

Quality assurance of expert's reports in civil law

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Judicial experts are appointed by judges to contribute to the quality of judgements. They can provide an answer to those questions that require specialized knowledge of and experience with a subject, of which the judge does not possess such knowledge or experience. A third party will thus conduct a part of the assessment of the facts. This may have certain consequences for the quality of the court's judgement. This article will discuss the possible ways of maintaining that quality when a judicial expert is called into the procedure.

The praxis

The most important element in assuring the quality of the expert reports lies in the appointment of a judicial expert. The right person with the required knowledge and experience for the in the procedure posed questions should be appointed. During the procedure the judge shall consult the parties for this. Parties may agree on the matter, after which the judge usually follows their nomination. The nomination and the appointment of judicial experts should be based on the specific expertise required by the questions at hand. However the scrutiny of this expertise is not conditioned by any requirements. Furthermore the legal knowledge of the judicial expert and his familiarity with his role in legal proceeding are not always examined. It is astonishing that the expert is assumed, if not even taken for granted, to be of added value for a judge's ruling.

The judiciary has different registers of judicial experts at hand, such as the LRGD³, the NRGD⁴, DIX and the NVMSR⁵. The Dutch National Register of Judicial Experts (*Landelijk Register van Gerechtelijke Deskundigen*, LRGD) was founded in 2007. It holds certified experts with areas of expertise ranging from Toxicology to IT and Business Valuation. The Netherlands Register of Court Experts (NRGD) is specifically focused on experts in criminal proceedings. The NRGD was laid down in law in 2010. Since 2008 the National Expert Index for civil and administrative fields (DIX) is operational. The amount of times the DIX is used is not known. The Dix-register can only be consulted by the judiciary and only knows a limited assessment of quality. Track is kept in particular of whether a report is handed in within the set term. Furthermore, the system offers the registrar or the judges the possibility to register an evaluation of the demeanour of the judicial expert. It is not known whether this possibility is used. The expert concerned will remain unaware of such evaluation and to that effect the registration will thus not contribute to the quality of his work. The DIX-register is

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³ www.lrgd.nl

⁴ www.nrgd.nl

⁵ www.nvmsr.nl

not updated anymore, but it is still in use. A separate register exists also for issues in the medical field. All members of the in 2009 founded Dutch Association for Specialized Medical Reporting (NVMSR) execute all their reports following quality standards they set up. These standards are consistent with the applicable rules of conduct and medical guidelines.

The Registry deals with the contacts concerning the appointment of experts. The experts receive a copy of the judgement with the question(s) that are to be answered. Usually the judge and the appointed expert do not deliberate about the content, neither will they accommodate to each other in any other way. The “practice direction for experts in Dutch civil law cases” is sent to the expert⁶, which comprises an elucidation for the execution of the expert investigation.

As a rule the expert will make his report in written form. He is not very often asked to explain his findings at the proceedings. Usually the expert does not hear from the court or courts of appeal about the content of his report. Some courts do send the later given ruling to the expert, whilst this only happens on request of the expert himself at other courts.

When a commercial organisation lets a third party conduct the investigation or part of it that will in general not be done in the more or less distant way a judicial college deals with these investigations. A formal system of quality control, which will be elaborated on later, would eliminate such a distant method of investigation. Furthermore the commercial organisation will take action to determine whether the chosen expert is of the required quality and whether the time spent and costs made are reasonable. Nowadays such a systematic way of assessment of the quality of expert’s reports does not exist, nor does the relevant case law provide any clarity on this quality element.

One could have the impression that in the largest amount of cases the quality of the presented report is sufficient. When the report is considered adequate, the judicial college adopts the reciprocation of the questions in the final ruling. The adoption could be understood as a token of eligibility, which more so stresses the oddness of the situation when the consulted expert is not informed of the adoption by the judge. However when the judge does not find the expert’s report adequate, this rarely leads to a court order for the continuation of the expert’s investigation or for the expert to conduct a new investigation. In those cases the judges tend to do two things. First, the judge may, for a lack of better, form his own answers to the posed question on the basis of the facts as they appear from the report. Second the judge tries to reach agreement on certain issues or a conciliation agreement on the dispute at large by summoning the parties for a hearing.

The process of quality assurance

As described above the assurance of quality of the expert’s investigation, if one could even call it that, mostly consists of the assessment of the eligibility of the end result of the investigation. In industry and in services the thought that with quality assessment testing the

⁶ Sometimes in paper form but mostly as a link to the website.

end result is most important, has been surpassed dozens of years ago. The mere protection of the quality in the end leads to inefficiencies (disapprovals), high costs (for quality that was not delivered) and maybe even loss of quality (in not timely acknowledged shortcomings). Any form of quality assurance of the expert's reports that puts the assessment with the final judgement of the judge will inevitably lead to a similar failure. Integrated care of quality needs to be focussed at all phases of the process of investigation or the rendering of services.

Quality means *status* or *characteristic* and denotes the entirety of characteristics of an object. Joseph Juran gives a well-known definition of quality with the concept of *fitness for use*⁷. More formal is the definition of the International Standards Organisation (ISO)⁸: the degree to which a set of inherent characteristics fulfils requirements.

The entirety of quality characteristics and features, which an expert's report should provide can be divided into three main components.

First and foremost, the expert must maintain an attitude of complete independence and impartiality and must answer the by the court or court of appeal posed questions knowledgably and motivated. In this the expert is to refrain his investigation from those aspects of the dispute that are not brought forward by the parties in their legal battle. In general he is to accept the correctness of the uncontested facts or of the points on which the parties agree. This can detract from the quality of the report if the facts (as held by the parties or as defined by the judge) do not tally with the truth, whilst this might be of influence on the objective correctness of the answer given by the expert. The applicable 'Code of Conduct for Court Experts in civil law and administrative law cases'⁹ gives an escape from this in the explanation under article 4.11. It says: "*The expert will, in principle, be required to report within the terms of reference of the assignment. However, if the expert, on the basis of his expertise, is of the opinion that he should make remarks that are not strictly related to the aforementioned terms of reference, but which are of importance for the case, he will report this to his commissioning party.*". It is of course expected of the expert to deal with this competence with due prudence, yet using this competence might be of importance for the quality of the end result.

Secondly, (the method of drafting of) the expert's report needs to meet certain legal and procedural requirements. The expert has to take adversarial principle into account, has to give the parties the opportunity to make remarks or requests and has to give account of how he dealt with these aspects in the report. Furthermore, the expert has to abide by a number of formal instructions and requirements that follow from for example his appointment, the law or the practice direction for experts in Dutch civil law cases. In the following overview the most important instructions are placed in hierarchical order. This hierarchy leads the expert to

⁷ See, amongst others, *Juran on Leadership for Quality*, Joseph M. Juran

⁸ ISO 9001:2008

⁹ This Code of Conduct must be viewed as an instrument for improvement of quality for judicial experts in the civil and administrative procedure. It has been laid down by the Central Board of Appeal and the national consultations of sector presidents of the courts and courts of appeal. The current version 3.7 – January 2012 can be found on www.rechtspraak.nl.

follow the method as described in the judgement of his appointment over the Practice Direction.

Framework for the expert

The expert is to follow the assignment and instructions given to him for the execution of the investigation in the following documents.

- Judgement or order of appointment;
- Instruction letter with the judgement or order;
- Articles 194-200 and 202 Dutch Code of Civil Procedure (*Rechtsvordering*);
- Practice direction for experts in Dutch civil law cases;
- Model Expert's report.

Overarching rules:

- Code of Conduct for Court Experts in civil law and administrative law cases;
- Rules of conduct of his own field of expertise;
- General rules on the field of expertise.

Therewith the quality aspects are not enough elaborated on. Finally, also aspects and characteristics of a more pragmatic nature play a role. It is for example a requisite that the advice is issued within reasonable time, that the expert does not exceed the advance payment he has estimated and the parties have paid and that the report is written in a clear and legible manner. In the accompanying cadre several questions are set about those quality aspect of the expert's report, that are not directly related to the substantive quality.

Examples of tertiary quality aspects

1. Is the field of expertise sufficiently clear and proved?
2. Is the expert familiar with the procedure?
3. Was the requested advance payment clearly substantiated?
4. Is the determination of costs attached to the invoice clear and in accordance with the budget?
5. Was the interim alignment (if so desired) with the court or court of appeal satisfying?
6. Has the expert finished the assignment quick enough (within the term of 13 weeks)?
7. Is the expert's report clearly formulated?
8. Is the in depth discussion appropriate?
9. Was the expert easily contacted and attentive with the alignment of the appointment?

Quality

The assurance of quality concerns the entirety of measures to lay down the policy and objectives in terms of quality and to achieve those objectives efficiently. One part includes the periodical assessment of the system to an external norm like ISO 9001.

Pivotal in every quality system is the quality circle of Deming¹⁰, which can be led back to Francis Bacon¹¹. This quality circle describes the cyclical process of ‘plan, do, check, and act’¹². Assurance of quality requires that for all processes the results thereof will be assessed to determine whether the produced result meets the intentions. Deviations must be evaluated and if necessary must lead to improvements of the process. Based on the norms for quality management such as ISO 9001:2008 the appropriateness of a supplier/service provider in a situation of outsourcing should be systematically assessed and assured¹³.

Formal testing or even certification of a system to assure the quality of expert’s reports is not obvious. From the common standard requirements can be derived that may also contribute to the quality of the reports. As regards to the expert’s investigation this contribution must be found in the applicable law, regulations and other documents (see the forgoing list). Quality assurance in case of appointment of a judicial expert requires first and foremost an adequate assessment of the suitability of the expert at the time of appointment. The main issue then becomes whether the expert is demonstrably capable to answer the detailed questions. Secondly, it is also important to assess the suitability of the expert to act within the context of the judicial procedures. Registers such as the LRGD, NRGD and NVMSR play an important role.

This is only possible when a procedure is developed in which the judicial authority as well as the expert is to evaluate the quality and usability of the issued report in answering the questions. More specific, the issued report has to be looked at in light of the rest of the procedure. When the answers given in a report are adopted into a ruling without modification this can after all be seen as a sign of eligibility. Also, the question of compliance to the other aforementioned characteristics of quality, both procedural and pragmatic, should be evaluated. The judicial authorities should furthermore record this evaluation, as to be able to consult it with future appointments. A policy concerning appointments may simply not be solely based on accidental and informal experiences of the judges and registrars.

As long as such a system is non-existing within the judiciary, the professional and legal procedural qualities of an expert may also be shown by admittance to the aforementioned registers. Admittance to the LRGD requires for example demonstrable knowledge of an expert on his own field of expertise, a completed education to judicial expertise and compulsory continuous learning. To be admitted to the NRGD the professional knowledge of

¹⁰ *Out of the crisis*, W.Edwards Deming

¹¹ *Novum Organum Scientiarum*, Francis Bacon 1620)

¹² This circle is an implicit and explicit part of the ISO 9001:2008 The circle is explained in paragraph 0.2.

¹³ For example paragraph 7.4.1 of ISO 9001:2008. says that the organisation with regards to quality assurance should lay down criteria for selection, evaluation and review of service providers. The extensiveness of this quality assurance should depend on the extent to which the end result is influenced by the quality as provided by the service provider.

the applicant and his earlier issued reports are placed under scrutiny. For membership of the NVMSR education has to be undergone. This education and the following exam explicitly focus on the legal aspects of the behaviour of the expert in court. All members are medical experts and registered as such. The Code of Conduct for Court Experts in civil law and administrative law cases are applicable to all members.¹⁴ Therewith the basis seems to be provided for assurance of the aforementioned substantive quality aspects. In most case this will also mean fulfilment of the pragmatic quality aspects. Due attention is paid to this during education, continuous learning and peer review sessions. The latter characteristics and aspects of the expert should be evaluated and made know to him. The expert receives indispensable feedback on investigation, which leads to, according to the quality circle of Deming, assessment of whether the execution was according to plan and whether the execution has to be corrected in the future.

The authors are aware of the fact that the judiciary are not waiting for such an expansion of the workload. It is extra work, whilst it is also not consistent with the distant attitude of the judiciary towards third parties in the course of legal procedures. Nevertheless a mechanism has to be developed by which the expert can evaluate the execution of his work. Otherwise the expert is in no position to correct his work and improve it.

In any case it is needed that the expert receives the judgement ruled after his report by default and automatically. In this manner the expert can evaluate his own work (to a limited extent). Concerning the other things such as for example the timeliness or clarity of the formulations simple evaluation forms could be developed. That does require the cooperation of judges. Furthermore, the registry also appears to have a big role in being able to present the feedback of a court to an expert by means of a concise and standard evaluation form.

Hitherto courts and courts of appeal appear to be hesitant to play such an active role in the assurance of quality with the deployment of a judicial expert. An attempt of the authors to have a court set up a formal evaluation, for the purpose of quality assurance, stranded because the court deemed it incompatible with its passive role. For an evaluation reference was made to the parties. However, it is obvious that this will not lead to a useful outcome. The confrontation with such an issued expert's report is for parties to proceedings just a one-time experience and those parties will not be waiting to give an extensive evaluation, whilst that will not have any practical consequences for themselves. Next to that it is to be feared that the expert's advice may not be to the likings of the parties.¹⁵

In the opinion of the authors it should not be deemed incompatible with the passive role of the judiciary when the judge gives a few practical measuring points (e.g. on time, on budget, correct answers to the questions, clearly formulated, general usefulness for the verdict).

¹⁴ With admittance of an expert reference to this Code of Conduct is made, however the Code is not always send. All experts at the LRGD are contractually bound to it.

¹⁵ There are cases known in which parties reach a settlement after the expert's report has been issued. That report apparently did justice to both parties, which should also be considered as a report of good quality.

It should further be observed that with the evaluation of the suitability of the expert the judge cannot be too passive. This is for example the case when parties agree on the person of the to be appointed expert, but they cannot establish whether this person is suitable as judicial expert. When a third party conducts an investigation to give the answer to a question on a main subject of a verdict, it is an essential element of the assurance of quality (according to for example ISO 9001:2008 paragraphs 7.41 and 7.4.2), that it is evaluated whether this outsider is suitable for the job. It is obvious that the judge will not adopt the opinion of an expert of poor quality, which evidently fails short. It would thus be more effective to establish this in advance. If not, the price consists of inefficiency (disapprovals) and high costs (for undelivered quality). Sometimes it will be hard to recognise that the answering of questions in specialist fields fails short. Then the price will consist of quality loss (not recognised failures) of the judicial verdict.

Conclusion

When in legal procedures the situation arises that more and more appeal is made to experts the quality of the judicial judgement shall be increasingly dependent on the quality of the expert's report. This requires a sound assurance of the quality of the expert and his report. Then it becomes necessary that the judge takes on an active role and that the expert is given structured feedback. The existing registers of experts can provide a useful contribution to the quality assurance of the expert's reports.

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