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**Introduction**

In 1986, our Dutch law firm represented a client who was charged with several sexual offences. He had pleaded not guilty throughout the first trial but was nevertheless convicted. On instigation of the defence, the Court of Appeal in Amsterdam allowed an English laboratory to perform a DNA-analysis on behalf of the defence. When the results came through (no match), our client was acquitted almost immediately by the Court of Appeal.

This trial was the first Dutch criminal case in which this new type of expert research was admitted into evidence by the Court, now 17 years ago. Not long hereafter, laws were drafted by Parliament in order to implement this expertise in the Criminal Code and the Criminal Proceedings Act, which came into effect in 1994.

As DNA-analysis proved to enhance police investigation, this legislation has been fully revised in 2001 making it now possible to acquire saliva, hair or blood from a suspect without his consent for the purpose of DNA-comparison in minor criminal offences such as shoplifting and burglary. Today, DNA-analysis has a firm basis in Dutch Criminal Law and is admitted as evidence by the Dutch courts more and more often in a wide variety of criminal cases. At this point in time, the national DNA-database of the Dutch Forensics Institute [NFI] in Rijswijk, The Netherlands holds close to 3,100 profiles of convicted persons and over 9,100 profiles of forensic evidence.

Since 1 November 2001 the biological DNA-samples [cell material, blood, saliva, hair, semen et cetera] are also stored in the NFI facilities. As DNA-analysis is being thought of as the wonder to solve all crimes, Parliament has – without any resistance – recently adapted a new legislation initiative which provides a legal basis for testing these stored and future DNA-samples on more genetic markers than before, providing information on gender, sex, race and colour of the eyes and hair of the suspect in order to facilitate police investigation.

There are also strong rumours on testing DNA-material for inheritable deficiencies in the nearby future. But until now, Dutch government has upheld that this type of study is not yet scientifically possible. In forensics, I presume, because University hospitals are since long testing DNA-samples from humans to detect such inheritable diseases in an early stage to prevent worse.

And last, but not least. Legislation is now pending to make it possible for convicted [psychiatric] felons to provide cell material to the NFI for storing in the DNA-database to prevent future crimes and/or to enhance future police investigation. Voluntarily, but those who refuse will not benefit from the change to another [lighter] regime, early release or other privileges.

All this, of course, has a backside. DNA-comparison has also proven not to be without flaws. New – more accurate – methods of DNA-analysis have been introduced since the first Dutch criminal case in 1986 and these methods are – as we speak – still evolving. The same goes for other types of expert research, such as matching fingerprints, the use of sniff-dogs, (digital) facial recognition, validity assessment of statements, pathology and behavioural conduct research.

As a result, the Supreme Court of The Netherlands [Hoge Raad] has ordered a mistrial in no less than two murder-cases in only the past three years, better known as the Puttense moordzaak (2001) and the Deventer moordzaak (2003). Cases in which the expert's opinion proved to be the weakest link of evidence when studied upon again by criminal defence lawyers. Cases in which the Courts convicted the defendants and sentenced them to severe jail terms. Cases that are now in review.

Therefore, challenging expert's opinions can be essential in Criminal cases. Not in the least to end common practice in the Courts to accept expert's opinions as legal facts rather than scientific ones.

But to get an expert's opinion ruled out as evidence by the Courts is another expertise. And that is what's this contribution is all about.

## **1 Expert (witnesses) in the Dutch Criminal Law system**

### 1.1 Legal definitions

Dutch Criminal Law does not provide a legal definition for the term “expert” nor the “expert witness”. This seems strange as the Dutch Criminal Proceedings Act states in Section 339 that the written report or the testimony of an expert can be admitted into evidence, even when it is not being supported by other evidence.

The legal definition of the “testimony of an expert” in Title VI, Section 343 of the Act is also not much as a use. The “opinion of an expert based upon his knowledge in the field of expertise on that subject” does not make clear on what grounds a person should be regarded as an expert and why his opinion should be admitted into evidence as an expert's one. The same goes for the legal definition of the “written report” of an expert, so the defence is not yet out of the dark.

Common practice shows that Courts will only admit expert's opinions when they are satisfied with the expert's skills, training and experience, although the way in which this is judged is not known to the public and the defence. But, as we shall see, this also creates the possibility for the defence to persuade the Court to regard the layman of today as the expert of tomorrow.

In this contribution, I will follow the (legal) distinction between the expert and the expert witness.

When mentioning the expert, I mean the person who should be – in the opinion of the Court - regarded as just so and whose written expert's opinion is known to the Court, the defence and the Public Prosecutor.

Where I mention the expert witness, I refer to the expert who has been interrogated as a sworn witness during a pre-trial, in-trial or post-trial hearing and whose statement must therefore be acknowledged as an expert's testimony.

The conclusions of an expert [both in reports and testimonies] will be called expert's opinions.

### 1.2 Experts and their fields of expertise

In The Netherlands – as in most other Western countries – there are numerous experts with as many fields of expertise. For the purpose of this contribution I will only discuss the Forensic experts and the Behavioural experts. Let me remind you that this is no legal distinction: Dutch Law, as we have seen, provides no clue about experts nor about their areas of expertise.

### 1.2.1 Forensic Experts

In general, there are three groups of Forensic Experts in the Dutch Criminal Law system. And no, this is also not a legal distinction.

First, there are **trained police experts** who have been trained on the job to conduct certain types of [technical] research on one or more specific fields of expertise, i.e.: traffic accidents [speed, collision course], computer crime [digital researchers], financial crime [bookkeeping analysts], controlled substances [cocaine, heroin, XTC, marihuana], ballistics [definition of fire arms] and of course the crime scene investigators [breaking and entering (tool-, tyre-, and fingerprints), arson (point of origin, chemicals) and rape, manslaughter and murder (semen, hairs, skin tissue, blood)]

Trained police experts conduct their research by internal protocols, not commonly known nor accessible to the defence lawyer. Their reports come in the form of sworn testimonies and can be admitted into evidence as just so by the Court. This type of police report should then be handled as an expert's opinion and has bigger power of evidence than a normal police report.

The second group of experts is being employed by the Dutch Forensic Institute [NFI], situated in Rijswijk, The Netherlands. These government appointed experts are **academically** or **internally highly trained experts** on various fields of expertise, among which are Pathology, Toxicology, DNA-technology, Firearms & Ammunition, Illicit Drugs, Speech and Voice-recognition.

The NFI claims their experts have a very high degree of external and internal training, good skills and experience and they only work by strict protocols that are constantly updated. Protocols which – again – are not always accessible to defence lawyers or third party's experts.

Due to the lack of a legal definition of the term "expert" in the Dutch Criminal Proceedings Act, the Courts have the liberty to appoint any skilled person as an expert and to accept his or her report or testimony as evidence [exclusions: DNA, blood and alcohol, drugs and pathology]. Therefore the Courts and the Prosecution may choose to let the necessary research be conducted by a third party, i.e: a **private company** or **institution** or a **skilled professional** [professor].

Cases in which third party expert's have been called upon vary from charges of fraud [research by an external accountant], possession of child pornography [research by a digital analyst], sexual offences [statement validity assessment by a psychologist], euthanasia [common practice among other skilled medical professionals], and organized crime [translation and interpretation of intercepted telephone conversations by an interpreter].

The same rules as to obtaining an expert's opinion apply also to the defence lawyer. However, caution is advised. The final decision as to whether a third party should be addressed as an expert and his report or testimony can be admitted into evidence as an expert's opinion is up to the Courts and not the defence lawyer or the Public Prosecutor. And common practice shows that trial judges are apt to place greater trust in the expert's opinion drawn up by experts defined in the first and second group, than third party's expert opinions. But I will address this issue later on.

### 1.2.2 Behavioural Experts

Behavioural experts, by which I mean academically trained psychologist and psychiatrists who are accredited by a semi-governmental Training Institution and registered in a national database [BIG-register], come mainly in three fields of expertise in criminal trial cases.

These expert's are called upon mostly to draw up a profile of an unknown suspect [serial rapist, serial killer], to assess the validity of a statement given by a witness or a suspect/defendant and to conduct a behavioural research regarding the suspect's or accused mental state of mind. Recently

another field of expertise in Dutch Criminal cases can be added: the Behavioural expert's opinion regarding the validity of a cultural defence such as Winti, Black Magic, Voodoo et cetera.

For the purpose of this contribution however, I will only focus on the third area of behavioural expertise: the expert's opinion regarding the state of mind of the suspect or the defendant..

## 2 Expert's reports and expert witnesses in the Criminal Procedure

During pre-trial investigation the **police** is entitled to draw up any expert's opinions regarding their fields of expertise, mostly crime scene investigation. If by law the research has to be carried out by the NFI's experts [DNA-analysis, Pathology], the **public prosecutor** – who is in charge of the Dutch police investigation – orders so. During pre-trial investigation, the police and the Prosecution's Office are also entitled to call upon a third party's expert at any time. Once a suspect has been arrested and is held up at the police station for more than 6 day-time hours he will be appointed a **defence lawyer**. From this moment on the defence lawyer is also entitled to call upon a third party's expert to conduct a specific type of research at the costs of his client. He can also persuade the police to conduct a certain research (via the Prosecutor's Office) or to have the police expert's opinion being reviewed by the NFI's experts (second opinion).

In the latter case the research will be financed by public means. But the prosecutor may not grant the defence's plea, in which case the defence lawyer should try to persuade the **Instructional Judge** instead to order the preferred expert's research on behalf of the defence. In some cases the law itself holds an absolute right to contra-expertise, to be conducted by another Institution than the NFI [DNA-analysis] or by a third party's expert [Blood testing regarding intoxicated driving]. The costs for exercising these rights have to be paid for by the suspect or the defendant himself.

If and when the Public Prosecutor decides to try the case before the Court, the **trial judges** take over the responsibilities of the Instructional Judge and therefore can order any expert's research. During this period, the police and public prosecutor also remain entitled to conduct research or to order so. Same for the defence lawyer, who is entitled to call upon a third party's expert [at his own costs] or to try and persuade the Court to order a second opinion or a (contra-)expertise.

Convicted felons have the legal right to ask the Dutch Supreme Court to review their cases. In order to succeed, the defence lawyer has to state that there is new information in favour of the defendant which was unknown to the trial judge when the conviction took place. In general, this plea will only be granted when supported by other expert's opinions or a second opinion from the then reporting expert based on new (factual or scientific) principles. Therefore, the defence lawyer is also entitled to call upon third party's experts to support this new theory in post-trial periods.

## 3 Challenging expert's reports and expert witnesses testimonies

As we have learned, the decision to admit the expert's report or the expert witness's testimony into evidence as an expert's opinion is up to the trial judge. This principle, known as the "Ultimate Issue-rule", can prove to be in the advantage of the criminal defence lawyer. First because the defence can try to introduce new types of research into criminal law trials. And second, because the defence lawyer can always argue that expert should not be regarded an expert because he is not (thoroughly) skilled in that area of expertise or on the grounds that the research is not conducted according to secure enough protocols to exclude flaws or that "confirmation bias" is the problem.

### 3.1 Challenging different types of expert's opinions

For the law, all expert's opinions are the same and have the same power of evidence. For the criminal defence lawyer this is very much not the case. For the purpose of this contribution, I will make a distinction between expert's opinions based on (1) Laboratory research such as DNA-analysis, Controlled Substances, Toxicology, based upon (2) Interpretation regarding (non-digital)

voice- and face- recognition, translation of intercepted (foreign) conversation, and research based upon (3) Diagnosis (i.e. psychological and psychiatric behavioural research).

Laboratory research results are most difficult to dispute. This can on the one hand be explained by the lack of expertise bothering the criminal trial lawyer. But this is also due to the inaccessibility for the defence of the protocols and research methods used by the expert to draw up his report. Courts are therefore not likely to dismiss the results of laboratory research on the sole opinion of the defence that the expert was not skilled or that the protocols and/or the research methods used have a [high] risk of false positive identifications (DNA, fingerprints, blood, hairs et cetera).

According to rulings of the Dutch Supreme Court, the defence – when challenging these and other types of expert’s opinions – has to present strong arguments as to why the results are unreliable to serve as evidence in that particular case. When such arguments are presented by the defence lawyer, the Court has to motivate the admittance of the expert’s opinion as evidence in the verdict. Whether the defence’s arguments are strong enough is up to the Court to decide as well, which means that the Court can pass a defence’s plea on this subject when the trial judge’s decides that the plea is not strong enough. If the arguments hold up, the Court will have to investigate whether the expert is skilled and trained thoroughly and whether the disputed (conclusions of the) research is conducted properly according to commonly accepted methods and standardized protocols. There is, however, no legally based obligation for the Court to order a contra-expertise or a second opinion when the expert’s opinion is challenged by the defence lawyer [see paragraph 4.2]. So strong arguments are not always the recipe for success as the Court will also have to be persuaded to either dismiss the expert’s opinion as evidence during (pre)trial investigation or to order a new research by another expert [appointed by the Court]. In the latter case, even when the second expert’s opinion is in favour of the defendant, the Ultimate Issue-rule can not prevent the Court to admit the disputed first expert’s opinion as evidence. But that decision must be properly motivated by the Court and is more likely to provide a ground for appeal.

The second type of expert’s opinions – that are mainly based on interpretation – is more easily to dispute. The same rules as mentioned before apply as to admittance and dismissal of these opinions by the Court, but the (experienced) criminal defence lawyer will not be as much bothered by a lack of expertise than with the first type of expert’s opinions [laboratory results].

This can be explained on the one hand that the defence lawyer has the advantage of speaking with his client freely and to obtain more information than is known to the police, the Prosecution or the Court. On the other hand, sound common sense will more easily lead to detect flaws in order to dispute the expert’s opinion strongly. Wrong calculations in fraud-cases or traffic accidents, voice recognition carried out by unskilled police interpreters, wrong translations of intercepted telephone conversations, wrong interpretation of used words and terms therein which is mainly the cause of conducting research based on assumption rather than facts and/or a whim of confirmation bias: drawing up conclusions first instead of blind research with no knowledge of the possible outcome.

The third type of expert’s opinions – Behavioural research reports – is used by the Courts to assess the defendants mental state of mind shortly before and during the offence(s) he or she has been charged with. If and only when both the examining psychologist and the psychiatrist conclude that the defendant was criminally insane during that period due to a mental disorder and he is likely to commit another offence which can cause (serious) harm to others when that order is not treated. When the advice of obligated treatment in a State Mental Hospital is being followed up by the Court, the defendant will stay there for an indefinite period of time. The law prescribes then a two-yearly evaluation by the Court, which tend to prolong the order of treatment until the State Mental Hospital’s experts report that there is no longer any risk for society that the patient will commit another crime. These expert’s opinions can also be challenged by the criminal defence lawyer on the grounds as mentioned above. But common practice shows that Courts tend to rely gravely on the State Hospital’s experts, even when their opinion is conflicting with the evaluation being conducted after six years of treatment by an external psychologist and an external psychiatrist.

### 3.2 The right to contra-expertise

In the Dutch Criminal Law system, there is no absolute right for a defendant to contra-expertise or a second opinion when confronted with an expert's opinion. The law only prescribes a right to contra-expertise in the case of DNA-analysis and for blood-testing regarding intoxicated driving.

But, when acting on time and when possible, the Dutch Courts will generally have to accept a defendant's plea regarding contra-expertise according to several Supreme Court rulings. This is in accordance with the European Treaty on Human Rights and the International Treaty on Civil and Political Rights, which demands member-States not to infringe with this (basic) human right.

To my opinion, this also means that the right to contra-expertise should not be made impossible by setting the costs [to be paid for by the defendant in order to conduct the research] too high. This problem can not always be solved by persuading the Court to order a contra-expertise [see before], because the Court can deny this defence's plea or the legislation itself subscribes the amount and the way it should be paid for [i.e. DNA-analysis: Euro 300,00 to be paid for by the defendant]

The criminal trial lawyer therefore has to make strategic choices as to when and how to execute the right of the defendant to contra-expertise. First there is the matter of who finances the research: the defence [client] or the State. Second, waiting can sometimes prove valuable. If the Prosecutor has failed to provide sufficient research-material to conduct a contra-expertise or this material is lost in the course of the trial, the Court can decide to dismiss the incriminating expert's opinion as evidence or to deduct a certain percentage of the punishment in the case of a conviction. But when he is too late, the Court can deny the defence's plea for a contra-expertise on that ground alone. Even though this appears to be interfering with the search for the material truth in a criminal trial.

### 3.3 Hazards and risks, mistrial and review

Common practice shows that expert's opinions drawn up by drawn up by the NFI's experts are more likely to be admitted into evidence by Dutch Courts than expert's opinions drawn up by the police experts or a third party's expert. This causes no problem if the NFI's expert opinion is in favour of the defendant. But when it is incriminating, now the defence can only rest.

However, recent events have shown clearly that expert's opinions are not flawless and can, when interpreted wrong by the Courts or when based on assumption rather than facts (confirmation bias), lead to unjust convictions.

#### *The "Putten" murder-trial [Puttense moordzaak]*

In this case, two male suspects were convicted of raping and murdering a stewardess by both the District Court and the Court of Appeal. When confronted with the statement – given by the in-trial expert – that his previous theory saying that the semen [which did not match the DNA-samples provided by the two suspect's] on the victims leg could have been found there because of the alleged rape was based on incomplete information provided by the Prosecution, the Supreme Court ordered the case to be reviewed by another Court of Appeal.

After being informed by the former expert that his semen-theory – based on all the information – could not hold up and a new DNA-analysis disputed the earlier assumption that the hair which was found near the victim's body matched with one of the suspect's hairs, they were both acquitted and were awarded almost 1 million euro for damages. After having served almost 8 years in jail...

#### *The "Deventer" murder-trial [Deventer moordzaak]*

Just a month ago, the Dutch Supreme Court ordered another review when confronted with new DNA-analysis showing that the supposed murder-weapon [a knife found by the police a few days

after the crime almost two kilometres from the crime scene] did not contain cell material that matched the victim's DNA nor the suspect's DNA. There was also a new statement given by a former in-trial expert that the use of the sniff-dog to identify the smell of the suspect on the assumed murder-weapon was not conducted properly and the risk of a false positive identification could therefore not be excluded entirely. The suspect, who has always claimed to be not guilty, was convicted in two instances to severe jail terms. His case will be reviewed in the nearby future.

#### **4 Conclusions**

As science is evolving, criminal investigators call upon it's theories more and more often.

And Courts rely upon the expert's opinions more and more to gather evidence for a conviction.

But expert's opinion, as we have seen, must not always be taken for granted by the legal actors.

Not by the Courts, not by investigators and certainly not by the defence lawyer. They must all stay alert for flaws, errors, false positive identifications and confirmation biased opinions.

In order to judge these expert's opinions justly, Courts and defence must be granted access to the used protocols and procedures.

An absolute right to costless contra-expertise for the defence should be implemented in legislation, so that a defendant has equal arms to dispute the State's case if based mainly upon expert's opinions rather than facts.

It is not clear who should be regarded as an expert by the Courts. What kind of training, skills and experience that expert should have had and why the one expert's opinion is favoured instead of another one's. Therefore, Courts should also be obliged to motivate these decisions thoroughly.

In conclusion: One must not forget that expert's opinions are just what they are: opinions, not legal facts. And opinions can and should always be challenged by criminal defence lawyers to create transparency in the criminal trial, but only if and when in the best interest of their clients.

#### **5 Propositions and Debate**

Judges seem to be ill-equipped to judge the merits of forensic evidence and behavioural research reports and should seek (expert's) advice to determine the validity and weight of these opinions I therefore propose these following statements to be implemented by the legislator:

- (1) A legal definition of the term "expert" has to be implemented in legislation;
- (2) One can only be regarded an "expert" after proper continuous training and proven skills and when registered in a national database and sworn in by the Court;
- (3) The protocols of each conducted Forensic and Behavioural Research method have to be freely accessible by other experts and the defence [or better: Daubert standard];
- (4) Each suspect and/or defendant must be awarded the legal right to cost free contra-expertise when confronted with an expert's opinion which is disputed;
- (5) Courts must always motivate in their rulings as to why the expert's opinion is admitted as evidence and – in conflicting opinion's – why the one expert's opinion is favoured instead of the other;