

**7 June 2019**  
**EEEI / General Assembly**  
**The Hague - NL**  
**Bart Jan van Ettehoven**

- Ladies and gentlemen, it is an honour and a great pleasure for me to welcome you to The Hague, the city of peace and justice, and in this special place, the ballroom of the Council of State.

## Council of State - welcome



- In the Netherlands, the Council of State not only advises on legislation, but it is also the highest court for general administrative law.
- The reason we are welcoming you here today is that, as highest administrative court, the Council of State frequently calls on the experts and expertise of a Foundation for forensic experts called the Stichting adviserende bestuursrechtspraak (or – in short - *Stab*). The Stab foundation is an organisation with subject experts on planning and environmental law. It works exclusively for courts such as the Council of State.
- As you may know .... Sascha Dalen Gilhuys is not only Secretary-General of the Steering Committee of your own European Expertise & Expert Institute, but also director of the Stab – Foundation.
- In the coming 20 minutes or so, I'd like to tell you more about our procedures for finding experts and expertise.

## The link between expertise, authority and trust



- Judges know an awful lot, but naturally especially about the law. Not always about the facts – they simply cannot have special expertise on every subject. That expertise is usually provided by the parties and their respective experts.
- I would like to introduce you to a special person. Dr Clavan.
- Dr Clavan was a caricature in a well-known television sketch, someone with great expertise on simply everything, a real Mister-know-it-all. It's a pity that we can't use him in the courts. We'll simply have to make do with the parties' own experts and with court-appointed experts.
- As a court, we have authority, but we can only maintain the trust of those seeking our help, if our judgements are factually-correct, legally sound, sensible and fair.
- And to be able to rule on the facts in complex disputes, we, as judges, need experts - subject experts.
- But who is a subject expert? And how can a court tell? A judge's problem is precisely that he has no way of assessing

this.

- The Netherlands does not have the tradition that expertise needs to be proved: we do not require experts to explain their expertise when they are heard as expert witnesses, and neither do they have to account for themselves in expert reports.
- This is totally different from, for example, the United States where I once witnessed the examination of an expert (a pathologist) in a capital murder case. She was examined for more than 15 minutes on her expertise before being permitted to make any statements about the case itself.
- In the Netherlands, the tone of the exchanges in court are hardening, and in the administrative courts we now also see experts being challenged on their expertise. Sometimes party A challenges the expertise - or lack of expertise - of the expert called in by party B.
- The Council of State is in the fortunate position that we can call on the *Stab* and ask them to evaluate the reports of the parties' respective experts in terms of their factual accuracy and – when disputed – the research methods.
- Sometimes we can also ask them to inform the court whether one party's expert has anything useful to say about the subject. In other words, whether that expert can in fact be seen as an expert at all.

## The importance of expertise

**ASK AN EXPERT**



- Disputes which go to court are about the facts in more than 90% of the cases.
- Medical errors, technical faults, radiation risks, the chances of an earthquake, the significance of medical problems for someone's driving skills, etc. – the courts are asked to decide on the most complex of factual disputes.
- As already stated: the problem is that a judge is not a subject expert.
- The parties can call in experts, but the court cannot assess the accuracy of the experts' reports.  
The only thing a court can do – if the report is at all in the kind of language which can be interpreted by someone with simply a good legal background – is try to assess whether it is logical, comprehensible and conclusive.
- Within the Council of State we deal with administrative law. One of the characteristics of the procedure is that one of the parties is always a government body (adm authority).

- If a government body has called in an expert, the administrative court must confirm whether that body has verified the soundness of that report.
- If a claimant (appellant, plaintiff) can submit no or insufficient defence to contradict the government body's report, then the game is often over.
- But if the claimant also calls in an expert, and if the court is unsure which expert is right, then the court MAY call in its own third, expert.
- Precisely because a judge has no subject expertise, he will be inclined to listen most to his own expert.
- But this mechanism is only acceptable if the expert called in by a court meets certain requirements.
- And that raises an interesting question. How does a court know whether it's dealing with a truly reliable expert?
- And my question to you is: what does a reliable expert look like?

## A reliable expert



- What to think of this guy?
  - how many of you are experts? Please raise your hand
  - how many of you have a Labrador?
  - how many Labrador lovers wear a Hand-knitted Norwegian cardigan?
- Studies have shown that people are more likely to trust a person wearing a hand-knitted Norwegian cardigan or someone with a labrador. That's heart-warming, but doesn't exactly help a court find a reliable expert.  
And yet it's extremely important that a court can trust the expert's expertise, as it must after all be able to base its conclusions on the facts presented by that expert.
- It is therefore in the public interest (inm the interest of public health, animal welfare, nuclear or food safety, the environment, access to basic rights, asylum, benefits etc.) that those factual conclusions are state-of-the-art.
- Greater expertise means a better grasp of the facts and

therefore accurate facts to support a court's conclusions. And, as judges, we attach great importance to the facts (not to 'fake news'). That in its turn promotes greater confidence in judges and the courts and in the rule of law.

## The requirements for court experts

- Impartial
- Independent
- Thorough
- Unquestioned integrity
- Subject expertise
  - proven, up-to-date knowledge of his own field
- A knowledge of law and legal procedure
- A court expert's report must:
  - account for the facts, sources and investigation methods
  - be verifiable and take account of evidence to the contrary
  - be in comprehensible language
  - be designed to respond to the court's needs

- What are the basic requirements for a court expert?
- A court expert must be **impartial and independent**. He must conduct a **thorough investigation** and his **integrity** must be beyond question.
- He must also be a **subject expert** with **proven knowledge and experience** in his field.
- A court expert must also have at least a **working knowledge of court procedure**. He must be able to understand the framework, legal and otherwise, within which the court requires his expertise.
- A court expert must also learn **how to report to a court** (as this is quite different from presenting the same facts to fellow experts).
- The expert must be able to **account for the facts** he presents, and for the **sources and investigation methods** he uses.
- His findings must be presented in a **verifiable manner**, so

that it is possible to examine them in the light of evidence to the contrary.

- He must formulate his findings in comprehensible way, which means: **plain language**.
- And finally, he must help the court by ensuring that his findings focus on the facts relevant for answering the legal question to be responded to by the court.

## Registers



- It's difficult, or even impossible for a court to verify whether an expert meets the requirements for a court expert.
- That's why the courts use various **registers** with reliable information on experts who meet those requirements.
- The Netherlands has a number of expert registers, some government-financed, some privately-funded.
- For criminal law, there is a special register, the NRGD, the Netherlands Register for Forensic Experts. This register is government financed. If a criminal court wishes to call on an expert, it must select someone from that register or explain why an unregistered expert should be called in.
- There is a special register, the DOBS, for experts on expropriation. (the requisitionment of land)
- There is a special register, the NVMSR (the Dutch Society on Medical Specialistic Reports), for medical specialists with extra expertise on legal issues.
- The administrative courts can call on the *Stab Foundation*

for advice on matters of environmental law.

- And then there's the LRGD, the Nationwide Register for Forensic Experts, which is a register of experts in every field: criminal, civil and administrative matters. The LRGD is privately funded. This register has no quality checks of its own, such as the register for experts on criminal law, the NRGD. They work with a different approach; their members must meet the requirements laid down by their own professional organisations.
- This business model has the advantage that the LRGD is flexible and wide-ranging, but the drawback is that it has no checks of its own to verify the quality of the experts. That means the quality of those experts depends on the requirements laid down by the various professional organisations.

## The Council of State's approach

- Has its own code of conduct for experts
- >95% of the experts - > Stab
- Medical experts– > NVMSR / LRGD
- Other experts– > 'disclosure statement'
- Requirements for 'unregistered' experts -> code of conduct
- Consequential effect: requirements for the party-appointed experts

- What is the approach of the Council of State?
- Our court has no legal obligation to appoint experts from a specific Register. In other words: we can choose who we want to appoint.
- From february 2018 we have our own Code of conduct for forensic experts. It is published in the State courier / the Government Gazette.
- >95% experts we appoint are experts in the field of environmental law. They work for the Stab-Foundation, and they all qualify.
- For Medical experts we can rely on the NVMSR; most of their experts are registered with the LRGD.
- If the Stab and the LRGD cannot help us out because we are in need of specific fields of expertise, e.g. document analist in a passport fraud case or a

nautical experts, we search for an reliable expert ourselves.

- When we have found an expert who is willing to work for the court, we use our own disclosure statement, with requirements for unregistered experts.
- What we hope for, is that with our requirements we set a standard (may be: the standard) for the parties' own experts. It's to early to tell, we have to wait and see if our Code of conduct and our Disclosure statement have any external effect.

## Council of State



- As I just mentioned The Council of State has its own Code of conduct for experts.
- This is not the time or place to discuss the entire code, but it includes provisions on:
  - the expert himself
  - the service to be provided
  - the on-the-spot investigation
  - contact with third parties and the parties themselves
  - the effectiveness of the investigation and the costs
  - the report itself

## Disclosure statement



**Professional  
Disclosure Statement**

- As stated, the Council of State uses a disclosure statement for experts not on an official register.

## Disclosure statement

- **General section**
  - profession / qualifications / experience
  - membership of professional organisations
  - complaints procedure / disciplinary code
  - (re)registrations
- **Case-specific section**
  - impartiality
  - information on specific expertise
  - information on investigation methods / sources
  - information on case-specific matters

- The Council of State's disclosure statement consists of two parts / two sections.
- In the first, **general section**, the expert is required to provide information on:
  - his profession / qualifications / the number of years of proven experience in his field
  - membership of a professional organisation
  - when he was registered as expert
  - whether he has been re-registered
  - whether he keeps up with continuing education.
  - whether he is subject to a complaints procedure
  - whether he is subject to a professional disciplinary code

- In the second, **case-specific, section**, the expert must provide information on:
  - his impartiality: does he have any interest in either of the parties in the case?
  - does he have the specific expertise required?
  
- If the expert submits a report, he is then required to provide information on:
  - his findings on the facts
  - his investigation methods and sources
  - his findings in the light of the questions put to him
  - any relevant case-specific matters

## Role and mission



- Ladies and gentlemen, I would like to wind up.
- I have tried to explain how the Dutch courts find experts and expertise, how we use public and private registers. How we use registers, codes of conduct and disclosure statements.
- Our methods are not unique, and are replicated in many other countries.
- At the end of the day, we try to ensure that a court is informed of the facts in a reliable, verifiable and comprehensible manner, so that it can reach a well-balanced conclusion. Conclusions which promote the legal system because they are based on subject expertise and which help maintain public trust in the courts and the administration of justice.
- That is in keeping with the goals of the EEEI.

- I hope that my introduction has provided a modest contribution to:
  - redefining the expert's role and place in our society
  - harmonizing professional practices and rules.
- Aside from this: I believe that the mere fact that key stakeholders - judicial experts, magistrates, lawyers and academics – are meeting here today to exchange ideas on the importance of expertise and experts in court proceedings, is an excellent initiative.
- I wish you all a very interesting morning. Thank you for your attention.