



# **Communicating expertise: The expert witness in Dutch criminal law**

An evaluation of existing views and important aspects of these views according to court parties

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## Summary

Communicating expertise is not as simple as it sounds. Many aspects play in role in how expertise is perceived, such as the perception of science and scientists by society. The more open the scientists are to society, the more society will take it upon itself to interpret science and assess expertise. The last decades science, and thus scientists, have become more visible to the public. New media, such as the internet, make information much more accessible than it used to be and people use these media to inform themselves. Society does not fully rely on the experts anymore for information; people form their own opinion and judge reliability of experts based on their own information. Public discussion on scientific issues has broadened and became more pronounced.

These developments have affected experts in all scientific fields, including the expert witness in criminal court cases. Since the debate is much more open to the public and the public is more critical in their opinion on experts, the performance of the expert witness is followed closely by the public. Public debates, heavily criticizing the handling and results of forensic investigations by expert witnesses, have led to the instalment of new laws and regulations with regard to the expert witness, indicating increased governmental interest in the expert witness. A well-functioning and reliable juridical system is important for the trust of the public in court rulings and thus, indirectly, for the trust in the government. A possible change of appreciation for and perceived reliability of the expert witness can influence the outcome of court rulings: if an expert witness is not perceived as reliable or objective, the results and conclusions of forensic scientific investigations will probably bear less weight for the judge with a risk of misjudgement.

Public criticism and the different approach of society to science and scientists has led to loss of esteem for the expert witness in The Netherlands. Danish expert witnesses do not feel they have the same problem; this might be due to cultural differences between The Netherlands and Denmark. Focussing on The Netherlands, professionally involved parties (judges, public prosecutors and defence lawyers) realize they do need experts to explain increased complex technological developments, but they have become much more critical about the performance and reliability of an expert witness. Independency and objectivity of an expert witness weigh heavily and are closely scrutinized. Counter-expertises are allowed more and more and counter-experts are chosen by court parties. This brings with it the problem of assessing expertise; there are differences of opinion in how expertise should be assessed between court parties and the expert witnesses. The differences in

the assessment of expertise can result in misinformation of the court parties and thus, ultimately, in possible misjudgements.

The circumstances an expert witness has to work in differ in many ways from the traditional workplace of the scientist. Specific communication rules in court, pressure on the expert witness by court parties and the risk of negative media attention all have their effect on the performance of the expert witness. Some expert witnesses may feel that their personal integrity is attacked by the public or a court room party with profound effect on their personal performance. Negative feelings of fear or insecurity can lead to nervousness or a protective attitude, possibly resulting in loss of important information for the judges which, again, carries in it the risk of misjudgements. Also, it is important that expert witnesses and their working environment realize what their task is, including knowledge of the boundaries of their duties and rights.

Knowledge of the frames on the expert witness is important to make everyone aware that trust in the expert witness can be increased by addressing any (perceived) problems and displaying behaviour that enhances trust in the expert witness.

## **Chapter 1.**

### **Introduction**

This thesis will focus on the expert witness from a communication science point of view. In the past years, several factors and events have had great influence on the role and position of the expert witness. Heightening of public interest for science in general and forensic work in particular, institutionalizing most expert witnesses and the implementation of new laws have profoundly affected the way of working of the expert witness. The expert witness is a scientist but the nature of his work, clarifying the meaning of scientific findings in forensic investigations to juridical people, also strongly connects the expert witness to matters of great public interest. The expert witness is very visible to the public and, on top of that, the results of his (or her) scientific work has great impact on important societal aspects such as the conviction of criminals and the prevention of innocent people being sentenced for crimes they did not commit. In the recent past exactly these aspects have regularly been the subject of intense public debates in more than one case. These debates were not limited to the justness or unjustness of court rulings, but also opinions on the way of working and the results of forensic investigations, performed by the expert witness, were passionately expressed. The public debate thus also reflects a tendency to not automatically accept the authority nor the expertise of an expert witness. On the contrary: it seems that the expert witness is eyed with distrust, his opinion only being accepted after thorough scrutiny of the justness of the expert witness's conclusions. The expert witness thus stands in the spotlights, and these spotlights are not meant to stress authority, on the contrary, it looks like "experts are open to challenge just for being experts" (Meyers, 2004, p. 177).

The public debate, in all his fierceness, most likely has had an effect on the people that are professionally connected to the work of the expert witness: judges, public prosecutors, defence lawyers and the expert witnesses themselves. The evaluation of their current views and the most important elements, according to the parties, of these views will give information about the perception of the quality of the expert witness and how this quality is assessed. After the evaluation, these views can be analyzed. The analysis might uncover certain factors or patterns that play a role in how expert witnesses are perceived and why they are perceived in a certain way. Knowledge of

these factors and/or patterns then can be used to come to recommendations to find a new way of dealing with expertise by all involved parties. The juridical system as a whole can benefit from this because less doubt may then be casted on the results and conclusions of the forensic investigations by the expert witness, thereby hopefully diminishing the risk of misjudgements. Apart from these reasons, the author herself has been an expert witness for several years and the personal interest of course also added to the choice of the expert witness as a representative of science and scientists.

I will start this thesis by discussing several topics that might influence the perception of the expert witness. After sketching the public interest for the work of the expert witness in the recent past and the consequences thereof, the position and role of the expert witness in different juridical systems is discussed. This is narrowed down to a description of the position and role of the expert witness in Dutch criminal law and the organizational aspects that have been set up by the government with regard to the expert witness. After identifying factors that have already been recognized as possible bottlenecks in the communication between expert witnesses and juridical persons in the given situation, the measurements that are taken to resolve these problems are described. The introduction ends with the problem definition, research questions and research objective.

### ***Public interest for criminal cases and investigations***

In the past years television programs like CSI have made the public aware of the forensic work that is done in criminal investigations. The success of these series could well have been an important factor for an increasing interest of society in forensic work and people discuss and criticize the outcomes of forensic investigations and the ruling in these cases. One of the examples on how far this can be taken is a particular case in the Netherlands called the “Deventer moordzaak”. In this case, in the early years of the twenty-first century, a man was accused of and convicted for the murder of an older woman. A person well known to the public was of the opinion that the convicted person was innocent and another person was the offender. The public got involved in the case and in newspapers, on television and on the internet the case was heavily debated. A main point of debate was the technical evidence that lead to the conviction, amongst which the outcomes of criminal investigations, like mobile phone tracking and the way the DNA-evidence was collected and stored. There were a lot of people who were of the opinion that mistakes had been made and that this led to the conviction of an innocent man. Due to the extensive public pressure eventually the case was reviewed and reinvestigated with the outcome that in the end the same person that was

convicted again was found to be guilty. Still people didn't agree and discussions continued. Another request for review was done, but the Hoge Raad (Supreme Court) finally ruled against it (Hoge Raad, 2008) and the case was closed.

The person who started the extensive discussions was eventually convicted himself for unjust accusation of another person committing the murder and spreading these accusations through the media. Until today, this case has not been closed and is currently handled by the Supreme Court (Hoge Raad, 2011).

This case is a good example of the enhanced public attention for and criticism of forensic work and the magnitude that this attention and criticism can take. The question is whether the public interest has had any consequences for the expert witness.

### *Consequences of the public's interest to the juridical system*

Not only the above mentioned "Deventer moordzaak", but also other cases have gotten extensive public attention. One of these cases, which I shall describe in more detail, has most certainly had profound effects on the juridical system. It is the case of the "Schiedammer parkmoord". This criminal case was also reviewed and the ruling was that the man that was sentenced for murder had been sentenced unjustly. The background of this case was as follows: a young girl (age 10) was raped and murdered in a park near the city of Schiedam in the year 2000. A young boy (age 11), who was with the girl in the park at the time of the murder and was also abused by the offender, was questioned by the police and he described the offender. Forensic investigations were done on the available material from the crime scene, amongst which a shoelace that the girl was strangled with. The DNA-material from the shoelace was difficult to investigate because of the way the shoelace was handled before being investigated; it was with the body of the girl in the body bag and got damp. A man got arrested for the murder and was convicted in 2001, despite the fact that the description did not match the description of the offender by the young boy.

Surprisingly in 2004 another man, arrested for sex offenses, confessed to the rape and murder of the girl and the abuse of the boy. The case was reopened and the forensic material and conclusions of the investigations were reviewed. The DNA-material, found on the shoelace and other items, matched the DNA-profile of the person that confessed the murder and the description of this person matched the description of the young boy.

The unjustly accused and convicted man, having been in jail for 4 years was released and the other man was brought to court and sentenced to jail. After this new sentence, the media investigated the

case and came to the conclusion that already in 2001 it was quite clear that the DNA of the accused did not match the DNA found on the items from the crime scene and that the description by the young boy did not match with the accused. It became publicly known that, although there were indications that the arrested person was possibly not the offender, the prosecution still decided to take this man to court. The forensic experts had told them that, based on the DNA profiles from the shoelace, they did have their doubts whether the accused could be the offender, but communication between them and the prosecution was not good enough to press this point convincingly.

Furthermore, the DNA-report of the experts was flawed in the way that they did say that the DNA-evidence was difficult to judge and did not clearly reveal that it matched the DNA of the accused, but they did not mention that other DNA had been found.

On top of that, it turned out that the young boy's description of the offender had been put aside as incorrect because of the posttraumatic stress the boy must be suffering from.

The public was in an uproar and the public pressure, along with the doubt that was cast upon the case after the confession of the real offender, led to an extensive official investigation and the results were published in the so-called "Posthumus rapport" (Posthumus, 2005). In this report the work and way of working of the prosecution, the police and forensic experts was heavily criticized and recommendations were made to improve their way of working and reporting. Also, a special committee by the state was installed in 2006 (Commissie Evaluatie Afgesloten Strafzaken [CEAS]) that focuses on already closed criminal cases to review them and, if deemed necessary, to have the case reopened. The CEAS also critically reviews the work and reports of forensic experts.

The "Posthumus report", for many people, has confirmed the righteousness of the already growing criticism on the handling of criminal court cases. Public criticism and involvement is worded as follows by an author: 'We have become familiar with a certain scepticism from the public about the outcome of some criminal court cases. Relatively new is the phenomenon that experts of other than judicial disciplines increasingly put forward their displeasure about the quality of the administration of criminal justice. That criticism seems to have grown rapidly after the indisputable misjudgement in the case of the 'Schiedammer parkmoord' (Groenhuijsen, 2008, p. 929).

The case of the 'Schiedammer parkmoord' was also an important factor for the Ministry of Justice to start making changes in the laws that handle the way forensic investigation have to be conducted. Not only the police work was to be subjected to much more rules, for instance on the way that suspects were to be interrogated, but also new laws were in the making regarding the right of the defence on second opinions on expert reports and a law was to be installed to ensure the quality of the expert witnesses. There seem to be two main reasons for the installation of these new laws:

‘First the remarkable shift of expert reports to the early phases of the criminal investigation. Secondly the tendency to more and more hire a kind of ‘party expert’, to the American model (the ‘hired gun’). It was recommended to standardize the first phenomenon and to combat the second phenomenon as strong as possible. To this background it was proposed to award the expert witness their own statute within the penal legislation.’ (Groenhuijsen, 2008, p. 936). This new law on the expert witness was put into effect in 2009. This law will be discussed in more detail later.

With all the measurements that have been taken, the question whether public interest has had any consequences on the juridical system and thus, indirectly, on the expert witness, can certainly be answered positively. It can be concluded that the current role and position of the expert witness has been influenced by several factors:

- Alleged and actual misjudgements have led to public discussions through the media about the functioning of forensic experts. Where they used to do their work in a fairly closed environment, this environment became much more visible to the public and subject to criticism through the media.
- The juridical changes and new rules affect the expert’s freedom in the way he works and reports.
- New laws clearly state the position and role of the expert witness.

These factors reflect the influence of societal factors on the way the expert witness can and must do his work within the given framework of Dutch criminal law. Other countries have different juridical systems that alter the role and position of the expert witness. In order to appreciate the effects of the Dutch system on the expert witness more fully it is important to have some information about these other systems.

### ***The position and role of the expert witness in juridical systems in other countries***

Because of the different juridical systems that exist in countries, this thesis will mainly focus on the position of the expert witness in the Netherlands. Much has been published on the role of the expert witness in other countries where common law, also indicated as adversarial justice, is used. The term ‘adversarial justice’ reflects one of the main characteristics of this system: the prosecution and defence bring their own expert witnesses into the process. They do so under established rules, like the Frye and Daubert ruling in the USA. In the Frye ruling, the federal appellate court stated that "the thing from which the deduction is made must be sufficiently established to have gained general

acceptance in the particular field in which it belongs” (United States Court of Customs Appeals, 1923). Basically, the court stated that novel scientific expert evidence was admissible only when this evidence was generally accepted in a given scientific field.

Later, in the Daubert ruling, the court emphasized that the judge should monitor the use and performance of expert witnesses. This court rejected the Frye rule, thereby setting different standards in admissibility and relevance of expert witness’s testimonies (Supreme Court of the United States, 1993). Not only should scientific expert evidence be based on generally acceptance in a scientific field, but also it should be reliable. This meant that, amongst other things, methods must have been tested and theories must have been subject to peer review.

Not every state in the USA, however, uses the Daubert rules; some states still use the Frye rules. Whether Frye or Daubert is used, these rules are particularly important when the juridical system uses a jury to prevent any misleading of jury members. The judge, in these systems, has an important role as a ‘gate keeper’ to prevent misinformation of the jury by scientifically unaccepted or one-sided statements from expert witnesses. In countries where there is no jury, like The Netherlands, the judge is his own gatekeeper by definition because he is the one that rules in a given case. In this system, the judge has to value and weigh scientific evidence in relation to other information to reach a verdict. The Dutch juridical system thus has its own peculiarities.

### ***The Dutch juridical system in criminal law***

In the Netherlands the judge bases his ruling in court cases mainly on the statements made and the results of investigations. These investigations are often carried out by experts that mostly are employed by the state in an institute that has the explicit task of carrying out independent investigations for the state. Expert witnesses may be called to appear in court sessions for a hearing, and the court parties have a right to approach another expert for counter expertise. If the judge agrees on the necessity of a counter expertise and agrees with the chosen expert, the cost of the counter expertise will be compensated for. When a criminal case is more complicated or a heavy crime case has to be investigated, the prosecutor will ask for a procedure where three judges will handle the case. The actual court sessions can take several days. After the court session(s) the verdict will be given within 14 days. During the court sessions the judges will question any (expert) witness and the prosecution, the defence and the suspect are given the opportunity to cross examine and state their opinion on the case. All court parties can ask for a (expert) witness to be heard. The

suspect will be convicted if the judge is convinced by the evidence that the suspect is guilty of the crime (Raad voor de Rechtspraak, afdeling Voorlichting, URL accessed Nov 12, 2010).

If the court of justice has ruled and the defence or the prosecution do not agree with the verdict, they can go to the appeal court. The appeal court will look at all the evidence again and may decide to have further hearings of (expert) witnesses or further investigations. After the verdict of the appeal court the case is, in principle, closed. If one of the parties however is of the opinion that the court has made mistakes in how the case has been handled or the verdict is incomprehensible, they can go to the Supreme Court. The Supreme Court will only judge on whether the conclusion of the court is understandable, given the evidence that has been admitted and/or if the court has followed all procedures correctly. The Supreme Court will not judge the facts and the interpretation of the facts. If they rule that the process has been faulty or the verdict of the court is incomprehensible, they can settle the case themselves or refer the case back to court.

Within the Dutch system there is also focus on the role and position of the expert witness.

### ***The expert witness in Dutch criminal law***

Due to the organization of the Dutch criminal juridical system as described above, the expert witness can only be called for a hearing by the court of justice or the appeal court. The investigations of the expert witness, on the other hand, will often take place before the case is brought to court and sometimes even before a suspect is identified. The investigation then is done on the request of the prosecution, sometimes with the goal to decide if a crime has taken place whatsoever. Often therefore, a written report on a certain investigation is available before the case is brought to court. In some cases it may take years before a suspect is found and taken into custody, thereby making the written report an important piece of evidence in court.

In recent years, because of several (alleged or proven) misjudgements, there has been discussion on the role and admissibility of expert witnesses. These discussions have resulted –amongst other things- in the introduction of a new law: the ‘Law on expert witnesses in criminal court’ (Ministry of Justice, 2009). It states that a register of expert witnesses (Nederlands Register Gerechtelijk Deskundigen [NRGD]) is installed for areas of expert knowledge, and from this register an expert can be chosen (Ministry of Justice, 2010).

The register describes the conditions to ensure the expertise of a given expert witness and the rules of conduct that are laid upon the expert witnesses. This will be highlighted next.

### ***Role and position of the expert witness in penal law and regulations***

The registration of expert witnesses is meant to ascertain the professionalism within the scientific area and knowledge of the expert on behavioural codes in court. In cooperation with the diverse professional authorities, whenever available for a certain expertise, the requirements for registration will be laid down. This can be done for instance for the expert fields of forensic medicine and pathology, toxicology and forensic psychiatry. The requirements for the expert fields that have no professional body, like speech recognition and gunshot residue investigation, will be laid down in conference with the professionals in The Netherlands and abroad.

The acknowledgement of a code of conduct is part of the registration procedure and every registered expert witness has to abide to this code. This code places the expert witness in an independent position as an objective source of information. The behavioural code of the NRGD states in article 3.3:

1. The expert will not be prejudiced or biased.
2. The expert does not have a substantive interest in the performance of the investigation, the provision of information and issuing a report.
3. The expert will not be led by a substantive interest of the commissioning party or any third party with respect to the performance of his investigation, the findings thereof and the conclusions based thereon.'

(NRGD, 2010, p. 6). The message is clear: no 'hired guns' and no relationships with other parties that go any further than what is needed for the job.

The register should make the search for experts in a given scientific field easier but it does not alleviate the need for court parties to truly understand what the value is of the expert's opinions. This is even more important since the expert witness has to be an independent and objective source of information for the judges, thereby 'tacitly assuming that science will give answers that are fixed facts' (Van Koppen, 2004, p.2). This register however, though providing help in assessing the expertise of an expert, does not lessen the problem for the judge in other ways. He is still expected to understand and correctly interpret the reports and statements of expert witnesses in many different fields of science in a time where science and scientific methods get more complex by the day. Basically, this is a problem that can be defined as a problem in how scientific findings and conclusions are communicated by the expert witness to judges, the judge being a lay person in a given scientific field. By bringing most expert witnesses together in a governmental institute, the government strives to enhance communication of expertise by subjecting the expert witnesses to

institutional rules of communicating results and conclusions in forensic scientific investigations. Another goal of this institute, The Netherlands Forensic Institute [NFI] is to promote and facilitate cooperation between forensic scientific fields.

### *The expert witness in The Netherlands Forensic Institute*

The Netherlands Forensic Institute ([NFI]) is a governmental institution that was founded in 1999. It was the result of a fusion of the ‘Gerechtelijk Laboratorium’ (forensic laboratory) and the ‘Laboratorium voor Gerechtelijke Pathologie’ (laboratory for forensic pathology). The idea behind it was that the quality of the forensic work and the performance of the expert witness could be enhanced by interdepartmental cooperation and by educating expert witnesses in court conduct. Having most expert witnesses working in a governmental institution would assure, to a certain level, a professional attitude and thus improve the quality of their work.

The mission statement the NFI says: “On behalf of its clients, the NFI uses state-of-the-art technology and science to provide high-quality forensic services. Passionately dedicated NFI professionals concentrate on the prompt provision of comprehensible, objective and – if necessary – multidisciplinary forensic analyses, with the aim of improving the client’s information position.” (NFI, URL accessed Jan 10, 2011). The mission statement uses the word ‘clients’. Up until now, the clients are mainly the prosecution and the police. Because it is a governmental institution and rather costly, these parties are more or less obliged to turn to the NFI for forensic investigations that require scientific forensic expertise. If lawyers would want to make use of the expertise within the NFI, their clients have to pay for it. Neither the prosecution nor the police are required to pay for expert investigations that on their request are carried out by the experts of the NFI.

It is noticeable that the forensic experts (e.g. expert witnesses) are described as “NFI professionals”; apparently they are not viewed as individuals, performing an expert task, but as part of an organization that performs expert tasks for the government. It is an intriguing description in the sense that it sketches an image of expert witnesses as government workers being (apparently) intrinsically objective and, above all, fast deliverers of results. Furthermore it states that their reports are comprehensible, but the definition of comprehensible is not given, nor the standard against which this is measured. Also it says that the experts work together if necessary, but it is not clear who judges the necessity of this, nor does it state on whose instigation the multidisciplinary

work takes place. From the mission statement one could get the impression that the experts at the NFI are not very autonomous and are subject to NFI rules and regulations in the way they perform their task and report to court parties. The mission statement also emphasizes the communication aspect of expertise that apparently has been denoted as a bottleneck in the juridical system. After the ‘Posthumus report’, the expert witnesses within the NFI were obliged to report according to NFI-rules: ‘The NFI will report more clearly in order to enable the police, prosecution, judges and defense lawyers to better understand their reports.’ (Rechtenuis, 2005. URL accessed March 11, 2010). Noticeable in this phrase is the discrepancy between “The NFI will report” and “their reports”. A dualistic approach seems to be taken towards the responsibility for reporting: “their reports” obviously refers to the expert witnesses in the NFI, but “The NFI will report” refers to the institute. The status of the individual expert witness remains unclear.

The communication issue was part of a more extensive program, named ‘Reinforcement of criminal investigations and prosecution’ (Versterking opsporing en vervolging), a program that was set up by the Ministry of Justice and worked out by the prosecution, the police and the NFI (Rechtenuis, 2005. URL accessed March 11, 2010). The program aims to ‘improve cooperation between the NFI and the public prosecution and police’. Also the program is meant to enhance understanding of technological and scientific findings amongst parties.

### ***Measurements to bridge the gap between expert witnesses and juridical persons***

In order to bridge the gap, a program has been developed to introduce judges, prosecutors and lawyers to certain areas of expertise, trying to bring basic knowledge: ‘Empiric Scientific Orientation’ (Stichting Studiecentrum Rechtspleging [SSR], URL accessed Nov 12 2010). Also, a course on communication with the expert witness is available: “Witness Examinations in Criminal Cases, Professional Interchange” (SSR, URL accessed Nov 12 2010).

The question remains whether all these measures will be enough to come to a better understanding between the expert witness and the prosecution, judges and lawyers. Will the gap between them be bridged sufficiently by courses for juridical persons to understand more about science? Or are other measurements also needed, such as changes in the court room setting or behavioural changes of expert witnesses? Since the program is fairly new, the effects cannot be measured at this point in time.

The earlier paragraphs have sketched several aspects that influence the role and position of the expert witness, including new law and regulations, institutionalization of expert witnesses and programs to enhance understanding between expert witnesses and juridical parties.

This raises the question whether these changes have any effect on the views of the involved parties and the functioning of the expert witnesses and what that effect is.

### *Consequences for the expert witness of enhanced public interest and imposed measurements?*

In order to be able to answer the question if the abovementioned factors are of consequence to the expert witness, it is important to know currently existing views (frames) on the expert witness and to identify the factors that, according to involved parties, are most important for these frames. By identifying and analysing frames and factors, knowledge can be gathered about possible new ways to appreciate and assess expertise. The juridical system as a whole can benefit since the expert witness, after all, plays an important role in enabling other people –judges and/or juries- to weigh the importance of findings in the witness’s field of expertise during criminal investigations.

Also, it is interesting to find out how the experts frame their own role and position these days and if there are any effects of higher visibility, subjection to public criticism and changes by new laws and regulations.

### **Problem definition**

Seen the impact of the expert witness on the outcome of criminal court trials and the interest of the public for these outcomes, it is important to understand how parties, including the state and the expert witness himself, view the role and position of the expert witness in criminal court processes. The effect of frames on the expert witness by involved parties on the functioning of the juridical system has scarcely been researched. Gathering knowledge about these frames therefore is an interesting subject for study.

Existing views might influence the value that is placed by court parties on the testimony of the expert witness and thereby influence the outcome of court trials. This is an important effect that expands the importance of this study from an interesting topic within communication science to a societal issue.

Identifying the factors that are important for the frames may reveal factors and/or patterns that can explain the perception of the expert witness. Knowing these factors and/or patterns, recommendations can be made to find a new way of dealing with expertise. On top of that, awareness of existing views on the position and role of the expert witness by all parties can also help all who are involved to understand each other better. From this, the juridical system as a whole will most probably benefit, which again is an important societal effect.

## **Research questions**

There are two main research questions that follow from the problem definition:

- ✚ What are the existing frames of professionally involved parties regarding the expert witness in criminal court cases?
- ✚ Which factors, including communicational and social cultural factors, according to the interviewees, are most important for their frames regarding the expert witness and should be addressed to improve the functioning of the expert witness?

## **Research objective**

The research objective is to reveal existing frames and unravel the most important factors for the frames. The gathered knowledge can then be used to create awareness of differences and conformities between parties in views and wishes with regard to the functioning of the expert witness. This awareness can then be used to come to new ways to assess and communicate expertise, thereby improving the value of the expert witness in criminal law.

## **Outline of the report**

This report contains 5 chapters. This first chapter has introduced the reader to the expert witness and his surroundings, along with the factors that can be identified when considering the expert

witness to be a member of the scientific community having to communicate his expertise to lay people. Factors like communication in court and public perception of science and scientists, are discussed in the theoretical framework in chapter 2. Chapter 3 is dedicated to the research methods. In chapter 4 the most important and intriguing results will be presented and analyzed. Chapter 5 contains the discussion and conclusions as well as the limitations of this study and suggestions for further research.

## **Chapter 2.**

### **Theoretical framework**

#### ***Introduction***

The major aim of this thesis is to assess the frames of the expert witness by parties involved, how they cope with those frames and to establish if there are wishes for changes in order to optimize the role of the expert witness. The expert witness has always been positioned by Dutch criminal law as an independent and objective source of information for the judges. This position more recently (2009) again has been consolidated by the Ministry of Justice in a new law, as stated before. But how objective and independent can an expert witness be? An expert witness, after all, is called upon by the judge (or other court parties) to ‘bring specific knowledge, experience and/or skills in the juridical process that the court parties cannot get otherwise. (Boonen, Hart & de Roos, 2000, p. 92). Court parties therefore have to give meaning to the reports and statements of expert witnesses. For judges this is especially important, since ‘Judges have an independent responsibility for the completeness and soundness of the juridical investigations’ (Boonen *et al.*, 2000, p. 92) and ‘The task of the Judge is not to establish the truth, but what – seen the circumstances and the interests at stake - the relevant facts are.’ (Van Koppen, 2004, p.1). The judge, therefore, has to keep an eye on the soundness of investigations and has to be able to pinpoint the relevant facts; he does not have to prove that the whole truth in a given case is revealed. Furthermore, both prosecution and defense will also interpret the reports and statements of the expert witness and probably have their own definition of ‘soundness’ and ‘relevant’. The expert witness therefore has to make sure that his statements are scientifically correct, stand the test of counter-expertise, cannot be misinterpreted or misunderstood and has to be objective.

Several aspects have to be taken into account in order to be able to interpret the frames of all parties on the position and role of the expert witness. Many sociological and psychological studies have been done on the position and role of the expert witness. From these studies it is learned that factors such as the perception of science and expertise, the influence of broader social culture and communication in the court room are of importance and influence the frame on the expert witness. These studies also show that there seems to be a shared view on the desired role of the expert

witness, but also differences between parties' frames can be identified and factors explaining these differences can be pinpointed. It can be concluded that several aspects influence the frame on and the frame of the expert witness. The following paragraphs will describe the underlying theory of these aspects, starting with an introduction to the specific court room environment so the reader can picture the expert witness in this environment. After this, the more general aspects will be discussed. The last paragraph will go into the matter of frames and framing and how it is used in this study.

### ***The expert witness and the court room environment***

Communication during court sessions is of importance in order to get a better understanding by all parties of the relevancy and scientific value of the expert witness's statements. In the Wheate study (2008, p. 130) for instance, it was stated that "Improved communication between experts and lawyers [*in the sense of the juridical persons; author*] would improve the ability of legal counsel to identify which expert performed which tasks within a forensic investigation. This would improve the presentation of the evidence in court, by ensuring that the right questions are asked of the right witnesses and that the limits of a witness' expertise are recognised but not unnecessarily emphasised." Also, the way that the expert witness words his statement is of importance: "Concurrent with failing to understand the limits of a witness' expertise is poor knowledge of the terminology used in a forensic discipline." (Wheate, 2008, p. 128). Reading this it can be concluded that all parties have to be aware of a difference in terminology and both parties should make an effort to make themselves understood.

Finally, the communication rules in court can hinder an expert witness in communicating all that he deems to be important. Gutheil has pointed out: "there are limits to an expert witness's control over what happens in the courtroom, limits that may affect the expert's primary function." ((Gutheil, Hauser, White, Spruiell, & Strasburger, 2003, p. 426). This would mean that the specific communication rules in court influence the performance of the expert witness in a court session and this might affect, in the end, the ruling of the judges because of the limitations that are imposed on the possibility of the expert witness to express himself clearly. If this is truly the case, this no doubt will be expressed during the interviews and will also shed light on the effect of this possible problem on the frames of the expert witness. The next part of the theory will address the matter of the perception of science and scientists by the public. Public perception almost inevitably must be

of influence on the view on the expert witness who, after all, is a member of the scientific community in direct contact with lay people and, through the media, with the public.

### *The perception of science and scientists*

The way people look at science and scientists and how scientists produce and present scientific findings has changed profoundly in the last decades. This is reflected by a relatively new field of science that has started to become established: Science and Technology Studies. It is an interdisciplinary field in which, amongst others, sociologists, historians and philosophers work together to study “the processes and outcomes of science, including medical science, and technology.” and is concerned with “issues about the legitimate places of expertise, about science in public spheres, about the place of public interests in scientific decision-making.” (Sismondo, 2010, p. vii).

If such a new field is developing, one can draw the conclusion that science is no longer an exclusive domain where the scientist can practice his expertise in seclusion. This already started with the emergence of several philosophical approaches to science, amongst which the falsification theory of Karl Popper (e.g. 1963). His falsification theory states, simplified, that a scientific theory (or hypothesis) is correct until proven false. This implies that theories that are empirically proven are true *for the time being* and therefore open for discussion. This theory gnawed on the fundamentals of ‘the absolute scientific truth’: “It is now recognized that what can be observed and analyzed today is only a momentary view of a long-term process” (Nowotny, Scott & Gibbons, 2001, p. 10). Many scientists however still regard science as an exclusive field, the so-called ‘reductionist science’: “In reductionist science, still the mode to which many scientists aspire, it is necessary to establish clear boundaries that frame the scientific area, and distinguish science from non-science.” (Nowotny *et al.* 2001, p. 19). These boundaries also maintained a distance between science and society: “Science, moreover, has historically maintained its legitimacy by cultivating a careful distance from politics.” (Jasanoff, 2005, p. 6). By allegedly not concerning itself with politics (and thus society) the boundaries between science and society could be maintained.

The world has changed, though, and the boundaries of science became less clear. The benefits of technical inventions, like computers and the internet, have changed the way scientific information becomes available. The public does not have to wait for the scientist to disclose information, they can easily find it themselves. Interpretation of scientific information has gone from the exclusive domain of the scientist to the public in blogs, discussion forums, general information sources like

Wikipedia and specialized information sources like PubMed. In that way, science has made itself available to the public and therewith undermined its own exclusivity and authority: “it has become more difficult to regard science as a distinctive sub-system, because all systems and sub-systems are in flux and have become transgressive.” (Nowotny *et al.* 2001, p. 58).

One might think that, since science is global (or better said: globalized), views on science and scientists are alike all over the world. This is not true; there are cultural differences, depending on the history and customs of the society involved. Since the Dutch juridical system differs from the systems that are used in other countries, there are bound to be differences in the way Dutch society looks at experts. As no specific research of cultural differences between the Netherlands and other countries has been published, we will illustrate this thought by drawing on research that has been done by Jasanoff in 2005, mapping the cultural differences in the way societies look at science in several Western countries.

Jasanoff states that “even economically and socially integrated Western nations are seen to differ in their reception of science and technology.” (Jasanoff, 2005, p. 8). This, according to Jasanoff, has to do with the way these countries (US, Great Britain and Germany) have gone through history and the way they see society, which in itself of course is also a result of historic development. The possibilities of state interference with science, for instance, differ substantially. In Germany there is a very strict boundary between state and science, the US lets science run its course as long as the state keeps the right to exclude scientific research or inventions from being part of society (e.g. stem cell research) and in Great Britain the state more or less dictates what fields of science must be explored. This is stated respectively as follows: “science as a process of discovery and a search for truth” (Germany) and: “the practice of American courts in upholding the freedom of scientific enquiry whenever it does not threaten the institutional power of the courts to declare what counts as right knowledge” and finally: “scientists, like all responsible members of the British elite, are servants of the state” (Jasanoff, 2005, p. 65-66). The views of governments on science and scientists will inevitably have its effect on society, possibly eliciting a concurrent view of the public on scientists.

Looking at the situation in the Netherlands, the government displays a view that is partly comparable to the view in the US and partly to the view in Germany. The debate on nuclear power, for instance, has focussed on whether the application of nuclear power should be allowed in the current situation of a threatening fuel shortage the next decades. The debate is not on whether research should be done on nuclear power (as long as it is done safely), but on whether or not to embed the scientific inventions in society. Very recently this is highlighted by the suggestion of a

political party to hold a referendum on the installation and use of nuclear power plants, triggered by the problems of these plants after a heavy earthquake and tsunami in Japan (RTL nieuws, 2011, URL accessed March 24 2011). This underlines the conclusion that the Dutch state does not interfere much with the subjects of research, but it does interfere with application of the results.

For the view of the state on the expert witness, this can be illustrated by a fairly recent ruling of the Supreme Court. It involves the restrictions that had been laid on an expert witness that was to be appointed by the court to perform a counter-expertise on a deceased person's cause of death (amongst other things) at the request of the defence. Several restrictions were described, such as that the expert had to ask permission of the court for the consultation of other experts and any other expert (if it was deemed necessary by the court to consult them) had to be an expert that was working in The Netherlands. The expert to be appointed did not agree with these restrictions, stating (amongst other things) that it was her right as an expert to consult other experts and she had the freedom of choosing those experts herself, even abroad. In the end, she was not appointed; the court did not comply with her terms for several reasons. The defence took the refusal to appoint this expert eventually to the Supreme Court, who ruled that the court was right to impose these restrictions because (amongst other things) it was up to the court to appoint experts, not for the expert to appoint her own experts, and the court had to be able to judge the expertise of experts which was more difficult when they would be from abroad (Hoge Raad , 2009). This case illustrates that the state will use science and scientists, but they want to have a say in who's doing what and when. In that way, the application of scientific results is regulated in this particular environment. In the juridical setting, the application of scientific results is reflected in the laws and regulations concerning the expert witness. More factors, however, surround the expert witness and his performance.

### ***The expert witness: desired position and background elements***

As said before, there are several factors in place regarding the expert witness and thus different aspects of the expert witness and his work are described. Some people have a juridical point of view, others dive into the perceptions of different parties or describe situations in which that position and role is challenged.

On the juridical point of view there is much agreement: the expert witness must always be honest and scientifically correct, no matter by whom he is called upon. Wagenaar (1988, p. 500), for

instance, states the following comment on this matter: “Expert witnesses should in principle do no more than provide information that may help to form opinions. They must never attempt to provide the final opinions themselves.” Along the same lines is the comment that “Expert witnesses should hold in mind that they are called upon to bring specific knowledge, experience and/or skills in the judicial process that the court parties cannot get otherwise.” (Boonen *et al*, 2000, p. 92). These views are what one could call rather ‘mathematic’ views on the role of the expert witness; they are restricted to the role of the expert witness as laid down in penal law.

A more philosophical view that does not restrict the role of the expert witness to the juridical description, but considers awareness of the consequences of given information by the expert witness as part of the job, is also described: ‘It is not purely about the “getting it right” any more, but also about the consequences that, in the mean time, are connected to the prior advice.’ (Loth, 2010, URL accessed January 19 2011). Following this line of reasoning, an expert witness who does not think about the consequences of his acting or even manipulates the consequences, should be reproached: “However, if the expert gives erroneous information, either through intent or ignorance, she can distort their decisions and can cause an unjust outcome for a party and secondarily, limit the availability of useful products and services to the public. When testimony is purposefully inaccurate, it is, of course, unconscionable, and the expert should be punished as a criminal.” (Kaufman, 2001, p. 8).

The above views on the position and role of the expert witness, although they represent different angles, still all focus on the expert witness as a juridical ‘tool’. That an expert witness is an expert in a scientific field, and thus is a scientist, is not mentioned. But this element is an essential characteristic of any expert witness: they are, or at least should be, scientists. So what effect might that have on the parties involved and the expert witness himself?

A look into ‘modern’ science reveals that science is not a purely technical thing. It does have connections to the outside world. These days science is all around us, for instance in the form of technology and in the form of arguments or predictions on which policy makers base decisions. The computer is part of everyday life and this technology nowadays is more or less publically owned. The scientific theories on global warming are the basis for the instigation of rules and regulations in politics. Science is very intimately interwoven with everyday life: “Science and technology explicitly engage in crossing back and forth between objects and representations, creating more situations in which humans and non-humans affect each other. Science and technology are responsible for the contemporary world, because more than any other activities they have mixed humans and non-humans together, allowing a dramatic expansion of the social world.” (Sismondo,

2010, p. 85). It seems to be clear that science and scientists these days not only are intimately connected to the ‘outside’ world but they have created that position with the use of science itself. In a way, scientists have not only become more visible, but have made themselves part of society. Placing the expert witness in a stand-alone position, as is done in the juridical description of the expert witness, therefore might create a problem for all parties, including the expert witness himself. Being interwoven, it is not easy (or maybe impossible) to demand that the expert witness in the juridical setting detaches himself from the surroundings and only communicates ‘pure scientific facts’.

These demands may therefore create feelings of unease in the expert witness and even feelings of dissatisfaction about the performance of the expert witness. Other factors, however, can also influence the performance of the expert witness. The court room environment, as described before, is one of them, but also the effect of being interrogated by court parties with (possibly) different incentives, the way the expert witness feels treated and the gap that –apparently- exists between experts and juridical people plays a role. The next paragraph will go into these aspects in more detail from the expert witness point of view.

### *Identification of influencing factors by expert witnesses*

In the literature, several factors that have impact on the functioning of the expert witness have been found and investigated.

First of all, the expert witness may feel that certain court parties try to influence him and put him in an unwanted and uncomfortable position in which he feels that the message he is trying to bring to court might be misunderstood. The following statement can be found in an article from a medical doctor that refers to medical expert witnesses in malpractice cases (Foucart, 2005, p. 1270): “there is great incentive for lawyers to find experts with scientific credentials to present favourable opinions said to be grounded in the scientific method, even when the major issues in a case are not technical.” These wordings seem to indicate that the opinion of the author on the incentives of lawyers using expert witnesses is not particularly positive and the impression seems to be that lawyers will try to find an expert that will specifically highlight the lawyers’ view on scientific truth, even if science (in the technical sense) is not the main issue. It suggests that science is being used by these lawyers to lend credibility to their reasoning.

A second issue is that the expert might feel that his objectivity or neutrality is jeopardized by the line of questioning and the communication rules that apply in court sessions. As Wagenaar (1988, p. 508) states: “The scientist as an impartial educator, on the other hand, might find it difficult to remain impartial under the cross-examination of attorneys playing a role in the adversary process. Not only because it is frustrating if an attorney tries to portray you as “ignorant, irresponsible, or biased” (Brodsky, 1977), but also because an attorney can, by selection of the questions, prevent the expert from making a balanced statement. This is illustrated by the following quote: “Half of all participants (*expert witnesses; author*) reported having been so badly affected by negative interactions with opposing (defence) lawyers that the experience constituted their ‘worst experience’ in court. Attacks on the credibility of the witness, including assertions that the witness had ‘made up’ their results to bolster the case of the prosecution.” (Wheate, 2008, p. 130).

A third problem that expert witnesses apparently experience is the knowledge of juridical people about science and the demands that scientists face to keep their expertise up-to-date. An Australian study on the views of expert witnesses and lawyers on the juridical system and its use of science (Wheate, 2008, p. 126) showed in the results that “most expert witnesses who participated in this research did not think lawyers have a grasp of the forensic results”.

It thus seems that expert witnesses have their own frames of court parties, as court parties have on the expert witness. Especially the point of view of the lawyers has been investigated.

### ***The lawyers and the expert witness: described factors in perceptions***

As for the lawyers, it looks like several factors play a role in their perception of the position of the expert witness. A study focussing on the perception of lawyers on expert bias describes one of these factors. The party that the expert witness works for influences their perception of the independency (and thus, it seems, the objectivity) of the expert witness: “Experts who were found to testify always for the same side were considered less desirable” and “experts who work for both sides are perceived to be “more balanced” and “more credible” than those who consistently work for only one side” and “court-appointed experts were viewed by all respondents as being more highly regarded. This view likely derives from the perception that court-appointed experts are not under any pressure to sway their testimony one way or another” (Dattillio *et al*, 2006, p. 489). From these comments it would follow that the perception of bias is an important factor in weighing the credibility of an expert witness, and thus an important element of the frame on the expert witness.

Interestingly, the article concludes with the statement: “Their ratings say they want unbiased experts. Their behavior shows that they want biased experts” (Dattillio *et al.*, 2006, p. 490). This ‘secret wish’ might influence their frame of expert witnesses: a truly objective expert witness might be desired for the sake of the proceedings, but this might not necessarily be appreciated.

After exploring different theoretical aspects and going into more detailed descriptions of studies on the expert witness, the use of frames and framing is discussed next. Why is the concept of framing used and how will it be used in this study?

### ***The use of frames and framing in this study of the expert witness***

Framing is the way that people perceive reality (e.g. Simons, Morreale & Gronbeck, 2001, chap. 6). Many different frames can be distinguished, but they have common ground: frames find their basis in, amongst other things, the settings and expectations about people. It would go too far to go into the details of all these different kind of frames, but the interactive frame and the cognitive frame will be discussed shortly to explain why framing can be used in this study.

Interactive frames, as the name already suggests, are produced when people interact with each other. Interactional framing is a dynamic process and ongoing throughout the interaction. It can be described as the process where “through non-verbal cues or indirect messages, participants signal each other as to how interaction is to be interpreted (DeWulf *et al.*, 2009, p. 160).

The focus of the study however is not on interaction between parties. The interviews aim to reveal the personal opinion of respondents on the functioning of the expert witness in general. The interactive frame therefore cannot be established and another type of frame is expressed by the respondents. The frame used in this situation is the ‘cognitive frame’. The cognitive frame theory was explicitly formulated by Minsky (1975, as cited in DeWulf *et al.*, 2009, p. 158) and it “focuses on cognitive frames as mental structures that facilitate organizing and interpreting incoming perceptual information by fitting it into already learned schemas or frames about reality.”

A cognitive frame is expressed when a person brings together facts, thoughts and feelings on a certain subject. A cognitive frame therefore is more than just a perception, although these two concepts have much in common. Perception can be described as ‘the personal interpretation of an observation’. A stuttering expert witness, for instance, can be perceived by a judge as insecure. The cognitive frame of the judge, however, has more elements than just this perception: the need for the judge to have certain things explained may be part of the frame, as can be a feeling of

dissatisfaction with the situation. The cognitive frame might be that expert witnesses should and can be useful, but their performance must be improved. Perception thus is one of the elements of a cognitive frame. The cognitive frame is part of the mechanism through which people cope with daily reality. Knowledge of the elements that make up a frame can explain, at least partly, what the basis is of personal opinions on a certain matter.

In this study, the aim is to find out what cognitive frames the different parties have on the expert witness. The description of these frames by the interviewees can then give insight into the relative importance of certain elements in framing the expert witness and of the views on the role of the expert witness by involved parties.

### *Summary*

In this chapter, the theoretical background of different factors that most probably are the elements of the frames on the expert witness has been described, as well as the given facts that surround the expert witness. Public views on and cultural aspects of science and scientists, the desired position of the expert witness and specifics of the environment in which the expert witness works have been discussed. Frames and framing is described as a tool to be able to explain existing opinions on the expert witness. This knowledge can then be used as a basis for suggestions to alter views on the expert witness, if deemed necessary.

## **Chapter 3.**

### **Research methods**

#### *Introduction*

In order to be able to answer the posed research questions, several subjects needed to be addressed. In this chapter the chosen research method and sampling population, the formulation of interview questions, the diminishment of bias and the transcription method of the interviews are described. These issues are all important elements of reliable and valid research. Topics that are specifically related to the research subject are privacy matters and the translation of interviews from Dutch to English. The next paragraphs will go into these subjects and describe them in more detail.

#### *Research method*

Mostly for this kind of studies, qualitative research is done, but quantitative methods nevertheless can be used. The choice was made for a qualitative method. This preference has two reasons: first of all, the number of interviews is small, which makes a statistical analysis less reliable. Secondly, since the aim is the exploration of personal feelings and opinions (frames), a qualitative method can give more information. There is no restriction in the answers as would be the case when using a scoring list and the interviewees can use their own words to describe their opinion. This kind of research is better off with the use of a qualitative method: “On the other hand, if you are concerned with exploring people’s life histories or everyday behaviour, then qualitative methods may be favoured. An insistence that any research worth its salt should follow a purely quantitative logic would simply rule out the study of many interesting phenomena relating to what people actually do in their day-to-day lives, whether in homes, offices or other public and private places.” (Silverman, 2010 p. 10).

#### *Interview questions*

Since the aim of the study is the description of the cognitive frames of the interviewees, the possibility to express their feelings and thoughts in answer to interview questions is important. The interview questions are worded in a way that enables the interviewer and the respondent to react on the previous answer. For these matters, open-ended questions usually are the most advisable: “Here, ‘because emotional responses are frequently too complex to report in a single phrase’, Selltitz et al. recommended the use open-ended questions, allowing the respondents to choose their own terms.” (Silverman, 2006 and Selltitz, 1964, as quoted in Silverman, 2006 p. 120). In addition to being able to follow the respondent in his or her answer, the issues that come from the theoretical framework also have to be addressed. Semi-structured interview questions can make this possible: certain issues can be addressed by the interviewer *and* the interviewees are still able to word their answer freely, including thoughts and feelings.

The interviews were done either face to face or over the telephone. The Danish expert witnesses were visited in person, as were the representative of the Ministry of Justice and one of the judges, since they both were in the same city at that time. The other interviews were done by telephone for reasons of time management: the interviewees were scattered over the country and performing all these interviews face to face would have cost too much time. Since the author was familiar with the target group firsthand it was judged that the interviewees would speak their mind and it would not matter whether they were meeting the interviewer or were asked to express their opinion over the telephone.

### ***Sampling and characteristics of the interviewees***

To gather information on the views of the position of the expert several parties had to be interviewed in order to get a ‘360 degree’ view on the expert witness. These parties were: a representative of the Ministry of Justice, judges, public prosecutors, defence lawyers and expert witnesses. The persons for the interview were not chosen randomly; the choice was based on (a) the needed population for a broad inventory of views on the expert witness in order to answer the research questions and (b) practical reasons of personal access and availability. One could say this is ‘purposive sampling’: “purposive sampling demands that we think critically about the parameters of the population we are interested in and choose our sample case carefully on this basis. [...] Sampling in qualitative research is neither statistical nor purely personal: it is, or should be, theoretically grounded.” (Silverman, 2006, pp. 306-307).

Based on theoretical grounds and the parties of interest, the choice was made for the following population:

- A representative of the Ministry of Justice
- Two judges
- Two public prosecutors
- Two defence lawyers
- Six expert witnesses, consisting of three pairs:
  - Expert witnesses working at the NFI
  - Expert witnesses working in the Netherlands but not at the NFI
  - Expert witnesses from Denmark

The reason for choosing pairs of persons is that at least there is more than one personal opinion within groups. With regard to the thoughts and motives of the Ministry of Justice, this was not deemed necessary since the ministry is not a person but an institution and has to act as ‘speaking from one mouth’, although clearly the quotes are personal.

The representative of the Ministry of Justice is a person that has been involved in the new laws and regulations from the beginning of the discussion within the Ministry. For instance, before the ‘Law on expert witnesses in criminal court’ was formulated (Ministry of Justice, 2009), many discussions were held at ministerial level. Also, the code of conduct that is part of the register for expert witnesses had to be formulated as an abstract from the imposed law, containing many elements that represent and emphasize the reasons for the law to be put in place. This person, therefore, has a good insight in the thoughts that brought the ministry to enact the ‘Law on expert witnesses in criminal court’.

Both judges that were interviewed work at appeal courts and have had ample experience in court sessions where hearings of expert witnesses took place.

The public prosecutors have experience in working with forensic experts (as does every prosecutor in criminal law), not only when prosecution takes place also but also at the stage of criminal investigation.

Both defence lawyers are specialized in criminal law and work at very well known lawyer’s offices, but they differ in experience.

The interviewed expert witnesses differ in experience; three of them have many years of experience, the other three are relatively new to this work. The expert witnesses were chosen in such a way that three pairs can be identified: one pair of expert witnesses that works within the NFI, one pair that is based in The Netherlands outside the NFI and one pair of Danish expert witnesses.

This was done to see if there is a difference in frames and frame forming elements between those pairs.

## **Privacy matters**

The interviewees participated willingly after being given the insurance that they would stay anonymous and that, if they used examples to emphasize a point, the persons or business mentioned in the example would not be named. This condition is important because the forensic and juridical world is rather small and people can be easily identified by other people in the field if too many details are given. This should not happen because some statements were fairly explicit. For that reason, the characteristics of the chosen population are not described in detail and explicit examples are left out to avoid possible recognition and complaints.

## **The researcher: managing role and reflexivity**

A special point of interest was the danger of asking leading questions from my side or discussing matters instead of performing an interview. Having been an expert witness myself it is all too easy to get involved in a discussion about the aspects of the functioning of the expert witness instead of doing an interview and let the other person formulate his own thoughts. Measures to prevent that as well as possible were: formulating the questions beforehand, sticking to those questions during the interview and checking if all questions had been asked before ending the interview. A third person, that had nothing to do with the interviews or the subject of research, has listened to random samples of the interviews. He was asked to check for leading questions and to judge on the nature of the interview: was it an interview or a discussion? This has helped me to reflect on my own actions. In practice it was noted that I did not interfere substantially, so the results of the interviews can be considered to reflect the thoughts and feelings of the interviewees.

## **Transcription and translation**

The interviews were all recorded. After recording, the interviews were transcribed to make specific points of interest easier to identify.

In the thesis the interviewees will be indicated as follows:

RM : representative of the Ministry of Justice

J1: Judge 1

J2: Judge 2

P1: public prosecutor 1

P2: public prosecutor 2

L1: most experienced defence lawyer

L2: less experienced defence lawyer

E1: most experienced NFI expert witness

E2: less experienced NFI expert witness

E3: most experienced non-NFI expert witness

E4: less experienced non-NFI expert witness

E5: most experienced Danish expert witness

E6: less experienced Danish expert witness

Since the thesis is in English, the Dutch quotes from interviews and literature had to be translated.

This of course means that quotes are never exact, but great care has been taken to translate quotes as accurate as possible. In the text, English quotes can be identified by the use of quotation marks –“English quote”- and Dutch quotes can be recognized by the use of the apostrophes –‘Dutch quote’-..

## **Interview questions**

Several subsets of interview questions were made to fit the different populations. All subsets start with a basic question to loosen the tongue and follow-up questions were formulated to extract more specific information. Subtopics were formulated beforehand, derived from the theoretical framework.

The interview with the representative of the Ministry of Justice started with a very basic question on the reasons for imposing the new laws and regulations with follow-up questions going deeper into the matter. From there, questions on the position of the expert witness as stated in the law ('independent and objective') are asked, going from theory to daily practice, ending with interview questions about the register.

Judges, defence lawyers and public prosecutors, all professionally active in the court room, were asked the same set of questions. Starting with asking their opinion on the new law with regard to expert witnesses, the interview moves towards daily practice, connected to that law. From there the questions more explicitly address their feelings and thoughts on and practical experiences with expert witnesses in general. The interviews end with the questions on changes over the years and their thoughts on the ideal expert witness. The last question was used to extract from their answers any wishes or critical notes on the performance of expert witnesses.

The third set of questions was designed for the expert witnesses. They not only had to address the matter of laws and regulations, but also their own performance. The basic starting point once more were the new laws and regulations, moving towards their own performance and possible changes in their role and position over the years. The interview ends with a question on the level of satisfaction with their personal performance.

The interview questions, although they are different subsets, were derived from the subjects in the theoretical framework. The possible influence of the working environment, the perception of science and scientists, the outcome of the public engagement with the functioning of the expert witness, expressed in the new laws: all these subjects are addressed in the interview questions going from basic, general questions to more detailed and personal questions.

The interview questions are listed in the appendix.

## **Data analysis**

After recording the interviews they were transcribed using the transcription method based on the simplified symbols as described by Silverman (Silverman, 2010, Appendix). This method was chosen because the emphasis of the interviews was more on the content than on the way it was worded. Longer pauses before or during an answer and stopgaps, like 'uh' and 'ehm' were noted because they could indicate hesitation before or during answering. After transcription the answers were grouped according to concepts from the theoretical framework, such as the perception of

science and scientists. Also, answers that addressed certain more specific topics were grouped, such as answers on the assessment of expertise. After grouping, any differences or agreements on topics became clear. These grouped answers formed the basis for the headlines in the chapter on results. The headlines of the results were grouped again, such as the headlines on the objectivity of the expert witness and these groups formed the basis for the discussion and conclusions.

## **Chapter 4.**

### **Results**

The results will be listed per research question. The first research question is aimed at describing existing frames. The second research question will reveal the cornerstone elements that form the existing frames. Within each research question there are subdivisions that highlight research findings. These findings are summarized and illustrated with quotes from the interviews.

#### ***Research question 1: Existing frames regarding the expert witness***

The expert witness is a political tool to enhance public and international trust in the juridical system

According to the representative of the Ministry of Justice, the expert witness was politically not very important before the public debate on the ‘Schiedammer parkmoord’. As public attention and criticism also focussed, amongst other things, on the expert witness, the politicians realized they needed to act. The representative stated this as follows:

***Question:*** *Why has the Ministry of Justice chosen to position the expert witness as ‘independent and objective’?*

***RM:*** *There was no frame within the Ministry of Justice of the expert witness. Ehm....reasons for ehm....there is a lot of political interest for the new law and after the Posthumus report the expert witness was a point of attention for the government. Also, costs for forensic investigations has risen. You know, it’s more expensive so it becomes more important.*

As measurements to enhance the juridical system as a whole came into place (see pages 7-9), the issues on the expert witness, like level of expertise, role and position, were also discussed. The main goal to the new laws and regulations was not so much focussed on an individual level of expertise, but on the broader issue of public trust. The expert witness became a political tool to enhance public trust, stating that ‘The citizen must be able to have trust in an criminal investigation department that

is organized in such a way that everything is being done to prevent mistakes or judicial errors.’  
(Rechtenuis, 2005. URL accessed May 27, 2011). Politically it was therefore also necessary to set official standards on the expertise of the expert witness:

*RM: The main reason for imposing the law was the publication of the Posthumus report. As a consequence, there was uhm.. a need to construct a eh framework as an aid to transparency and objectivity. Also, it was important, politically so to say, to restore public trust in the legal system. I mean, public criticism is okay but eh to a certain extent. You know, politics and public opinion are sort of intertwined.*

Not only public trust in The Netherlands was an issue, but also the international esteem of the Dutch juridical system was at stake. As the European Union develops, the wish to exchange certain information between countries is growing. The possibility to accept and integrate information from other countries will alleviate procedural pressure for all countries in the European Union and has economical advantages. Exchanging results of forensic investigations between countries in international crime cases can be a good way enhance the efficiency of crime fighting. Individual countries however need to be certain that the information that is obtained from other countries is trustworthy. Public debates that cast doubt on the expertise of forensic investigators diminish the value of the results. As a consequence, other countries will hesitate to accept the results, thereby lessening the esteem of The Netherlands on an international level. This was also a reason to impose the new rules and regulations:

*RM: And further, as a more distant goal, there is the issue of the European co-operation. There have been meetings on a European level to eh how shall I put it, to simplify and shorten juridical procedures. European countries will have to have trust in each countries legal findings and thus, legal procedures. To be effective in this, eh eh people must be able to trust uhm investigation results from other countries.*

Since the role and position of the expert witness is described in the law as objective and independent, the question is what view the professionally involved parties have on this description. When asked about their opinion on the role and position of an expert witness, all parties agreed that an expert witness should be independent and objective.

### Professionally involved parties desire an objective and independent expert witness

The main reasons for the preference for independency and objectivity are connected to juridical and scientific considerations. The juridical considerations find their basis in the truth finding character of criminal law. Judges need to be able to come to a decision on the weight they give to all evidence that is presented in a criminal case because they base their ruling on this evidence:

**Question:** *“What is your opinion on the fact that laws and regulations state that an expert witness has to be independent and objective?”*

**J2:** *Certainly, that is how an expert witness should do his job. I mean, eh, we are looking for the truth and it doesn't help if you try to find that with a biased point of view.*

Defence lawyers express a need for expert witnesses to be objective and explain scientific findings in such a way that everyone can understand the conclusions and how these conclusions were reached. Although stated somewhat indirectly, the following quote illustrates this opinion:

**L1:** *The only requirements that an expert witness should meet is that a. he needs to have a lot of expertise and b. he must be able to tell his story, his expert thing, very clearly whether it's a medical person or someone from the ICT sector or he yes a psychologist.*

Public prosecutors have a very strong opinion about the objectivity and independency of an expert witness. They feel that these requirements are the basis of the juridical system and when these requirements are not fulfilled the juridical system is threatened:

**P2:** *The moment an expert witness is not objective and independent the fundamentals of our criminal juridical system are in jeopardy.*

Expert witnesses base their own need for objectivity and independency on the very nature of science. A good scientist avoids any bias and cannot do anything else than be truthful about scientific findings, i.c. scientific forensic investigations:

**E1:** *Principally objectivity and independency are the starting-point because it (the expert witness – auth) is a position that describes what has been found according to*

*science with all possible alternative explanations that come with these findings.*

**E2:** *It eh it is all about finding the truth and that can only be done if you're independent and objective. By being biased you cannot find the truth.*

**E5:** *Well, it goes without saying that one is objective and independent. I mean, ehm, what else is science but objective and independent truth-finding?*

Although all parties agree that the requirements of objectivity and independency should be met by the expert witness, when asked about their opinion on the current status of the expert witnesses in this respect the opinions are stated with some nuances. Interestingly all parties state that absolute objectivity and independency basically is a utopian thought. From their statements there is no hint that the possibility of non-objectivity in particular is a big problem as long as the realization of possible bias is a conscious thought.

#### Judges currently frame the expert witness as being as independent and as objective as possible

For the judges the matter is quite clear: absolute objectivity is virtually non-existent but the expert witness must strive towards it. If an expert witness is clearly not objective or independent, this will have consequences for the weight they give to the findings, reported by such an expert witness. It seems that they do accept a certain level of non-objectivity, but there are limits to what is an acceptable deviation from the rule.

**Question:** *In your opinion, do you feel the expert witnesses in general are independent and objective?*

**J1:** *An expert witness should report as careful and critical as possible. If from the report it shows that and expert witness is not objective, I will dismiss this person's report.*

**J2:** *Uhm, we do have to realize, how shall I put it, ehm that ehm in fact everyone is biased.*

Public prosecutors and defence lawyers express doubts on the objectivity of expert witnesses that are called upon by the 'other' party.

Prosecutors and lawyers currently frame the expert witness of the other party as non-objective

Apparently there is a distrust about the objectivity of an expert witness, called upon by either prosecution or defence, that is deeply rooted in the distrust they seem to have about each other's goals in criminal court, these goals not being truth-finding but a strive for (personal) victory. Both parties express the feeling that the other party will try to mould the opinion of an expert witness to their point of view in a given case. For the defence lawyers this means that an expert witness, called by the prosecution, probably will express an opinion that is non-favourable for the suspect.

***Question:** In your opinion, do you feel the expert witnesses in general are independent and objective?*

***L2:** look, at the moment that it's an expert witness who doesn't work for the prosecution that I think would be more objective. I'd say it was best if that investigation eh is instigated by eh by the judge.*

For the public prosecutors this means that an expert witness, called by the defence, probably will express an opinion that is favourable for the suspect. These feelings of distrust are reflected in their opinion about the expert witnesses in such a case.

***P1:** I think that working for one court party by definition does affect independency and with that, also the objectivity because after all it is like this: who finds me bread and cheese, it's to his tune I dance.*

***P2:** I think the objectivity is endangered when the expert witness is not independent. And ehm I think that in fact we all ehm tend to see the expert witness as objective and independent. It is not so that when eh when an expert witness is hired by the defence that well that ehm I think the expert witness is not objective. I don't want to think about an expert witness that writes down what I want him to write down. Not as a prosecutor. A lot of lawyers do want that because it can be of use for the defence.*

Since most expert witnesses in The Netherlands that work in forensic cases are at the NFI, for lawyers it almost speaks for itself that they have their doubts about the independency, and thus the objectivity, of these expert witnesses.

Lawyers frame NFI expert witnesses as probably biased for the prosecution

One of the main reasons for their distrust in the expert witnesses from the NFI is grounded in the fact that these expert witnesses are employed by a governmental institution. According to one of the lawyers, working in such an institution almost equals working for the prosecution. Doubts on the objectivity are barely suppressed by the oath an expert witness has to swear to be truthful:

***Question:** In your opinion, do you feel the expert witnesses in general are independent and objective?*

***L1:** of course you could say with regard to the experts of the NFI that they're not completely objective because ehm they are employed by the government and especially the prosecution but on the other hand ehm because they also swear an oath to eh report truthfully and consciously you have to assume that this oath eh ensures objectivity.*

Also, the expert witnesses of the NFI are in close contact with police and prosecution. For the defence lawyers this means that the involvement with these parties will influence the independency and objectivity of the expert witness. Even the appointment by the judge of an expert witness from the NFI does not take away the doubts of the defence lawyers:

***L2:** it shouldn't be like that the judge orders the prosecutor to investigate and the prosecutor has all the contacts with the NFI etcetera.*

***L2:** I think that eh yes eh this regulation (the new laws and regulation; author) will not contribute that much because what I noticed myself eh is that there is much contact between the prosecutor and the expert witness and that fences in the independency and objectivity to a large extent because the prosecutor is very involved in the investigation.*

The doubts that the defence lawyers have about the expert witnesses of the NFI are shared by non-NFI expert witnesses.

Non-NFI expert witnesses frame NFI expert witnesses as probably biased for the prosecution

Apparently the employment in a governmental institution like the NFI is enough to raise doubts about the independency and objectivity of the expert witnesses of the NFI. Whether consciously or unconsciously, close contacts with police and prosecution almost automatically leads to a loss of objectivity. In the opinion of non-NFI expert witnesses, whether from The Netherlands or from Denmark, the employment by the NFI is a threat to objectivity and independency.

*E3: Well eh eh I think that most people or eh the people I meet eh.... at the NFI I think they are aware of it but they will because of the environment they're in tend to I expect to favour the prosecution eh even if they don't notice it themselves.*

*E6: Yes, eh ..... I think.....In my opinion a crucial factor is that we are working for the university, not for the police or the prosecution. All parties can come to us for advice freely and they get the bill. Anyone that pays us, gets an advice. I believe that is an important factor to keep your independency.*

All expert witnesses however, when asked how they judge their personal independency and objectivity, express a clear opinion without any hesitation.

All expert witnesses frame themselves as being as independent and objective as possible

In their eyes, they personally do their very best to act as is desired: independent and objective. They state awareness of the possibility of bias creeping in and have their own way of trying to be objective. Most of the expert witnesses rely on others to point out to them a possible biased attitude towards a case. Others think that working for all parties will diminish the chance of bias because they do not want to be seen as non-objective by any party that can call upon their expertise.

*Question: Do you think you can be independent and objective, as the law and regulations require?*

*E1: Well eh the way the request for investigation is worded is of course always subjective and ehm well ehm sends you in a certain direction. Every time I have a case ehm I try to be as objective as I can. But eh..... there must be cases where this cannot be maintained until the end.*

*E3: I imagine I can eh yes eh I'm an expert for both sides and then almost without saying you get a more balanced view on all these cases. You cannot afford to commit yourself to one party because next time you're in court for the other party.*

*E5: ehmmmm that's a difficult question ehmm how can you judge yourself? I can only say that I try to be objective and hopefully if I'm not someone will tell me. Ehmmmm so far I must say I haven't had any comments on my objectivity.*

In spite of the awareness of expert witness of the danger of possible bias towards a certain party, one of the NFI witnesses chooses his wordings such that it looks like the statements of others on NFI expert witnesses could hold some truth in them.

#### A prosecution bias seems to be confirmed by one of the NFI expert witnesses

The way this NFI expert witness words comments on the defence lawyers seems to express a bias towards the prosecution. The use of the words 'the counterparty' when talking about defence lawyers cannot be taken as a neutral comment. In this case it seems to imply that the defence lawyers are seen as opponents.

**Question:** *Have you ever experienced circumstances that influence your performance and/or objectivity?*

*E2: Sometimes you notice that some court party takes a different approach because in his opinion it doesn't go the right way. Then it's hard to see where the counterparty wants to go. And then ehm..well..you can only say what you think as an expert when the counterparty changes its story.*

The first research question on the existing frames of the expert witness has been answered above. The second research question will expose the most important factors that influence the functioning of the expert witness.

***Research question 2: Most important factors in frames regarding the expert witness***

The uncertainty of science was the basis for the government to install new laws and regulations

Part of the public criticism on criminal cases was directed towards the non-disclosure of other possible scientific explanations of investigation results. The government has taken that point into account when formulating the new laws and regulations on the expert witness. It is not so much the content of the reports of expert witnesses they address, but the way it is presented. The government wants to make sure that alternative explanations for results are included in the conclusions of the reports. By doing so, the government strives to have possible differences of opinion on a subject within a scientific field brought forward for discussion and prevent one-sided conclusions.

***Question:*** *What considerations played a role in making that new law?*

***RM:*** *There is insecurity in science so we have to ascertain that the discussion within scientific fields is brought out. We ehm we have to try to ehm ..... to make sure that different opinions are discussed.*

Awareness of uncertainties in science led to loss of authority for Dutch expert witnesses

The awareness of involved parties of the uncertainty in science has had its effect on the appreciation of the expert witness in general. The realization that science isn't rock solid and open for discussion has diminished the authority of the expert witness as a scientist. It is *because* they are scientists that authority has been lost to a certain degree; their scientific opinion is viewed with criticism.

***Question:*** *Have there been any changes in your view on the expert witness over the years?*

***J1:*** *There is more realization that the expert witness has lost authority. The authority is no longer automatically assumed.*

***J2:*** *I can say that more and more lawyers call on American scientific literature that is based on the opinion of some experts, opinion that are not widely accepted. That could do something with judges' opinions.*

***PI:*** *It's the hardest with psychiatrists and psychologists because often they do reason from a certain trend in their*

*science field and that can lead to different conclusions but isn't necessarily wrong.*

***L1:** There can be different trends in science. That eh that is not a problem but let them try to explain that as good as possible eh to the judge. It is not a problem but they have to be able to explain that as clear as possible.*

The discussions and differences of opinion between scientists came into the open much more the past years. The increase in possibilities for people to inform themselves no doubt has contributed to the awareness of the uncertainty of science. The resulting loss of authority of scientists has had its effects on the esteem of scientists in general and thus also on the expert witness.

### Loss of authority has lessened the esteem of expert witness in The Netherlands

It is evident that the expert witness these days, being a scientist, should not assume an automatic acceptance of his conclusions by involved parties (nor the public). Their reports are critically reviewed, leading to more and more counter-expertises by any party. Challenging an expert witness is no longer the exception, but almost the rule. Involved parties want to make sure that every aspect in a given case is critically examined, and one of these aspects is the expert witness.

***Question:** Have there been any changes in your view on the expert witness over the years?*

***J1:** It is not automatically assumed that someone is an expert in a certain scientific field.*

***P2:** I don't think that we value their opinion less but ehm the eh we're more critical.*

***L1:** Let me put it this way: the expert witness, also because of the increased transparency of science the expert witness is demythologized.*

The assumption that an expert witness as such does not automatically has sufficient expertise has caused involved parties to find their own ways in assessing the scientific findings presented by the expert witness.

### Judges do not depend on the expert witness to weigh the value of scientific findings

Where in earlier years the opinion of an expert witness weighed heavily for the judge in his ruling, nowadays judges don't follow that opinion automatically. The judges assess findings and reports of expert witnesses critically and form their own opinion on what is the most convincing conclusion when it comes to scientific discussions and findings.

**Question:** *Have there been any changes in your view on the expert witness over the years?*

**J1:** *These days it eh the judge has to determine for himself whether a specific line of reasoning will hold.*

**J2:** *Science by definition is hypothetical and subdued to adjustments and we do have to ehm have to take a decision at a certain point and say 'this is it'. You always do that according to the way it is at that moment. That also has to do with your societal responsibility.*

It is clear that for the expert witness in The Netherlands, much has changed, at least in the eyes of the other parties involved. The expert witnesses themselves are not immune to these changes.

### Dutch expert witnesses are aware of their loss of authority and challenge of their expertise

The expert witnesses feel the pressure on their personal performance that comes from the loss of authority and the challenge of their expertise. The pinpoint several changes that affect the way they have to perform. They notice they have to go to court more and answer more questions.

**Question:** *Do you feel there have been any changes in your role as an expert witness over the years?*

**E1:** *I'm very sure they look at us differently. They used to ehm believe me when I said something and now, and I do think that that's a good thing, now I must show why I came to a certain conclusion and on what I based my reasoning and eh yes I think that's a good thing.*

**E3:** *I think the role of the expert witness has changed, judges have developed the habit of ehm asking 'well what do you mean when you say you're sure, how sure are you?' and it's no longer that when the expert witness says something that the judge keeps silent and just accepts the conclusion. It's not like that anymore. The defence has also become keener.*

A rise in counter-expertises is also mentioned in this respect. Whether there are indeed more counter-expertises is not clear, but at least it is perceived as such. Seen however the awareness in the uncertainties of science it would be very logical if there are indeed more counter-expertises.

*E4: I have the feeling that we have to go to court more these days. It's ehm well more trickier you know, they ask way more questions and you have to tell them more. Also there are more counter-expertises which can be a nuisance seen the quality of some of these so-called counter-experts.*

Having noticed the loss of authority and esteem for the Dutch expert witness, it is interesting to see whether the same has happened in Denmark.

#### Danish expert witnesses do not feel they have lost much authority or esteem

Both Danish expert witnesses do not express the same feelings as the Dutch expert witnesses when asked about any change in their role over the years. Their description of the way they are treated has many similarities to the way it used to be in The Netherlands. They are questioned by court parties, but their expertise isn't challenged much. The reluctance in questioning the expertise of an expert witness has been described by all Dutch parties as part of the past, the 'way it used to be'.

*Question: Do you feel there have been any changes in your role as an expert witness over the years?*

*E5: I don't notice much difference. Of course I do tell them on what scientific grounds my conclusions are based but ehm well, there is no trend to use more counter-experts. And when it comes to the defence lawyers ehm I must say that ehm they hardly get tough on us, that's just not done.*

*E6: Ehm...good question...ehm....I have to say that we are still treated with respect and they are reluctant in questioning our expertise. Not that they don't check, but they don't ehm give us a hard time.*

When asked if they could explain why in Denmark, contrary to The Netherlands, the expert witnesses are less challenged, they had no clear explanation:

**Question:** *What is the reason, to your opinion, that in Denmark expert witnesses are less challenged than in The Netherlands?*

**E5:** *I don't know, ehm, maybe it's because Denmark is a smaller country and it isn't so easy to get counter-expertise? I mean, they almost have to go abroad to get another expert because the forensic pathologists in Denmark all know each other and it's not done to do a counter-expertise without the other pathologist knowing that it happens.*

**E6:** *Maybe it's because that over here the lawyers aren't going to the press that much. Eh well, there aren't just that many that question expertise publicly so maybe we get less negative attention in Denmark?*

From these answer two possible causes can be extracted. The first answer may be that apparently there isn't as much public debate on criminal trials as in The Netherlands. The second answer may be that defence lawyers in Denmark are more reluctant to question expertise in court or through the media.

Questioning the expertise of an expert witness brings with it the problem of choosing another expert witness. How do you choose when you are aware of scientific discussions and differences in expertise when you are not part of that scientific society? Judges, prosecutors and lawyers realize they have a problem and have found their own way of solving this problem.

#### Judges, prosecutors and lawyers assess expertise mainly on the basis of professional esteem

The assessment of expertise in a given scientific field, not being a professional in that field, is not a simple thing. The interests that are at stake in a criminal case that is handled by court are high. The suspect can be convicted, he can go free or the punishment can be higher or lower as a result of the impact of scientific investigations. Therefore, the quality of an expert witness is important. Since parties cannot judge the scientific quality of a person's work in a scientific field, they rely on other aspects. Professional titles, the amount of publications and former experiences with an expert witness are the main points on which expertise is judged.

**Question:** *How, in daily practice, do you check the expertise of an expert witness?*

**J2:** *Nowadays I ask them questions like ehm how long have you been in this field of expertise, what exactly do you do, publications etcetera.*

**P2:** *With some expert witnesses I have my doubts on the expertise and then I'm very critical. It's not always easy to judge, especially when they're from abroad. And you also don't know how valuable their publications are...ehm...you know, it's hard to judge if someone has real expertise.*

**L2:** *I do ask colleagues for instance or eh yes I do look on the internet to find out what publications someone has what was the research focus.*

Clearly, they do struggle with how to assess expertise and have found a way that is satisfactory for them. Since the expert witnesses are intimately connected to a scientific field their view on judging expertise has a different focus.

#### Expert witnesses feel that experience in a scientific field is the most important factor of expertise

The expert witnesses will judge a person on professional aspects and not so much on 'circumstantial evidence' such as titles and the amount of publications. In their opinion it is not the packaging but the content that counts. Hands-on experience in the scientific field is deemed most important. Apart from the difference in the way expertise is judged, the expert witnesses seem unaware of the difficulties for lay persons to assess expertise in a non-familiar scientific field. They feel that the way the other parties judge expertise does not necessarily assure good quality.

**Question:** *Have you ever experienced circumstances that influence your performance and/or objectivity?*

**E1:** *I mean, well, ehm, there are differences in how they judge expertise while that does not necessarily reflects the real differences in expertise. I'm still convinced that there are people that testify in court as an expert witness but certainly cannot be acknowledged as experts.*

**E4:** *Saying something doesn't mean that you actually say something that makes sense. Titles and stuff don't tell it all. I don't know why that impresses people.*

The way the other parties judge expertise is not only realized by the interviewed expert witnesses, but it also leads to irritation and sometimes even resentment of an expert witness that to their eyes is not an expert. The choices that are made, based on professional esteem and other elements, apparently are no guarantee for expertise.

*E1: An expert is judged based on say the fact that someone is a PhD, professor or medical specialist. That makes a difference in court. Those are ehm...societal differences. They are impressed by titles and not impressed by expertise. What I often see is that a professor says someone and doesn't need to substantiate it and if we (without title) have to say something about it then we do have to substantiate.*

*E4: They do ask you questions like how long have you been practising this field of expertise and what are your publications etcetera, but sometimes ehm I see other so called experts and they have a CV that states they are the informers for a television show and then that supposedly adds to their expertise? That's ridiculous, of course.*

The efforts that parties put into finding an expert witness with satisfactory expertise in a scientific field do tell that this is an important issue. Even though there has been loss of authority and esteem of expert witnesses, much time is invested in judging the expertise of an expert witness. Apparently, the expert witness still holds an important position in the criminal investigations process.

### Scientific and technological developments increase the importance of the expert

Awareness of discussion and uncertainty in science has increased the importance of the expert witness. At first, sounds contradictory, but when looking more closely it is a logical consequence. Discussions between science makes lay people realize how difficult it can be to come to a certain conclusion. Also, technological developments have increased the need for professionals that can work with the equipment and make sense of the outcome of investigations with that equipment. Looking at the development in the forensic scientific field, much has changed indeed: the use of DNA as evidence, the advanced research methods in toxicology, the use of computers and other ICT-related devices and much more. The more advanced the used methods are, the more need there is for experts.

**Question:** *Have there been any changes in your view on the expert witness over the years?*

**J2:** *There are so many more technical possibilities to investigate things these days that the expert witness has become more important. After all, we need to understand or ehm at least think we understand the ins and outs of these scientific fields.*

**P2:** *So much is possible these days that we cannot grasp ourselves. We don't know, the expert does. We do the judicial interpretations and eh we well we do need the experts to fill that scientific gap.*

**L1:** *The role of the expert witness has grown. I think this is mostly because ehm ehm ..... a lot of eh methods of investigation have become more complicated [...] so the technology or the increased technology has caused the increase of importance of the expert witness.*

The expert witness thus is an important factor in the investigation and court process in criminal cases. Every party has expressed the need for an expert witness that is not only knowledgeable, but also able to explain scientific aspects to other involved parties. Certain aspects are judged to be important for an expert witness in order to make optimal use of the expertise.

#### Insecurity of expert witnesses in the court room lessens their value

The court room environment is not a daily environment for most people. This also goes for the expert witness. He spends most of his time doing scientific work in a familiar environment. The specific court room sphere and communication rules (see pp 19-20) can influence the performance of the expert witness in many aspects. Focal fluency is one of the aspects that can be negatively affected by the court room environment with the result that the testimony of the expert witness is valued less because it gives parties the impression that the expert witness is not sure of his conclusions.

**Question:** *Do you think there might be factors that can influence the performance of an expert witness?*

**J2:** *One expert witness can express himself better than the other one. Sometimes I see that an expert witness is under pressure by the defence lawyers and he exerts his right for the defence so you have to give them room to do so.*

***L1:** There are quite a few expert witnesses I think that eh don't do well in court. They cannot put things into words eh they eh express themselves badly eh they eh they cannot clarify things eh yes when they are put under pressure than eh they keep repeating themselves instead of really answering the question.*

The mere fact that someone is being interrogated can also influence the personal performance of an expert witness. It can be nerve-wrecking to be questioned, especially because this questioning is not done in the style of daily discourse. Critical questions and comments as well as a certain pressure that is exerted upon the expert witness can lead to insecurity or rigidity when testifying. It will be clear that this does not fulfil the needs of court parties to really understand the background of certain findings or conclusions. Parties express a need for the expert witness to be clear and complete in their statements.

***J1:** When ehm when it tends to the enforcement of answers from the expert witness that suit the defence than as a judge you have to ask the expert witness if his answer would be the same if he considers other aspects as well. Sometimes you see well you see that the expert witness breathes easier and can tell his story.*

***P1:** Sometimes a party (usually the defence) aims to embarrass the expert witness. The president of the court should cut that off, but if he doesn't the expert witness must save himself. Sometimes they don't dare to state things clearly and then everybody gets confused. Than the expert witness is basically worthless.*

***P2:** The lawyer can 'fire at will', they don't care, they can ask ridiculous questions and then it is for the judges and the prosecution to end this. [...] Expert witnesses are nervous in court whether they will 'pass the competence test'. But that's not what it's all about. Ehm sometimes they eh it feels like they are ashamed, they are too shy.*

The factors, mentioned by the judges, prosecutors and lawyers are also felt by the expert witnesses. From their point of view, the cause of this behaviour is the feeling that is evoked by certain ways of conduct by other parties.

Attacks on their personal integrity negatively influence the performance of expert witnesses

What other parties mostly see as a critical line of questioning or doing what is necessary for the job, expert witnesses often interpret as a personal attack. They see the necessity of being critically questioned, but certain behaviour is seen as an attack on their personal integrity. This feeling can bring forth annoyance and a need to protect oneself by volunteering no more information than is asked for.

**Question:** *Do you think your performance as an expert witness is sufficient?*

**E1:** *If they ask questions in a way that respects your expertise it's no problem. If it is done from ehm a certain contempt or ehm the idea of I will show them that you have no expertise than it troubles me. It annoys me.*

**E2:** *The lawyer can be fairly subjective. They take you by the hand in their line of thought and then you have to be alert to stick to your investigation and conclusion.*

**E3:** *The defence lawyers are ehm sometimes ehm really aiming to unsettle you and eh they start to say even if you do this job for years for 35 years then they ask why do you think you are an expert? What have you done in your life to be here as an expert witness? [...] I can tell you the first time that happened eh I didn't expect it and didn't know what to say at first. [...] I did have that feeling of please sir (the judge; author) make them quit doing this, it's all about nothing and only ruins the atmosphere that much is true.*

Not only the courtroom environment and communication rules can have an effect on the expert witness, but also the consequences of him being there and making a statement. Since basically all court room sessions are public, there can (and usually will) also be journalists attending the court session. Sometimes press releases can be very unsettling for expert witnesses if these press releases are very negative towards the expert witness. When protection for the effects of these negative press releases (whether based on objective or subjective information) fails, it does have a negative effect on the performance of the expert witness.

*E4: Of course you can never be 100% sure, scientific insights change and we also can make mistakes. The problem with that is that ehm well, it's very unpleasant because some newspapers write just about everything and then you're like a sitting duck. I've seen news items in which clearly lawyers gave the newspaper some information and it was really false information but the expert was blamed. The ehm the heightened interest in forensics is good on one side, but can have negative effects especially because the media and public aren't critical.*

Other parties are also aware of a possible negative effect of unwanted public attention for an expert witness and realize that they need to be protected up to a certain level. In their opinion, failing to give that protection can lead to suboptimal performance of the expert witness.

*PI: The director of such an institute (the NFI – author) should create an atmosphere of open-mindedness and thus of safety and should protect his people. Eh he mustn't be afraid of negative publicity. I'm 100% sure this influences expert witnesses.*

Not only the above mentioned factors, stemming from the public environment of the expert witness, influence the performance of the expert witness. All parties expressed their concerns about the influence of the NFI rules and regulations.

### The closed environment of the NFI hampers the performance of the expert witness

Several aspects of NFI rules and regulations were mentioned as negatively influencing on the performance of the NFI-employed expert witness. The drive of the government to improve the reliability of the juridical system apparently has unwanted side-effects. The judges, for instance, pointed out that the drive of the NFI towards more coherence in reporting lays responsibility for that report at the wrong party.

*Question: Do you think there might be factors that can influence the performance of an expert witness?*

*J1: One of the things that strike me, and is absolutely wrong, is the expression "The NFI has reported that...etc". I mean, after all, it is the expert witness that reports, the expert witness is personally responsible for the report. It's his signature, isn't it?*

For other parties the NFI is a black box: experts discuss things amongst each other and after they have internally come to a consensus a report comes out. They feel that the scientific discussions are not out in the open and it isn't clear what happens during forensic investigations. And that was important for other parties: to highlight possible differences in scientific opinions and be clear and open about the considerations to come to a certain conclusion.

***P1:** It is trickier when ehm when differences of opinion aren't out in the open. That is one of the drawbacks of bundling expertise.*

***L2:** For myself I think eh yes what I said before that the way things are handled during an investigation what comes into the NFI yes from the moment the material arrives at the NFI until the moment the report is printed it should be much clearer what happens.*

Internal rules and regulations also have their effect. Striving towards 'better reporting' has led to stricter rules in reporting. Of course, writing an understandable report is a crucial thing for an expert witness and care should be taken to educate expert witnesses on how to write these reports. One can imagine that for other parties it is handy to have a standardized format, so they don't have to search where the conclusion is, for instance. The NFI though goes much further than that; they have rules on the wordings that should be used, thereby hindering the expert witness to report his findings and conclusions in his own words. This has a negative effect on the clearness of reports; the contrary of the intended goal of the rules on reporting.

***L2:** Nowadays there are strict rules on how conclusions and results have to be worded, which ehm in itself makes it more clear. But ehm on the other hand I do think that ehm eh it is difficult for an expert witness to explain in detail what the value is of those results. [...] When the expert witness would be entirely free to use his own words then eh eh then you can judge better whether there is a certain subjectivity and that's something that nowadays is subdued.*

***E3:** At the NFI they have a so-called chief scientist who wants people to report according to Bayesian methods and eh yes for some fields of expertise that is eh yes let's just say it that is non-applicable. [...] It led to numerous weird wordings just to meet the so-called scientific norm but for the people for whom the report was intended they couldn't understand very well what it was about in the end.*

The impression is that the NFI does not see the expert witness as an individual unit, but as part of a whole system that works in unison to produce a certain output under strict rules and regulations. These rules and regulations have to be maintained and so, logically, there is a managerial level. In itself, the existence of a managerial level is not a problem. After all, the expert witnesses cannot work in an environment that fails to supply the necessary working conditions. There is criticism on management, however, that can imply that the working conditions are such that the expert witness is hampered in performing his core business.

*E2: the management can be a problem ehm they think they are the head of the department but they haven't got a clue about it all but ehm still they have the power. The expert witness doesn't seem to be important anymore.*

## **Chapter 5.**

### **Discussion, conclusion, limitations of the study, recommendations on future research**

#### *Introduction*

For this thesis the main subject of research was worded into the two research questions:

- ✚ What are the existing frames of professionally involved parties regarding the expert witness in criminal court cases?
- ✚ Which factors, including communicational and social cultural factors, according to the interviewees, are most important for their frames regarding the expert witness and should be addressed to improve the functioning of the expert witness?

The answers to these questions can (and should) be used to critically look at the way the expert witness performs his task at present. The identification of the elements that are most important in frame forming and influence the view on the expert witness creates the possibility to handle any negative elements that are currently present and reinforce the positive elements. In doing so, the credibility and performance of the expert witness can be enhanced. In the end, the juridical system as a whole can profit and this will also have a positive impact on public trust in the system.

#### *Doubts on the independency and objectivity of expert witnesses will be hard to counter*

The first research question has identified the frames of all parties. There is an overall agreement that the desired role and position of the expert witness is one of independency and objectivity in order to have the juridical system function as is desired by the Dutch society. However, parties do also agree that this is a utopian thought. Everyone is aware of the practical impossibility of absolute and total independency and objectivity and a certain amount of bias has been accepted as a reality. The government has tried to guarantee a certain amount of independency and objectivity by formulating new laws and regulations on the admissibility of expert witnesses. The instalment of a register for expert witnesses is meant to ensure the scientific quality and integrity of expert witnesses by

formulating professional standards with regard to scientific expertise and a code of conduct to ensure objectivity.

In spite of these efforts, some situations however carry with them the prerogative of biased expert witnesses, at least in the eyes of the beholders. An expert witness that is specifically hired by either the prosecution or the defence is judged by these parties as dependent on that particular court party. This finding is consistent with the outcome of the research that has been done on the view of lawyers on expert witnesses (see pages 24-25): expert witnesses who are considered to be working for one side are seen as less credible. The results show that in particular the public prosecutors and the defence lawyers see each others' expert witnesses as more dependent on a certain party. This dependency, in their opinion, almost automatically leads to loss of objectivity.

The practical consequences of these views are intimately connected to the situation in The Netherlands. Most experts are institutionalized in the Netherlands Forensic Institute, a governmental institute that falls under the Ministry of Justice. The NFI has intimate connections with the police and the prosecution. These connections have tightened the last years under the influence of increased public interest for forensic work and public outrage over (real or alleged) cases of misjudgement. Tightening these connections was the result of efforts to prevent misjudgements: 'They make sure there is an optimal connection between the forensic research question of the police detectives and the juridical department and the possibilities in the forensic technical investigation at the NFI.' (NFI, 2007. URL accessed March 12, 2011). These efforts no doubt are well intended, but they can backfire. There is a risk that these tight connections cause bias in expert witnesses of the NFI and this risk apparently has more or less become reality; one of the NFI-witnesses refers to the defence lawyer as 'the counterparty' (see page 40). This risk has been brought to attention earlier: "However, in order for state employed forensic experts to preserve their independence, it is desirable that state forensic laboratories should be divorced from police organizations, especially from operational police units, and forensic experts in state laboratories should always be aware of the danger of identifying with the prosecution perspective." (van Koppen & Penrod, 2003). The fact that the NFI is a state institution in itself is probably already, in general, a cause for less trust in the employees (including the expert witnesses). In research on expert communication on biotechnology it has been found that people had about twice as much trust in experts from universities than from national public bodies ((Bauer, M., Durant, J. and Gaskell, G., project coordinators, 1997). One could conclude that the expert witnesses from the NFI will have more problems in gaining trust than other expert witnesses. This problem is only worsened by the intimate connections between the NFI, police and prosecution.

It is no big surprise therefore that defence lawyers have an almost intrinsic distrust of NFI-expert witnesses; they consider them as being dependent of the prosecution and thus less objective. The defence lawyers are not the only ones that have commented on the NFI expert witnesses; the public prosecutors have also expressed their worries. This research shows that the expert witnesses from the NFI are not in a very good position when it comes to credibility. Not only do they have the intrinsic disadvantage of working in a governmental institute, The NFI is also considered a black box by parties like the prosecution and defence lawyers. It is not clear to them whether different scientific points of view are discussed internally without bringing them in the open nor is it clear to them what happens between the start of an investigation until the results are reported (see page 51). The apparent semblance of secrecy does not enhance trust in expert witnesses from the NFI. Also, the NFI-expert witnesses run a real risk of unconsciously becoming biased towards the prosecution because of the intimate connections they have with that party.

What other reasons can explain any perceptions of non-objectivity by the involved parties? One other reason can be that certain court parties have a distrust in expert witnesses from the other party since both the prosecution and the defence have the incentive to win their case. Then it is logical to presume that everyone that might state something that undermines a parties' case will be eyed with distrust and treated with criticism. Another reason can be found in the dissatisfaction about the performance of expert witnesses in the past. The role of (alleged or true) mistakes of expert witnesses in misjudgement cases most probably did not enhance trust in the expert witness. Also, the fact that the government has deemed it necessary to install new laws and regulations that particularly address the expert witness could be interpreted as a signal that indeed there must be something wrong with their performance. This can also strengthen the lack of trust in the expertise and objectivity of expert witnesses.

In the Dutch criminal system, the judge ultimately decides on the credibility of the statements of an expert witness. The judges that were interviewed think that the large majority of the expert witnesses is as objective and trustworthy as possible. The consequences with regard to the juridical system therefore most probably are not as extensive as could be feared, at least not with respect to the impact of doubts on the objectivity of the expert witness. This does not, however, diminish the accountability of expert witnesses for their performance. It has become clear from the interviews that if the judge thinks that an expert witness is not doing a good job, be it with respect to objectivity or scientific work, they will exclude the statement of this expert witness from evidence.

In conclusion it can be said that the expert witnesses in The Netherlands have to realize that the rules of the game have changed. No longer are they automatically seen as experts and this has profound effects on their accountability. Expert witnesses will have to take more effort in showing other involved parties that they indeed are objective and are capable of reporting according to the required scientific standards. The NFI expert witnesses in particular have to take great care not to become unconsciously biased for the prosecution. On top of that, management of the NFI will have to find a way to show to the prosecution and defence lawyers that the expert witnesses are stand-alone professionals, doing their scientific work without any interference from any involved party, including the police.

Another striking result is the struggle that parties have with the assessment of expertise. The fact that science is no longer a secluded area but a public arena (see pages 20-22) forces juridical persons to develop their own way of assessing expertise. This is not without problems.

#### ***Methods of assessing expertise used by some parties can lead to misinformation***

There is a big difference in the way the expert witnesses think that expertise should be assessed and the way that the other court parties use. The underlying problem finds its roots in the changes in the perception of science and scientists that has taken place in the past decades. Nowadays, science has become a public domain and scientists are much more visible than they used to be. Society and science are intertwined, also because of the increase in possibilities for the public to inform themselves about scientific issues. The use of information on the internet and the exchange of opinions through social media has extended the possibilities for lay people to form an opinion on a scientific issue. These developments have also created awareness of the public that science has its insecurities. The awareness of these insecurities in science in combination with a better informed audience has led to loss of automatically assumed authority for scientific experts. The flipside of the coin however shows an increase of importance. This increase is due to the ongoing technological development that has created very usable but complicated research methods, like DNA profiling or methods for the detection of toxins. It has become virtually impossible for lay people to understand these research methods and thus to judge the results. Court parties therefore have to rely on the expert witness more and more, but on the other hand they need to make sure that the expert witness has the right expertise so they get the right information.

Since court parties do not take the expertise of an expert witness for granted anymore they had to find their own ways of assessing expertise. However, being lay people in the scientific field of any expert witness, they rely on external labels for expertise, these being mainly the number of publications and professional titles. The expert witnesses on the other hand point out that these external labels are not a good reflection of actual expertise, because the matter of experience is left out of the equation. According to the expert witnesses, someone that actually has been working in a scientific field for a long time can be a better expert than someone with lots of publications and titles. In their opinion, hands-on work in a certain forensic scientific field is a prerogative for building expertise. For them, the main question is not ‘who are you’ but ‘what have you done’.

In conclusion it does seem wise for expert witnesses and other parties to discuss the matter of assessing expertise because the information from an expert witness can profoundly influence the outcome of a criminal court trial. All parties should come to an agreement about a method of assessing expertise that on the one hand assures parties that they will get the expertise they need and on the other hand is a method that can be used by lay people. Since demands on expertise have to be formulated for the register to come into effect, it seems an excellent chance for all parties to come to an agreement on how to assess expertise by formulating these demands.

Even when we assume the issue of the assessment of expertise is solved satisfactory, there are still other elements that influence the performance of the expert witness. When expert witnesses do not perform as well as they should, the outcome of criminal trials can be influenced by credibility loss of the statement of the expert witness. The next paragraph will discuss the most important elements that influence the performance of the expert witness.

### ***Problems in court room performance of expert witnesses can lead to loss of valuable information***

The outcome of the research indicates that the court room performance of an expert witness is a very important factor for his credibility. Expert witnesses are held much more accountable these days for their findings and conclusions and they must be able to explain their considerations clearly to all parties. Since science has become a more public domain, lay people have a greater desire to apprehend scientific considerations and desire clear answers to their questions. This is especially the case in the court room, most probably because of the public attention for forensic investigations. One could easily say that the expert witness is under much more pressure these days than before.

The pressure that is exerted on the expert witness during interrogation can lead to insecurity of the expert witness. This pressure can come from one of the court parties or can be a fear for public pressure. The result of this pressure is basically the same: expert witnesses can become insecure. This insecurity can lead to visible effects like stammering and stuttering, but also to invisible effects like not volunteering any information even it might be useful. Whatever the actual effect, the overall effect is loss of possible valuable information for the court. Also, the expert witness will lose credibility: “the way in which persons speak affects not only their credibility and how much they are liked, but also their ability to persuade.” (Gass & Seiter, 2003, p. 190). This of course is undesirable.

When looking at the causes and symptoms of court room insecurity there are several domains to be distinguished. Personal performance can be poor, resulting in stuttering and stammering. It has become clear that this will have a negative influence on the credibility of the expert witness and should be avoided. Apparently however, seen the fact that stammering and stuttering expert witnesses are mentioned by other parties, the problem does exist. It seems wise for any expert witness that has a problem in this domain to seek help to resolve the problem.

The court room environment is another problem that is not solved so easily. As one of the judges stated, sometimes it helps to relieve some of the pressure that is exerted on the expert witness. Since the judge presides, the judge is also the designated person to prevent an expert witness from getting too pressured. Of course, one should bear in mind that there will always be some pressure on the expert witness; after all court parties have to be critical and that automatically involves critical questioning. Sometimes though this critical questioning can go so far that it has unwanted side effects: “In other words, the interrogator’s game is to elicit acknowledgments from the witness of various practical, procedural, and epistemic limitations, and to suggest that these were crucial lapses that compromise the witness’s competence and credibility.” (Lynch & Cole, 2005). There is no need to say that when it goes that far, justice is not being served as it should be. It is up to the judge to decide whether or not to interfere, but also up to the expert witness to stand his ground when the situation occurs.

Coping with the effects of public pressure is even more difficult. Based on the interview results, one of the problems apparently is a lack of protection from public pressure or even downright naming and shaming. This lack of protection of the expert witness has been mentioned by more than one party. Of course, no one can prevent public pressure and indeed it has had positive effects, like revealing misjudgements. And whenever there is a negative public opinion on an expert witness it is

always unpleasant for this person. Nevertheless, when this leads to such an impact on the expert witness that his functioning gets impaired, there is an indication that public pressure has gone too far. This might be caused by a lack of efficiency in negating any unjust allegations, insufficient internal support for the expert witness or even a total lack of action. Whichever possibility is applicable, the negative effects must be countered in order to prevent unnecessary loss of functionality of the expert witness. Furthermore, but that almost goes without saying, it would be unethical to create public pressure on an expert witness during a criminal trial by leaking information to the press by one of the court parties, no matter whether this information is (allegedly) true or false.

The conclusion on these issues is that there is much room for improvement of the performance of the expert witness on a personal level, environmental level and on the level of being subjected to public criticism. Failing to improve can lead to a failure to acquire valuable information in court procedures. Other factors that influence the performance of the expert witness have to do with circumstances that are not directly related to the court.

***Containment of the personal responsibility of the expert witness leads to legal problems and possible misunderstandings***

The extent of the personal responsibility of the expert witness for his work (investigations and results) is apparently a point of discussion at the NFI. The instigation of rules on reporting and the more or less compulsory way of wording reports conflicts with the personal responsibility of the expert witness. In its mission to improve the quality of the work of the juridical system as a whole, no matter how well meant and supported by the government, the NFI obviously has overstretched the external influence that should and can be exerted on the individual expert witness. As one of the judges worded in the interview: *‘One of the things that strike me, and is absolutely wrong, is the expression “The NFI has reported that...etc”. I mean, after all, it is the expert witness that reports, the expert witness is personally responsible for the report. It’s his signature, isn’t it?’* (page 43). The legal responsibility that is laid upon the expert witness is violated when the NFI deems it necessary and obliged for an expert witness to report as though the expert witness is not a person, but part of an institute. The problem here is two-ways: the institute should not impose such rules and the expert witnesses should not accept them. The fact that they are personally responsible for reporting must

be known by anyone that acts as an expert witness. If there is a lack of knowledge about the implications of working as an expert witness it must be corrected. Knowledge of the personal responsibilities at least makes clear to all parties that the expert witness knows where he stands in the juridical process and might heighten the appreciation for the expert witness.

The same goes for the rules on the wording of reports, as was mentioned by some interviewees (page 43-44, L2, E3). These rules hinder the freedom of expression of the expert witness, thereby (apparently) leading to less clear reports than are wished for by involved parties. Again, the personal responsibility of the expert witness seems to be denied, creating not only the risk but the reality of misunderstandings in the juridical process. The way a report is written can be a critical factor: if the considerations and conclusions are not clearly stated they can be misunderstood. Also, longer reports do not always mean better understanding by the receiver. This has been investigated for police reports on the hearings of suspects. Short reports with short statements from suspects were compared to long reports with very elaborate statements. Strikingly, the more elaborate the statement, the less credible the statement was judged by readers (Malsch, M., Keijser, J.W. de, Kranendonk, P.R. & Gruijter, M. De, 2010). It can be concluded that a report should be clear and to the point, otherwise there is not only the risk of misunderstandings in readers of the report but also a possible loss of credibility for the author of the report. It goes without saying that the creation of opportunities for misunderstandings opposes the strive towards a better functioning juridical system.

To conclude this subject, it is obvious that the NFI, in its strive towards a better understanding between involved parties (including the police), has to pay more attention to the legal requirements and the acknowledgement of personal responsibilities of the expert witness. The expert witnesses of the NFI, on the other hand, must be more aware of the responsibilities that come with the job.

### ***In Denmark the expert witness is less challenged than in The Netherlands***

From the statements of the Danish expert witnesses (page 45-46) it becomes clear that in Denmark the expert witness is not as challenged as in The Netherlands. Several reasons for this phenomena were suggested by the Danish expert witnesses. It was suggested that in Denmark there is less public debate on criminal trials than in The Netherlands. Also it was thought that the lawyers

(defence lawyers and public prosecutors) seek less counter-expertise and contact with the press in Denmark than in The Netherlands. What could explain these differences, has it to do with culture?

Looking at Denmark the country does have less inhabitants than The Netherlands; Denmark has about 5.5 million inhabitants, The Netherlands almost 17 million. That does not mean, however, that there are more forensic experts in The Netherlands. Denmark has several forensic institutes (Copenhagen, Aarhus, Odense), The Netherlands has only one institute that employs most expert witnesses. One could even say that it should be easier to get counter-expertise in Denmark than in The Netherlands. The population count therefore does not explain why expert witnesses are less challenged in Denmark.

Another explanation can be that the esteem of the Danish expert witnesses suffered less from public attention. In The Netherlands, the influence from public attention is clear: not only did the public openly and vehemently questioned expertise of expert witnesses, but the government also drew the subject of expertise towards itself in introducing new laws and regulations. Public criticism occurs to have been less pronounced in Denmark which could explain the diminished loss of authority for expert witnesses in Denmark. It could also be that the public in Denmark is either less inclined to question expertise or the government is more reluctant to interfere in questions on expertise (or: *who* is an expert). If this truly is the case, then the difference in esteem and authority for expert witnesses could be explained by cultural differences. Another possibility is that in fact there are less (true or perceived) misjudgements in Denmark than in The Netherlands. This can be explained by, for instance, a better quality of experts and the juridical system leading to less misjudgements. Whether this is true lies beyond the scope of this study. Another possibility to explain the difference could be the juridical system: in Denmark there is a jury in heavy crime cases. Perhaps the jury is seen by the public as a representative of their interest. Perhaps, as long as the jury does their job properly in the eyes of the public they feel no need for public debate in criminal cases. And of course, if the public does not feel a need for public debate, the media might be less inclined to publish on the subject of criminal cases, making it less appealing for lawyers to seek media attention.

Looking at the theory on cultural differences as an explanation for the way a society looks at science and scientists (pages 21-21), the population can be influenced in its view on science by the way the government handles science and scientific results. In Denmark the government might be less inclined to interfere with science than in The Netherlands and this might lead to less public

debate on science in Denmark. A reflection of less public debate on science could then explain the lower level of public interest in the performance of scientists, like expert witnesses.

The view of the society on science and scientists, according to Jasanoff (Jasanoff, 2005), is influenced by history. A comparison between historical developments in Denmark and The Netherlands could provide clues for possible differences in societal views on science and scientists.

## **Limitations of this study**

This study should be regarded as an introductory study into factors that influence the performance of the expert witness and the perception of that performance. Of course, in this study only a small number of people have been interviewed and the comparison to the situation abroad is based on only two interviews in one other country. Whether the differences between the situation in The Netherlands and Denmark find their basis in cultural differences remains unclear because of the limited scope of this study. Also, the question remains whether the respondents are a good representation of the population; larger numbers of interviews could answer that question. Larger numbers could also tell us more about the validity of the findings. A larger study however, might be hindered by the use of the semi-structured interviews with open-ended question; the transcription of these interviews is time-consuming and not an easy task.

## **Recommendations on future research**

Cognitive frames on the expert witness are made up of several elements, such as thoughts, feelings and facts. Changes in either element can change existing frames. From this study it seems that performance is an important factor within cognitive frames, making it all the more interesting to dive into the factors that influence the performance of expert witnesses. Further research on the factors that influence performance can help the expert witness to better understand them and give insight to the expert witness on how to cope with them to optimize the performance and, in doing so, influence the frames.

By broadening this study to other countries, specific cultural influences can be identified, thereby deepening the understanding of the effect of societal factors on the perception and performance of the expert witness. A comparison between Denmark and The Netherlands, diving deeper into possible cultural differences or facts, as there are the number of misjudgements and the nature of public debates on criminal court cases, could broaden the understanding of the specific situation in The Netherlands with regard to the cognitive frames on expert witnesses.

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## Appendix: Semi-structured interview questions

### *The representative of the Ministry of Justice*

- \* What caused the Ministry of Justice to make the new law on the registration of expert witnesses?
- \* What considerations played a role in making that new law?
- \* Where all considerations equally important?
- \* Why has the Ministry of Justice chosen to position the expert witness as ‘independent and objective’?
- \* Has the Ministry of Justice considered another position and role for the expert witness?
  - ⊗ If yes, what would this position and role be?
  - ⊗ If no: why not?
- \* How does the Ministry of Justice think the position of the expert witness, as described in the law, should be ascertained in practice?
- \* What were the reasons that made the Ministry of Justice decide to install a register for expert witnesses?
  - ⊗ If the Ministry of Justice thinks there were problems to be solved on the issue of the role and position of the expert witness, what were these problems?
  - ⊗ How does the Ministry of Justice think the installed register of expert witnesses will solve these problems?

### *The judge, public prosecutor and defence lawyer*

- \* What is your opinion on the fact that the law states that an expert witness has to be independent and objective?
- \* Would it be a problem for you if the expert witness has another role, such as an expert witness for the prosecution or defence as can be found in e.g. the USA?
  - ⊗ If yes, why would that be a problem?
  - ⊗ If no, what position do you prefer and why?
- \* Seen the fact that Dutch law requires an expert witness to be independent and objective how do you, in practice, check whether this is true for an expert witness?

- \* Do you experience problems with this check?
  - ⊗ If yes, what are these problems and how do you solve them?
- \* In your opinion, do you feel the expert witnesses in general are independent and objective?
  - ⊗ If no: how do you handle that?
  - ⊗ If no: what do you think causes that?
- \* Do you think there might be factors that can influence the performance of an expert witness?
  - ⊗ If yes: what factors do you identify?
  - ⊗ If yes: how do you handle that?
- \* How, in daily practice, do you check the expertise of an expert witness?
- \* Do you experience problems with this check?
  - ⊗ If yes, what are these problems and how do you solve them?
- \* Have there been any changes in your view on the expert witness over the years?
  - ⊗ If yes: what where these changes?
  - ⊗ If yes: what do you think caused these changes?
- \* Could you describe what, in your opinion, would be the ideal expert witness?
- \* If any changes are needed in order to get closer to this ideal expert witness, what would these changes be?

### *The expert witness*

- \* What is your opinion on the fact that the law states that an expert witness has to be independent and objective?
- \* Would it be a problem for you if the expert witness has another role, such as an expert witness for the prosecution or defence as can be found in e.g. the USA?
  - ⊗ If yes, why would that be a problem?
  - ⊗ If no, what position do you prefer and why?
- \* Do you think you can be independent and objective, as the law and regulations require?
- \* Seen the fact that Dutch law requires an expert witness to be independent and objective how do you, in practice, prepare yourself for that role?
- \* Have you ever experienced circumstances that influence your performance and/or objectivity?
  - ⊗ If yes: how do you know?
  - ⊗ If yes: what problems do you encounter and how do you handle these problems?
  - ⊗ If no: how do you know?

- ★ Are there any factors in the environment you work in that you would like to see changed?
  - ⊗ If yes: what are those factors?
  - ⊗ If yes: what changes would you want to see?
- ★ Do you feel there have been any changes in your role as an expert witness over the years?
  - ⊗ If yes: what were these changes?
  - ⊗ If yes: what do you think caused these changes?
- ★ Do you think your performance as an expert witness is sufficient?
  - ⊗ If no: what would you change?