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The law of evidence in Dutch criminal cases in a nutshell: the role of the expert

Abstract

This article pays attention to the form of evidence brought into the process by experts (oral/written). There is free selection of experts by the court, the prosecutor and sometimes even the police. Appreciation of expert evidence, however, is the task of the court.

1. History

Under the former Code of Criminal Procedure of 1838, Dutch law did not consider an expert's statement in itself sufficient to support a conclusion of fact. The court could take the opinions of an expert into consideration, but the Code only allowed the court to rely on a statement or a conclusion or written reports of an expert when the court adopted the opinion of the expert as its own.

The present CCode treats an expert's statement on written reports, about his/her opinions, based on his/her field of expertise, as a unique category, an independent and sufficient means of proof. A great number of litigated cases include some evidence from experts. When we take into consideration that the files of a manslaughter case normally will include an expert statement of the coroner, or that the files in each drug case will include a statement of a chemical analyst about the nature of the drug, it is clear that the experts' involvement in a criminal case is in fact very important.

2. Two forms: oral statement or written report

Article 343 of the Code of Criminal Procedure of 1926 sets the requirements for the recognition of a statement of an expert who the court examines in the court room. Normally an expert, just as a witness in court, makes a statement in answer to the court's questions, especially those of the presiding judge, and to questions of the other participants: the prosecutor, defendant's counsel and the defendant him/herself. As a result of the Netherlands Supreme Court's acceptance of hearsay in a broad variety of forms since 1926 - the same year as the enactment of the Code - experts are seldom called to the court room. The only traditional exception is that psychiatrists and other behavioral scientists often appear in court when there are doubts about the defendant's mental condition at the time that the crime took place and/or at the time of trial. Forensic experts' main contribution consists of written reports that are placed in the files before the trial. The Code itself does not establish a preference between the written or oral forms of experts' reports: in article 344, par. 1 sub 4, merely says that the report of an expert is a sufficient means of proof. I will now not discuss the development of Dutch criminal procedure's preference for the written form. A Dutch court may rely on the opinion of the expert, whether written or oral. If the court relies on the expert's opinion it must indicate very precisely the parts of the statement or report it uses.

3. Free selection of experts

The Code of Criminal Procedure does not establish any minimum qualifications for experts. The court may in fact rely on anyone it considers truly expert, whenever necessary. However, in practice, the court heavily relies on the work of so-called tenured forensic experts. A tenured expert is an expert who is permanently under oath, serving the court to his/her best abilities.

The code itself assumes that the prosecutor or an investigative (or: investigating) judge (when the latter is involved in the pre-trial stage) will normally be responsible for calling any expert needed into the case. The code also indicates that the police may call for the help of an expert, which in practice they often do. In theory, and also in practice, the expert is generally presumed to be objective and neutral. This explains why the defense will only introduce an expert in a small minority of cases. When proof in a criminal prosecution relies heavily on expertise, the investigative judge normally will have appointed one or two experts. According to the code, whenever the investigative judge chooses an expert the judge may appoint an expert suggested by the defendant. The code includes some requirements for control of the investigation and performance of experts working under the authority of the investigative judge. In reality the system is rather free of restraint: the investigative judge is actively involved in a minority of cases. The vast majority of experts reach their conclusions in conjunction with the police investigation before the case reaches a judge. One, already mentioned, major exception has to be made: forensic psychiatry. Whenever there are reasons in the pre-trial stage to have doubts about the mental defendant's capacities, the code establishes a special procedure for psychiatrists' and other behavioral experts' observations and reports.

4. Good faith

In the same atmosphere of presumed objectivity and neutrality, the courts' basic attitude toward experts involved in criminal cases is a presumption of accuracy and good faith. In my opinion, Dutch courts are not very critical on so-called expertise. In America some empirical research with so-called blind testing (proficiency tests), has shown that the quality of experts' work in criminal investigation is often very poor. There is no reason to believe that the quality of our experts' investigation would be much better.

5. Special state institutes

The Netherlands have two specialized forensic institutes, owned and governed by the state. The first is the Forensic Laboratory of the Ministry of Justice (Rijswijk); the other is the Penitentiary Observation Clinic (Pieter Baan Centrum, Utrecht). Among the experts who will discuss their work and the criminal justice system later this week are two speakers who will be able to give more detailed information about these institutions.

References

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