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de Groot, G.

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Summary

This book is about expert evidence in Dutch civil law cases. In the management of a civil law case a judge may invoke the opinion of an expert, in Dutch called ‘deskundige’. In civil procedure experts are mainly asked to deliver professional opinions on certain matters. The purpose of their contribution is to enable litigants and the judge to understand the factual truth in their case as much as possible.

When a judge obtains and uses expert evidence, he may be hindered by the so called ‘knowledge paradox’: while assessing if the judge needs expert information or experience with regard to a non-legal field, he already needs part of this knowledge or experience. At this stage a lawyer does not always sufficiently know what precisely he does not know. To instruct the expert correctly and to assess the probative value of expert evidence a lawyer needs some knowledge of the expert’s profession, but the fact that he lacks this knowledge, induces him to ask the expert’s opinion.

A judge is obliged to give a judgment in the litigation of the parties, even if he cannot fully assess the validity of the expert’s report. Thus the possibility exists that a court judgment does not administer justice sufficiently during litigation. Furthermore, litigants or third parties may get the impression that the case is, in fact, decided by the expert. In such cases it is difficult for litigants and third parties to see and to accept that justice has been done. An accurate court judgment requires that an attempt is made to find the truth in the parties’ litigation which corresponds as much as possible with the truth that is susceptible to human perception. In civil procedure an expert’s report should give an optimum contribution to a court judgment that is as accurate as possible. The tasks, competences and responsibilities in civil procedure must be distributed between parties, judge and expert in such a way that each of them promotes the situation where the expert’s report contributes best to a court judgment that is as accurate as possible.

The focus of this study

Against this background, this book focuses on two questions. The first is the question who determines and should determine which facts are part of the fact-finding, should a judge consider taking expert evidence. The second question is, to what extent should the person who determining this, take into account the wish of other persons in the same procedure, to partake in the fact-finding. The two questions can be summarized in the question: who (and to what extent) should and does determine which expert examination is done and on which facts. It is a theme in this book that the answer depends on the balance in the control of a litigating

party over his civil rights and the task of a judge in civil procedure. A recurrent theme is also that the two questions can be considered against the background that an expert's report has to make an optimum contribution to a court judgment which is as accurate as possible. The realisation of this contribution depends to a certain degree on the way in which parties, judge and expert interpret their tasks, competences and responsibilities in a civil procedure.

Complications of getting expert evidence

The so called knowledge paradox complicates the process of obtaining expert evidence. The judge is free in assessing the need to ask for expert opinion. Part of this freedom is that the judge determines what questions are put forward to the expert and what instructions are given to him. The questions and instructions of the judge are leading for the expert's examination. Because the judge does not always know what he does not know in a different area of expertise, he may formulate incomplete or incorrect questions, which do not (sufficiently) produce the elucidation of the relevant facts in issue. Furthermore, an expert examination may be complicated because a party or the expert considers other questions relevant for the court judgment than the questions put forward by the judge.

Purpose of expert evidence and the principle of direct observation

Another complicating aspect is that an expert examination ordered by a court almost never takes place in the presence of the judge, while litigants only have a right to observe the examination as far as the expert's assignment entitles them to be present. An expert's opinion is usually laid down in a written report. Litigants may comment on it. The expert is almost never questioned about his report in a court session. The judge assesses the evidence. In the law of evidence, expert opinion is mainly seen as an instrument for the judge. The evidential value of the result of an expert examination for the parties is considered as a secondary aspect of expert opinion. This view may be engrafted onto the idea that expert evidence substitutes the direct observation of the judge. This can be historically explained, because it is likely that expert evidence has developed in the past from judicial survey and initially has mainly functioned as a substitute for judicial survey. In a judicial survey or inspection the judge clarifies disputed facts with relevancy for the court judgment by direct observation.

In the course of time, however, expert opinion has developed into an instrument of its own nature and content. An expert examination mostly involves the proof of facts in itself, and expert opinion has normative influence on the outcome of the case. The procedural safeguards surrounding expert examinations have not kept pace with this development. On the other hand, the principle of direct observation asks for a course of evidence in civil procedure before a judge in the presence of litigants, as much as possible. It is part of the right to a fair trial (Article 6 § 1 ECHR) that parties must be able to participate adequately in a litigation, also if an expert examination is executed. The standard is that the proceedings in their entirety, including the way in which the evidence was obtained, must be 'fair' within the meaning of Article 6 § 1 ECHR. The parties and the judge need instruments to be able to control this. The possibilities of the parties

and the judge to control the fact-finding by the expert are limited by the minimal extent to which the parties and the judge observe the activities of the expert during the expert examination. Within the bounds of the assignment of the case given to him by the judge an expert is rather free to execute the examination in the way that seems best to him. In the Netherlands the participation of litigants in an expert examination is relatively limited. After the expert has finished the report, parties have the right to send the judge their written comment on the report. They do not have a right to put questions to the expert about his report in a court session. The expert is not obliged to answer the written questions the parties may send to him about the draft of his report. This affects the balance of interests of fact-finding in a fair trial (including possibilities for control), the costs of procedure, and the time a procedure may take: the emphasis in Dutch civil procedure veers towards the tasks of the judge in the obtainment and use of expert opinion, and derived from these tasks towards the freedom of the expert to organize the examination in the way which seems best to him. The autonomy of the parties over the determination and grant of their civil rights is made of secondary importance.

This situation has arguably three undesirable side effects. Firstly, the responsibility of the litigants to ensure that an expert's opinion contributes best to a court judgment that is as accurate as possible, is underexposed. Secondly, the responsibility of the expert is not linked enough to the judge's responsibility. Thirdly, the responsibility for a court judgment that is as accurate as possible, including the assessment of the expert's report, rests to a very substantial extent with the judge. I consider it illusory that a judge is capable of carrying this far-reaching responsibility on his own. The litigants know the facts of their case mostly better than the judge. They have their own possibilities to verify if an expert's report contributes best to an optimally accurate court judgment. Besides, judges are hindered by the consequences of the so called knowledge paradox. To assess the expertise of the expert, a judge depends to a great extent on the information given to him by the parties. To put the right questions to the expert, a judge partly depends on the parties and the expert. To assess the correctness of an expert opinion, a judge is partly dependent on the comment of the parties on the expert's report, and partly on the report of the expert, which must be complete, understandable and logical.

The current inadequate balance in the distribution of responsibilities between litigants, judge and expert is problematic: it suggests – in my view improperly – that a judge is fully capable to assess which person is the best competent expert to give an expert opinion in a certain case, and which facts have to be part of the expert examination to ascertain that the expert's report contributes to a court judgment that is as accurate as possible in the dispute of the parties. Should it afterwards become known that a judge erroneously relied on an expert opinion: the question will soon arise if people in a democratic and lawful society can still trust that justice can be seen to be done and that court judgments are acceptable for litigants and third people. Suddenly, the confidence in the judiciary may be at issue.

Procedural mechanisms and instruments

In this book attention is paid to procedural instruments or mechanisms which could assist expert opinion regarding disputed facts in civil procedure thereby contributing to the greatest possible accuracy in a court judgment. The right of the parties to decide which facts are in dispute and which facts they wish to be examined for the determination of their civil rights, the task of the judge in litigation and the task of the expert while creating a report, offer enough possibilities to reach this situation. Some adjustments to the distribution of tasks, competences and responsibilities between parties, judge and expert, relating to the procurement and use of expert evidence, are necessary, however. The essentials will be stated hereafter.

Recommendations: the practice of the discretionary competence of the judge to appoint an expert

Adjustments are desirable on two topics relating to the practice of the discretionary competence of the judge to appoint an expert.

Firstly, I recommend that the judge should be obliged to give explicit reasons why he gives a judgment without invoking expert opinion in cases in which a party claims that he can prove certain facts by expert opinion, the offer to prove is related to disputed facts relevant for the outcome of the case, and the judge does not appoint an expert. Apart from this, such an obligation may cause a reduction in litigants demanding for a so called ‘voorlopig deskundigenbericht’ (interim expert report), which is a separate judicial procedure outside litigation for getting an expert opinion. Nowadays, this request sometimes results in procedural complications between the interim procedure and the simultaneous litigation of the parties.

It will partly depend on the statements of the parties to what extent a judge will be able to give reasons for not appointing an expert. It deserves consideration to stimulate the parties to pay attention in their statements to the eventual necessity to appoint an expert. This could be done by extending the existing statutory duty of parties to mention their possibilities to prove facts by witnesses and documents to expert evidence.

Furthermore, without expert evidence a judge should not decide a case by using personal experience in a non-legal discipline, in which a lawyer generally can not be expected to have enough expertise, unless the parties agree to this, or the judge explains why matters are within his expertise.

Recommendations: choice of expert

On the topic of the choice of the expert attention should be given to safeguards for impartiality. Complaints about a lack of impartiality of an expert must always be judged by the standard of objective impartiality: can the doubts of a party in respect to the impartiality of the expert, raised by appearances, be held objectively justified? Besides, I expect that parties, judges and experts will know better how to deal with the most common aspects of disputes about the impartiality of an expert, if some procedural rules about the challenge of experts are established.

Recommendations: the choice of the questions

In the choice of the questions to be presented to the expert a judge should in my view explicitly consider if the expert opinion is only meant to assist the judge, or if during the expert examination factual proof will come forward and the report is likely to have normative influence on the outcome of the case. Mainly in the second situation, in which it is beforehand likely that at a later stage of procedure the evidential value of the report will be assessed, the judge must not formulate the questions from the only perspective that he decides on his own which information he needs for his judgment. He will have to give due account of the facts litigants want to have examined. This can be made possible by developing a presentation of the questions for the expert with the help of the skill which the judge also uses to list, analyse and select the factual and legal grounds of the claim out of the statements of the parties. Then the presentation of the questions starts with a coordinating question, which links up with the factual grounds of the claim or the defence. In their statements during procedure litigants have connected the disputed facts that need expert evidence with these factual grounds. Subsequently specific questions are formulated with respect to the facts that substantiate the factual grounds of the claim or the defence. It may be necessary to distinguish between disputed and settled facts in the questions, to make clear to the parties and the expert what the expert examination may or may not be about. In this way the assignment will be within the bounds of the litigation of the parties and the expert will be able to examine the facts that are relevant for the fact-finding in his discipline. As an additional advantage a presentation of the questions in this layered structure will make it less likely that the judge will ask the expert for a juridical opinion.

Recommendations: the execution of the assignment

By defining in the presentation of the questions, which (disputed) facts are part of the fact-finding in the expert examination, and which facts the expert must take for granted the judge does his utmost to ensure that the right facts are considered in the expert opinion. Thus, in the execution of the assignment it is in principle clear for the expert which facts need to be part of the examination. An expert should be able to file a request for directions to the judge if he nevertheless needs assistance in carrying out his function as an expert. For this purpose, the dialogue between the judge and the expert must be facilitated by law. It is underlined that this dialogue must be there wherever necessary for the optimum contribution of expert opinion to a court judgment that is as accurate as possible.

Additionally, for the benefit of this contribution, the extent to which litigants can participate in the expert examination needs to be improved. It is not self-evident that the freedom of the expert to execute the examination in the way that seems best to him should be of more weight than the interest of litigants in participating in the expert examination. On the basis of all circumstances of the case the relevant interests must be weighed to determine the significance of the equality of arms in the examination of the expert for the extent to which the parties must be able to participate in the examination. In the assessment of the relevant interests, the following will be generally represented: the interest of finding the

truth within the bounds of the assignment, the interest of the parties to follow by direct observation activities of the expert in which factual proof will come forward or that have normative influence on the outcome of the case, the interest that an expert can do the examination effectively and efficiently, the interest that an expert may form his opinion unbiased, the interest that litigants afterwards can comment effectively on the report of the expert, the interest that civil procedures can be finished in due time, and the interest that the costs of procedure are acceptable.

Recommendations: comments and requests

A party must be able to get elucidation about elements of an expert's report which he does not understand. Otherwise he would be restricted in his right to comment effectively on an expert opinion before the judge, partly because he has no right to ask the expert for clarification in a court session. A proper instrument for this is a reaction of the expert to the comments and requests the parties send to him after getting the draft of the report. According to current law it is doubtful if the expert is obliged to respond to comments and requests of the parties with the purpose of getting clarification about elements of the report they see as unclear. It is about time that the statutory rule about comments and requests is interpreted in this way by judges or is thus modified by parliament.

Recommendations: the court judgment after the report of the expert

If the correctness of an expert's report is disputed, a judge can check in his considerations, and make transparent in the reasoning of his judgment, if the report is complete, understandable and logical. In doing so, he approaches the assessment of the correctness of an expert opinion as close as can be asked from someone who does not have (sufficient) knowledge and experience in the discipline in which the expert opinion was obtained. This working method contains enough mechanisms to check if the examination has been about the facts that had to be examined to ensure the optimum contribution of the expert's report to a court judgment that is as accurate as possible in the dispute of the parties. It is recommended to interpret the obligation of the judge to give reasons for his judgment from now on in this way, irrespective of the scope of the obligation in a specific case. This also is a proper instrument to manage the risk that a court judgment does not enough justice to the interest of finding the truth within the bounds of the dispute of the parties, a risk which is the more real as the parties and the expert have less influence over the choice of the facts that are involved in an expert examination.