Raimond Giard[*]

The expert's mission: the importance of open questions

Asking a question is not an innocent thing to do.[1]

How should a lawyer phrase the expert's mission? This has long been a topic of research and discussion. And until now, there have been no satisfying answers. In many cases, the expert is meant to explain how a certain event may have happened – an analysis. Meanwhile, the legal intervention's purpose is to assess whether or not a party or a suspect can be held responsible – a value judgement. The difference we are suggestion hints at the answer: there is a judicial goal and a de fact issue. If they are clearly distinct from one another, if the issue is phrased correctly and answered in a satisfying manner, it should be possible to get closer to the ideal image of the expert's report, truly trustworthy and judicially useful.

[*] Pr Dr. Dr. R.W.M. Giard is a methodology and liability professor at the Erasmus School of Law, civil law department, Erasmus Universiteit of Rotterdam. He is also the editor of this journal. Many thanks to Siewert Lindenbergh and Willem van Boom for their critical comments on previous versions of this article. The original Dutch version of this article was published in the journal *Expertise en Recht*, Eer 2013, vol 2.

[1] Steensig& Drew 2008, p. 7.

1. Introduction

When lawyers and judges have to adjudicate on questions outside of their area of expertise to solve legal issues, they may wish to call upon the services of an expert who is a specialist in that particular area, be it in a penal, civil or administrative area.[1] For example, he may need to assess an existing situation, explain an adverse event or assess damages or value. This in-depth investigation focuses on the assessment of the violation of standards and its consequences, especially in liability, since in the end, the judge has to adjudicate on the causality and admit liability. The expert's specialised analysis consists in measuring and/or ascertaining before sifting, selecting and interpreting the data he has obtained, and finally drawing conclusions. The expert's report has a concrete legal purpose but can involve vastly different interests for each party. Several experts can come to a different conclusion based on a single analysis even though they are talking about the same incident. And for the subsequent intervention by the legal adviser, it is essential to determine who the expert is and how he will examine the question raised.

From the moment when the need for non-legal specialised skills has been felt, one can, during a procedure, ask oneself legal questions: who determines or who decides what is investigated, based on what facts, and who carries out this investigation?[2] Therefore, one needs selection criteria to hire the right expert, and there are rules to be followed. Yet beyond this procedural dimension, there is a significant material dimension, which is the manner in which the investigation will be carried out and generate knowledge.

If one wishes to reach a normative understanding of a problematic situation, legal and theoretical aspects of knowledge are important, and have to be carefully integrated. The mission is usually given to an expert in the shape of one or more questions. Why a question rather than a set of instructions: "carry out an assessment from your own perspective and provide us with your professional comments"? This carries a risk: there might not be enough guidance for the request, and thus, it may not reach depth of the legal substance in this case: knowledge has to be acquired in a targeted manner. The questions are a useful framework to start the investigation procedure, channel it, but also limit it. Asking questions is probably the best communication practice within the legal institutional traditions.[3]

What will we find if we choose this type of questioning? The question will basically determine the answer, and it is thus necessary to consider the best way in which the question must be phrased for the experts.[4] This also implies that one needs to be aware of the criteria necessary to separate good and bad questions. What criteria are they? And are they reliable? Firstly, we should focus on the process of *phrasing* the question; this means that we will need to focus on key notions – the art of asking the right questions and phrasing them correctly. Then comes the process of *answering* the question. If one wishes to look at this issue, one cannot do it without bringing the wider methodological perspective of problem solving into focus.[5]

[1] Kranse.a. 2011.

[2] De Groot 2008, p. 6.

[3] Tracy & Robles 2009, p. 131.

[4] See 2003, Akkermans 2005 and Akkermanse.a. 2009 as well as De Groot 2008.

[5] See Payne 1951 for a classic text on this topic, and recently McClimans 2012.

The case has to be targeted and solved in a transparent manner, which requires good organisation and a supervision of the quality of the work process series which are thus carried out.[6]
In this article, I have chosen to highlight the issue of knowing how one can present the issue to an expert as a question, but I am not limiting myself, within this consideration, to determining what the right way of phrasing a mission is. I am choosing a wider approach and examining the question from an epistemological and methodical point of view, and obviously keeping in mind the legal frameworks involved.
Two elements play a role in the expert's mission: a judgement must be pronounced by the person adjudicating (this is the last element); but prior to that, there is a need for an investigation generating knowledge. This is why the expert deals with two questions, which are respectively evaluative and analytical; the evaluation follows the analysis. This article's main topic can thus be summarised: why is this distinction so important in actual practice, and how should it be made concrete. I will first show working examples which occur when phrasing questions, and then present the requirements which will be asked in an expert's report. To solve a case, one has to follow a plan and draw a distinct line between the procedure's purpose and the question which flows from the empirical analysis. We will be confronted to examples of types of wrong questions to then ask the question: but how to phrase it then?

2. Some examples of questions

Before examining the questioning process theory, let me first list a few examples of this type of missions seen in the area of (medical) liability law.

1. "Would a rather skilled general practitioner and fairly knowledgeable treating physician have sent the applicant to see a cardiologist (as an emergency) on 25 August 2003?"[7] In this case, it was a missed heart attack diagnosis.

2. "Do you believe that the treating physician should have sent this man to see a neurologist again, given his previous complaints before 12 November 2002?"[8] In this case, the applicant was convinced that he should have been operated of his spinal herniation earlier.

3. "Do you think that in an identical case, an orthopaedic surgeon with sufficient experience and skill would have acted in the same way as his colleague did?"[9] This case was about complications during an orthopaedic intervention.

What do these questions have in common? They are more similar than one might think initially:

- they are *hypothetical* questions;
- they are multi-faceted questions, therefore *complex* in their semantics;
- they are always *categorical*, closed questions, to which the answer can only be "yes" or "no";
- they focus on *contrast*: acting rightly *vs.* making a mistake;
- they are *weighted* with guilt in the sense where one has to investigate whether a specific mistake could have been avoided by the person mentioned;
- the unwanted outcome of the event is the *motivating factor* behind the question, and one assumes it is known by the expert;
- finally, they ask the expert for a *value judgement* on the behaviour of the mentioned party to determine whether or not it acted wrongly.

Were these legitimate questions to ask the experts, and did they lead us to accurate answers in their respective procedures? We must be careful: to answer these questions according to their proper phrasing, we have to realise that we are dealing with an expertise including a full work process. There is still a concrete event, an accident for example, a construction defect or a misdemeanour whose consequences prejudice the (legal) person. This unwanted outcome has legal consequences and to solve them, value questions will appear and a specialised expert will have to investigate them.

Therefore, a concrete task presented as one or more questions should be asked by the lawyer of the practice to the specialist; the expert will then look for the answers and the results will lead to the reflection and evaluation of the parties. Finally, it is the legal decider who will adjudicate and decide whether or not the conclusions of the expert's report shall be used.
The questioning is meant to provide the person requesting the report with an accurate and useful answer. Given the links between all the steps, it is obvious that the key condition is for the right question to be phrased – but it is not the only condition. Moreover, this is all part of a legal institutional practice and can therefore not be approached outside of the leading legal principals and procedure requirements that are expected for a procedure.[10] I will explain the sequence of steps in the following paragraph.

3. The experts' missions and their requirements in a legal context

There is a mutually complimentary relationship between a question and its answer: your answer depends on the question and your question depends on the answer. How can the optimum result be reached

[6] Verschuren 2011b.
[7] Rb. Utrecht 8 December 2010, *LJN* BO6888.
[8] Rb. Alkmaar 18 April 2012, *LJN* BW7789.
[9] Paraphrase using a question, Akkermans e.a. 2009 op p. 92 from HR 9 November 1990, NJ 1991, 26.
[10] De Groot 2008.

for an expert's mission then? Asking the right questions, carrying out the right investigations and providing the right answer. All three elements naturally determine the quality of the report.

It would be useful to start by thinking about the essential requirements that the expert's report has to satisfy, to examine the consequences involved when it comes to phrasing the question(s) and then to carrying out the expert's report. What characterises the suitable report best?[11]
– The report has to show sufficient depth and breadth in terms of research: it requires the *entirety* of the results.
– The report has to be valid: it proves the relevance of the empirical reality accurately and precisely; the observations are based on the determining requests of scientific knowledge, it requires *conformity*.
– The report's conclusions are logical in parts, and thus useful for legal purposes: this is the *efficiency* requirement of the answer.
– The possibility for rival reactions to a single question have to be catalogued, and the choice for one of these options has to be made free from prejudice: it requires *argumentative fairness*.

The expert's logical task consists in submitting something to the lawyers and the parties, and can be carried out from two different positions: as expert for the party trying to help establish the position of the party in question or as expert for the court to inform the judge of the facts of the case and the way in which they can be interpreted. These different starting points can affect the results of the investigation. If all these conditions necessary for a good expert's report would present, this would not have any consequences, strictly speaking, whether the expert is hired by a party or assigned by the tribunal. In reality, it is very different. The choice of the expert of the party is important on the legal chessboard and so the lawyers deliberately choose a specific expert.[12] In some procedures, the report brings up new questions which will have to be investigated by another expert and thus increase the number of experts involved in the procedure. So, working for the parties, several experts can find themselves facing each other and the legal battle can turn into a "battle of experts." It can happen that experts may or must agree over facts and conclusions, but they can also disagree (and keep on disagreeing) with their interpretations and appreciations of facts. The latter is more a subjective issue which, in the end, cannot be objectively verified. It may be that the experts have a relaxed approach compared to the responsibility they bear due to their theoretic knowledge and that they adapt their "science" to promote the party's interest, sometimes creatively. Therefore, it is not always recommended to blindly agree with the experts' conclusions; one should always examine them with a critical eye. Moreover, since the judge is not usually involved in a case until there have been several pieces of research and exchanges of facts, it is essential to demand the explicit phrasing of the methodology requirements of the expert's report. Retrospectively, this provides an evaluation framework for any expert report which has been carried out previously and which will not necessarily serve the party, and prospectively, a methodological framework for the next investigation. I will now detail this framework.

4. The expert's report has a purpose and a question

Within a legal context where the notion of "search for the truth" – frequently implied – plays a key role, it is necessary, during a mission, for the expert to systematically carry out and investigate the question carefully and entirely.[13] The workflow is made of two elements:
(1) a clearly defined purpose for the investigation and
(2) mentioning the means necessary to reach this purpose, therefore, respectively, the conceptual aspect and the technical aspect of the task to be carried out.
This two-step approach will also have consequences on how the expert's report is established. The conceptual phase includes the right phrasing of the mission for the expert and therefore important responsibility also falls upon the lawyers of the practice in question. The technical implementation is first and foremost the responsibility of the expert, and he or she must answer concrete questions. In the conceptual phase, i.e. when stating the issue of the expert's mission, there are two different aspects, the purpose and the question of the investigation.

The purpose

The legal judicial or extrajudicial intervention being carried out should always be focused, by using the questions which are phrased following a catastrophic event, and which must be answered. This is a normative judgement of human behaviour. Did the doctor follow procedure like a good emergency worker? Did the orthopaedic surgeon act with enough care? These are questions that the expert has to clarify. One is judging whether or not the doctor in question has transgressed the norms, and if the burden of proof is found, there is a legal sanction.[14] In penal cases, a legal medical expert will carry out his investigation to find out how to prove whether or not the suspect commit the violation he is being charged with.
As a category, the legal purpose is a closed question.[15] The only possible answer is positive or negative. But

[11] See Elder & Paul 2008.
[12] See Goldman 2001, Bernstein 2008 and Edens 2012.
[13] Verschuren 2011b, chapter 4.
[14] Present norm art. 7:453 CC.
[15] For an overview of the different types of questions: Harrah 2002

this is a deduction that has to be preceded by a solid investigation.

In the knowledge generation process, it is extremely important to carefully choose the purpose and phrase it accurately to guide the practical implementation, motivate all the concerned parties, provide the customized work necessary while serving as a reference to judge whether or not the investigation accurately reached the purpose.[16] Each question, including the legal question, has meaning which depends on the area to which it belongs.[17] The question's *area* concerns the focus of the investigation and the *assertion* describes the level of knowledge needed. In the legal question, the objects of knowledge and their characteristics are (legal) people, their behaviours and the causes for their behaviours. The questions that the experts were asked above concern doctors (area) and the ways in which they practice their profession (assertion). The scope of the legal question is limited to the acts of the party or parties being sued. But their actions are defined by many personal as well as external factors, which belong to the context of their behaviour.

To judge an incident or a catastrophe properly, the investigation must show enough breadth and depth and requires wide analytical questions, which goes against the personalised aspect of the normative legal question. The behaviour of people always happens within social or organisational structures and within a certain knowledge area, therefore the action plan is always located within an obvious context. These circumstances would appear to be highly important and are usually of crucial interest to follow the events.[18] Therefore the explicit purpose has to be "translated" into an agenda to be examined more closely: one wants first to obtain an explanation analysis of the events and only after evaluate the actions of the people involved.[19] The real practical work carried out by the expert is thus the question and not the legal question – which only mentions the legal framework for the investigation. But what does a question look like?

The question

We must realise that the expert will investigate a story, and for him to consider it accurately, we need both a description ("what happened?") and a declaration ("why did it happen?"). The first question only gives us a story. The second is more important since it provides us with the causal explanation of the accident.[20] To fulfil the exhaustiveness requirements, the question should always be phrased as an *open* question, for example starting with "why…?"

This type of question leads to a multitude of possible answers and thus the exhaustiveness requirement is satisfied.[21] Thus the supervision and efficiency of the research process is dependent on the right question. Supervision, in this case, means that the choice of the question provides the direction taken by the research, which can also be made explicit through sub-questions stemming from the main question. It is thus easier to record the specific meaning of key concepts included in the question, especially if their interpretation can be ambiguous, such as for example "reasonably competent," "carefully" or "negligent."

In the three examples mentioned, the questions can be: (1) Why was the heart attack diagnosis not detected? (2) At which point should one consider operating on a hernia? And (3) what kind of complications can happen in this type of operations, and what is their cause? All of these are open questions to which related sub-questions can be attached. One would then obtain information on the situation and therefore be able to make a judgment about the doctors' actions.

As for the question, one expects it to fulfil the exhaustiveness requirements as well as the depth requirements; it has to be genuinely open, and the assumptions that motivated the questions have to be made explicit and consciously checked for accuracy. Using the term "efficiency," we phrase the abstract idea that we want to know just enough to adjudicate justly. But how can one know that? Our effective reconstruction of each event is always incomplete, however, if we think about what we should know, that allows us to keep the measure of the investigation into proportion.

A necessary and final test consists in checking the answers obtained against their value in terms of content: to what extent are they accurate?[22] It is not irrational to fear the trap of the illusion of explanatory depth,[23] when one believes that one has understood everything. To sound out the accuracy of the answer, one can use the following questions: was it really a clarification or simply a description with different terms and different means? Was the clarification found suitable within a broader reliable scientific framework? Is one aware of the danger of circular reasons, where mentioning the cause explains the logical sequence stemming from it, when the cause itself has not been established independently?[24]

Example:

"This damage was due to the doctor not acting carefully." This is a fake declaration, for in that case, what is the negligence, or why has the doctor been negligent?

5. Wrong type of question

In paragraph 2, I showed examples of questions experts were asked, and their analogies. They were inadequate for expert missions, not only because of

[16] Verschuren 2011b, chapter 3.
[17] Verschuren 2011a, p. 203 e.v.
[18] Stevens & Shojania 2011 and Croskerry 2009.
[19] Lombrozo 2009.
[20] Keil 2006.
[21] Verschuren 2011b, p. 85 e.v.
[22] Lipton 2004.
[23] Keil 2008.
[24] Rips 2002, Keil 2006 and Hahn 2011.

what has been mentioned previously, but also because of the following criticism.

Do not ask hypothetical questions

The three examples mentioned were all hypothetical questions. In law, this kind of question is commonplace. Their scope is always: "what would have happened if…?" In practice, such guesses usually play an important role in determining the cause and *sine qua non* context, but they can be a dangerous tool.[25] Using hypothetical questions is contentious, and has been rejected by lawyers such as John Henri Wigmore or judge Learned Hand: the latter referred to this kind of question as "the most horrific and grotesque when on the fair face of justice."[26] Hypothetical questions always show the way since they invite the expert to imagine what may have happened if, at some point, someone had acted differently. This relies on the idea that the action was a mistake, and this is the bases for the causal selection phenomenon: why judge this action situation specifically?[27] Thus the expert's investigation becomes biased.[28] During normative judicial judgements, the use of hypothetical questions is discouraged for these very reasons.[29] Another practical question remains: can a trustworthy answer be given to a hypothetical question? For, indeed, what is the expert's answer based on? Does he mostly give an intuitive opinion or is his answer based on the data extracted from reliable empirical and scientific sources which allow one to reliably guess the result, which would make them all comparable one to the other? Using open and current questions in the interrogation would thus be useful since it helps obtain a good empirical interpretation, especially in cases of causality.[30]

Do not ask complex questions

The third question is an ideal example of a complex question: "Do you think that in an identical case, an orthopaedic surgeon with sufficient experience and skill would have acted in the same way as his colleague did?" Such a query is (1) semantically complex, (2) loaded, since it supposes that the doctor has made a mistake, (3) categorical since it only allows for a positive or a negative answer and (4) the burden of proof discretely shifts from the requesting party to the defence: the expert becomes the virtual substitute and from this position must assert whether or not the action was just.

A certain amount of sophistry ("the fallacy of complex questions' of 'the fallacy of many questions") is hidden in complex questions such as these.[31] While the applicant is pushed towards a situation in which the undesirable result can only be explained by a behaviour error on the defender's part. Thus the burden of proof eludes the requesting party.[32] This shows once more the fact that the procedure's goal is not fitting to being the guide of the investigation.

The use of complex questions is therefore discouraged. As an open question and add the matching sub-questions phrased separately which can be answered respectively.

No value judgements

To what extent does the expert resemble the judge? A lot of attention has been given to the expert who, through his mission, could be tempted to sit on the judge's chair.[33] By persistently maintaining the separation between the goal and the question, one can solve the problem of the expert hoping to wear the judge's gown. The expert looks for and exposes facts through analytical questions. It is only after this phase that one can prove whether or not the behaviour was illegitimate or whether there was a causal effect. Finally, the judge will provide the final answer to the questions of law, this is the goal, and the answer to the experts' question is given by the judge thanks to the arguments that were presented first.

6. Questions first, answers later: methodological implications

By asking the right questions, are we guaranteed a satisfactory expert report? To obtain an impeccable report, something more is required: this is an integral process which starts from the phrasing of the question and goes to the transmission of the answer. The logical structure of these questions which tend towards clarifications cannot be considered separately from the answer they seek and the way in which they seek it.[34] The ideal expert report will have to be created by respecting methodology and following the three-step plan in which each phase is different from the next, and each has its own key issue.

The statement phase

As previously explained: ask an open question, preferably a simple one, which has to be clear and precise. But is this easy? When it comes to the question's clarity, the metaphors of the metaphor of the transmitter (judicial entity requesting the mission) and the receiver (the specialist in this field) are useful. The question asked has to be taken into account. The lawyer and the specialist will in any case possess part of the same knowledge, a common ground, if they

[25] Mandel 2003, Lombrozo 2010 and Giard 2011.
[26] Quoted in Brodsky e.a. 2012, p. 357.
[27] See Hesslow 1988, Lipton 1991 and Lagnado e.a. 2008.
[28] Fitzsimons & Shiv 2001.
[29] Brodsky 2012, Moore e.a. 2012.
[30] Keil 2006, p. 235 e.v.
[31] Walton 1999, Walton 2006 p. 191 e.v. and Tindale 2007, p. 69 e.v.
[32] See also the critical question test by Tindale 2007, p. 71.
[33] Akkermans e.a. 2009, p. 89, Dekker & Hartman 2006, p. 6 e.v. and Wagenaar 1988.
[34] Koertge 1992, p. 96.

want to succeed in their mission.[35] It has been proven through tests that the semantic explanation of a same question (even if it appears to be very simple) can be very different.[36] Key terms such as "capable," "carefully" and "illegitimate" are not only defined by their context but can also be used differently, whether or not there is knowledge of the usually unfortunate outcome! Therefore, it would be useful for a more specific description of the meaning of these words to be given in a glossary. Moreover, the core part of each question is base around one or two premises, and these should be explicitly mentioned to improve the quality of the answer.

The investigation phase

What mistake could the expert make during the practical investigation? There are a lot of possible traps: the cognitive prejudice, the use of erroneous resolution strategies (heuristics) and argumentation mistakes. [37] The most important aspect is to always research and only judge *after* (retrospective bias). The potential mistake can for example be rooted in the phrasing of question 1 and 2 paragraph 2. We can find a question here phrase as "would it not have been better, seeing the unfortunate outcome of this case, for the doctor to first…?"

This phase focuses on empirical investigation, which involves a very detailed attention when carrying out measurements and observations. The context in which everything is carried out, the known information, especially, should not influence the expert; therefore, in his report, he will pronounce himself in a reflective manner on the possibilities and limitations of his own research methods.

The data gathered is only transformed into knowledge through a process of interpretation. A catastrophic case does not exist on its own, it is a part of a series of event which have already been subject to empirical investigations. Searching for and evaluating basic knowledge as well as the implementation of the methods and answers to achieve it are an integral part of the research carried out by the expert.

Reports and conclusions

Ideally, the report should provide a correct answer to the questions asked. This is what we called the reflection factor: to what extent is this answer accurate? Control questions are required: "is this answer relevant, accurate in terms of content, sufficiently sustained, has it avoided circular reasoning and is it and consistent?"[38] Thanks to all of this, not only does the expert in charge of the mission check the result of their work, which is internal quality control, but the person requesting the work can also check it, and we can call this external quality control.

7. Conclusion

An important element which plays a part in each legal intervention, whether it is a judicial intervention or not, is whether or not the aforementioned event is judged as effectively as possible and whether or not all the actors of this truth lean in the same direction. The specialised expert who is then involved in the resolution of a legal question must investigate and come to a conclusion. This investigation is carried out through questioning. We could expect the expert to always give the right answer when asked the right question, but this oversimplifies a complex issue. In Dutch judicial literature, the issue of the right question is a topic that has attracted a lot of attention, especially when it comes to the role of legal (liability) medical experts.[39] In 2008, the *Richtlijn Medisch Specialistische Rapportage in bestuursrechtelijk en civiel-rechtelijkverband* was published: it provides experts with guidelines to fulfil their missions.[40] In the directive provided as an example to answer a question, we can find: "do you believe that, medically speaking, they acted recklessly? And if that is the case, what was the medical error?" Having read this article, it will be obvious that this is not a good starting question for the expert, since it does express the goal – but does not express the investigation's right question; it is an evaluative and not an analytic question. Beyond the action, the context within which it was carried out is the essential element. The key to improving expert reports is anchored in this difference between the means and the goal. Within the framework of the existing procedures within which the expert has a mission to carry out, it is possible but also urgently necessary, to choose the open question approach described here. But this is not enough. The preparation of the mission, the technical phase, has to attract the lawyers' attention more. The report does not come out of a black box, it requires an explicitly described preparation for which the methodological framework is used as ex ante and ex post test for all lawyers and parties concerned. This increases the precision of the judicial judgement. If the saying "there are no wrong questions" does exist for a reason, it does not in any case find its roots in legal practise!

[35] Gibbs e.a. 1988.
[36] Vinten 1994.
[37] Kahneman 2011.
[38] Keil 2006, p. 238 e.v.
[39] See footnote 5.
[40] http://knmg.artsennet.nl/Publicaties/KNMGpublicatie/Richtlijn-medischspecialistische-rapportage-in-bestuurs-en-civielrechtelijk-verband-2008.htm.

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