 2013, p 3)

5. Controlling the testimony through reconstruction

Controlling the testimony may be conducted by using technical devices (polygraph) or without using such measures. One of the later evidentiary means is reconstruction, a rather effective method conducted in order to control the testimony at offenses against traffic regulations. We may even state that the reconstruction is an evidentiary procedure

that has its the greatest practical role in offenses against traffic regulations. (Bodor – Székely – Vaskuti, 2011, p 219) Even the consequences of the on-site survey may point out to the necessity of the reconstruction, and such demand may only strengthen if there is a need to check the testimony of the defendant or the witness, whether the event or occurrence mentioned in their statements could, in fact take place in a way they've stated. Similarly, to the inspection, in the course of the reconstruction, the authority (investigating authority, prosecutor, court) shall actually have a sense of the proof of fact, a site or the following-up of events and the artificially generated event. (Bócz, 2006, p 133) The authorities conduct an experiment, whereas they schedule and scheme to generate and create a certain event, condition or cause for the purpose of scientific observation. (Barta - Illár – Katona – Kertész – Lakatos – Lichtblau – Magyar, 1998, p 168) For example, the witness's cognitive, representative and display abilities might be determined through the reconstruction. (Angyal, 1915-1917, p 333) In case of a car accident it can determined whether the spotlights of the vehicle were visible or not. (Bolgár – Kárpáti – Traytler, 1965, p 69) Also, this procedural event allows the witness to show his experiences of the criminal act in the presence of the authority. (Nagy, 1966, p 364) Uncovering false statements may already be completed at the first saying, discovering that the witness surely could not have seen the debated event from the spot he's been staying at. Namely, reconstruction verifies or excludes an assumption by remodelling. (Tóth, 1999, p 151) Either way, reconstruction is deemed to be successful if the procedure leading to the positive or negative result was lawful and met the requirements of criminal tactics. (Tremmel – Fenyvesi – Herke, 2005, p 321)

Regarding reconstruction, we must mention, that in case the on-site circumstances or the debated conditions have played a significant role in the act, conducting the procedure may only make sense at the actual site and in the same (weather, visual, etc.) conditions, otherwise only the essential conditions should be simulated. (Bócz – Finszter, 2008, p 174) For instance, if the subject is only to prove whether the defendant is able to open a certain type of lock with a bended wire as he otherwise states, no season, time of the day, lights or weather conditions have any importance. On the contrary, the fact whether a train approaching from behind a line of trees could have been sensed from a certain section of the road crossing the railways (visibility, audibility), the significance of the time of the year or the day and other meteorological conditions is inevitable. (Bócz – Finszter, 2008, p 174) Typically, causing a road accident is criminal offense that usually requires conducting the reconstruction under the same circumstances.

As of the personal side of reconstruction, participation of the both the witness and the defendant must be mentioned, alongside with the statutory presence of the proceeding authority. Nevertheless, while the witness is obliged to cooperate at the reconstruction, the defendant is in a special position, since showing the scene of the crime he's committed he may provide – or substantially strengthen - evidence against himself. With regards to the above, the defendant is protected by the prohibition of self-accusation hereto. (Herke – Hautzinger, 2014, p 56) In case the defendant is not willing to

participate or show the intention active cooperation (or he is just pretending to cooperate) a stunt might be employed to replace him. The replacing participants must be of the same figure and age as the defendant. (Fenyvesi, 2017, p 102) Anyhow, not only the defendant, but the witness can have a duplicate, as one of the advantages of this procedural act, the other benefit of this measure that it can be repeated as several times. Reconstruction may result in a new testimony with higher evidential means if the new testimony alters from the previous statements due to the results of the reconstruction. (Budaházi 2015. p. 187)

Experts 'employed by the proceeding authority in order to establish state of facts that require special knowledge' can be important participants of reconstruction involved cases. (Székely, 1967, p 11) According to Section 99 of the act on criminal proceedings 'an expert shall be employed if the establishment or evaluation of a fact to be proven requires special knowledge'. However, Árpád Erdei is more than right stating that 'notwithstanding to scientific perceptions, authorities tend to use experts in many cases, where there is no need for any special knowledge' (Erdei, 1987, p 23), still, reconstruction is actually one of the evidentiary measures that demands special expertise and expert opinion for offenses against traffic regulations. For example, it is the task of the traffic expert to present the objective sensing possibilities under the given circumstances to the authorities in case of accidents that took place in the dark or in foggy weather. (Tóth, 1986, p 251)

6. Pitfalls of reconstructions

Although reconstruction is considered a magnificent measure to control testimonies, still, there are a few factors that may lead the investigation to rather wrong directions. The fact that creation of circumstances similar to the remodelled occasion or event is often impossible (for example, the site has changed significantly) can be a problem. Deficiencies of the records taken at the on-site survey can also cause difficulties, thus circumstances are going to be different from those present at the conduct of the criminal action (for example, the walking person has stepped out from the cover of a tree, but the tree is cut by the time of the reconstruction). It may also occur, that the actors of the event are placed at the wrong destination, or the stunts are completely different from the persons they should replace (the defendant is 150 cm tall, while his replica's height is 190 cm); the clothing they wear at the reconstruction is inadequate, the vehicle is way different, also, if the officer of the investigating authority is acting for the defendant knowing what he should see (in case the goal of the reconstruction to model whether the defendant could actually see the walking victim from the vehicle). (Budaházi, 2015, p 131.)

7. Summary

I have aimed to introduce the means of evidence characterising the criminal proceedings for the offenses of causing a road accident. These cases reveal that mistakes and deficiencies of the authorities may mislead the investigation, whether they are related

to witnesses or defendants giving false testimonies yet remained undiscovered, similarly, a poorly conducted inspection or reconstruction may also result in the perpetrator's escape from criminal liability or lead to the punishment of someone innocent in the offense. Besides the great liability of the authorities proceeding in the criminal case the liabilities of the expert involved are also evident, since his expert opinion is completed to assist the investigation, regardless of the fact whether it results in incriminating or exempting evidence against the defendant. We may also conclude that both personal and material evidences play a significant role in the cases of causing a road accident, neither one of them are more substantial than the other.

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* Dr. Árpád BUDAHÁZI PhD, Police Major, Senior Lecturer, Faculty of Law Enforcement, Department of Criminal Procedure Law, National University of Public Service, Hungary; budahazi.arpad@uni-nke.hu.