

The Use of Experts in Icelandic Law of Procedure

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1 Introduction

Society is steadily growing more complicated and so are court cases. It is well known that an understanding of the ‘simple facts of the case’ is often not at all simple and may require special education or training. If a professional judge can be considered to be an expert in something, that area of expertise would be the law and especially procedural law. So even if we assume, for the time being, that the judge ‘knows the law’, a prior understanding of the facts of the case is a prerequisite for applying that legal knowledge and deciding the case. To take one example, a judge might be well trained in Tort Law but would nevertheless be unable to identify what is required by diligent medical practice when trying a case where physician’s liability is at stake. In short, when judges are confronted with facts the understanding of which is beyond what can be expected of a normal enlightened and educated person, any reasonable judicial system must make the necessary specialised knowledge available. In practice, all legal systems aspire to meet this need for specialised knowledge within the judicial system, albeit by different means.

In most Anglo-American judicial systems (or common law systems) the parties submit either reports and/or produce expert witnesses at trial. Hence, in conformity with the dominant *adversary principle* of the Anglo-American legal tradition, the parties control, as a general rule, what evidence is submitted to the court and are in a position to influence how it is interpreted by expert witnesses (e.g. by ‘preparing’ the witness). One problematic consequence of *the Anglo-American system of expert witnesses* is that a party will typically choose an expert who supports her own view of the facts. Hence, expert witnesses are often under suspicion of being ‘hired guns’ of the parties concerned rather than objective and independent advisers to the court. Another problematic aspect is the possibility of conflicting expert opinions being presented during proceedings. Ultimately, a judge with no special knowledge in the relevant field of expertise, or even a jury composed of laymen, may have to decide between conflicting expert opinions.

In contrast to the Anglo-American tradition, continental legal systems (or civil law systems), often under the influences of an *inquisitory tradition*, limit party autonomy and provide for a more judge controlled procedure, *i.a.* with respect to expert evidence.¹ Typically, the production of expert evidence, such as reports and opinions, is wholly or at least partially assigned to court-appointed experts (Fr. *experts judiciaires*). These experts can usually be appointed either on a motion of the parties or on the judge’s own initiative. In many cases they are accountable to the presiding judge and will report directly to her.² The court-appointed expert is thus unconnected to the parties and is to be disinterested as to the conclusion of the litigation. However, in saying this I do not want to overstate the difference between Anglo-American and continental legal systems

1 A valuable comparative study in this respect is a report prepared by D. McIntosh and M. Holmes, *Civil Procedures in EC Countries*, London 1991.

2 *See*, for example, the detailed provisions on expert evidence in Chapter V, Title VII (esp. section IV) in the New French Code of Civil Procedure and Title 8, Part 1, Book 2 of the German Code of Civil Procedure.

with regard to expert evidence. The problematics of expert evidence in Anglo-American legal systems is by now a familiar topic of Anglo-American legal scholars and practitioners (above all judges).³ Also, at the present, there seems to be a general trend in Anglo-American systems towards an increased judicial control of the judicial process.⁴ Thus, in many Anglo-American systems the presiding judge can, in spite of the adversary principle, order the parties to explain the lack of expert evidence or to bring forward an expert witness. In some cases the judge can even order the parties to present a joint expert witness and, if the parties fail to do so, appoint an expert upon her own motion.⁵ Exceptionally, the Anglo-Saxon judge might have the power to appoint an assessor (adviser) to advise her directly during proceedings.⁶ Hence, at the end of the day the difference between Anglo-American and continental rules with regard to expert evidence might prove to be nominal.

Even in a continental system where the judge would benefit from the opinion and clarifications of an independent court-appointed expert, she might still be confronted with conflicting expert evidence as well as complicated factual issues when deciding the case. In some cases, both in Anglo-American and continental legal systems, specialised courts have been established to respond to the constant and ever increasing need of expertise in some areas of law, e.g. Juvenile Courts, Commercial Courts and Administrative Courts. These courts are typically composed, wholly or partially, of experts or directly assisted by experts (sometimes referred to as *assessors*). Even in Anglo-American systems these courts would normally have more control as to the gathering of evidence than would be the case under a fully adversarial system.⁷

In Iceland, where virtually no courts with specialised jurisdiction have existed since the implementation of the Judicial Reform of 1992,⁸ the problem of

3 Cf. Zuckerman, A.A.S., *Justice in Crisis: Comparative Dimensions of Civil Procedure*, Civil Justice in Crisis, Comparative Perspectives of Civil Procedure, Oxford 1999, pp. 3-52.

4 An influential discussion on the topic and recommendations for reform within the legal framework of the United Kingdom may be found in Ch. 13 of the so-called Woolf Report of 1996 (Final Report to the Lord Chancellor on the Civil Justice System in England and Wales, HMSO, London, July 1996). In his report Lord Woolf calls for various restrictions on the use of expert witnesses. The general trend for the increased of judges over civil procedure can probably be said to expand to continental systems as well. See Zuckerman, A.A.S., *Justice in Crisis: Comparative Dimensions of Civil Procedure*, Civil Justice in Crisis, Comparative Perspectives of Civil Procedure, Oxford 1999, pp. 3-52.

5 See, for example, the U.S. Federal Rules of Evidence of 2004, Art. 706 (a) on Court-appointed Experts and the U.K. Civil Procedure Rules of 1999, Part 35.

6 One example is Art. 35.15 U.K. Civil Procedure Rules of 1999 which empowers the Court to appoint an assessor to participate in the proceedings. These rules of 1999 increased considerably judicial control over expert evidence in respects, among other things by empowering the Court to order that evidence is to be given by a single joint expert (Cf. Art 35.7).

7 The term assessor (Fr. *assesseur*) refers sometimes to lay-men (usually experts) acting as judges but on other occasion to experts who only act as advisers to the court.

8 This reform, which was initiated in 1987, was above all intended to separate judicial and executive functions (police work and prosecution) in the districts, both of which had until then been assigned to district commissioners (Ice. *sýslumenn*), however with the exception

expert evidence and the need for specialised knowledge on the bench can be said to be tackled by two separate systems. First, expert evidence is mainly produced by court-appointed experts who operate under a specific set of rules aimed to enhance their impartiality and objectivity. Secondly, the professional judge, to whom a case has been assigned, is empowered to call suitable experts *ad hoc* to the bench if the case requires specialised knowledge, *i.a.* in order to review any prior reports made by court-appointed experts.

Clearly some parallels to the Icelandic system exist in other legal systems where expert laymen and assessors are part of the bench in specialised courts. However, the Icelandic provisions differ from these parallels in two respects. Firstly, these provisions have a potential applicability to all types of proceedings (civil, criminal etc.) and court cases in a very flexible way. It is for the presiding judge to evaluate, on a case to case basis, whether there is a need for an expert on the bench. Secondly, Icelandic Law combines the system of court-appointed experts on the one hand and provisions relating to experts on the bench in a particular way.⁹ One of the principal functions of the experts on the bench will thus be to review any expert material produced by court-appointed experts. What follows is an outline of the Icelandic provisions as well as some normative assessment of the system.

of Reykjavik where there was a special Town Court and Criminal Court. The reform entailed the establishment of independent district courts and the removal of all judicial powers from the district commissioners. As a part of the reform some acts of the district commissioners, which could be classified as *jurisdictio voluntaria* (e.g. various types of registrations, notarial acts, liquidation proceedings and seizures) were now defined as administrative acts, thus leaving the district commissioners without any formal judicial function. These acts were, in return, subjected to the judicial review of the district courts. The reform also entailed a concise revision of all Icelandic procedural law which was, at the time, fragmented and to some extent based on sources as old as the Norwegian Law of 1687 (Norske Lov). In conformity with Icelandic legislative tradition this revision was achieved through six separate Acts of Parliament and not by constructing a concise code of procedure. In conjunction, these six statutes, which were drafted parallel and came into force July 1st 1992, have, however, many of the defining characteristics of a code, e.g. with regard to cross-referencing and the uniform use of concepts. The reform of 1992 can be said to have been completed with the Courts Acts No 15 of 1998.

(Lög nr. 15/1998 um dómstóla) which stipulates the structure of the judicial system and procedures relating to the appointment and demission of judges.

- 9 The Sea- and Commercial Court of Copenhagen (*Dan.* Sø- og Handelsretten) can call experts to bench. This applies also to the general courts, including the appeal courts (*Dan.* Landsretten), when trying sea- and commercial cases (there is only a separate Sea- and Commercial Court in Copenhagen). These provisions apply only to sea- and commercial cases contrary to the Icelandic provisions which have a universal material scope of application. *Cf.* Art. 9 and 9b and chapter 9b of the Danish Act of Procedure (*Cf.* Lbk. 961/2004). For a discussion of the operation of Sea- and Commercial Court and its composition a reference can be made to Poulsen, Frank, *Sø- og Handelsretten - særligt om 'sagkyndige retsmedlemmer' i retsplejen*, Dommeren i det 20. Århundrede, (ed. by Garde, P., Larsen, C. og Pedersen, B.), Copenhagen 2000, pp. 327-334.

2 The Icelandic Judicial Process in a Nutshell

Since the establishment of the Icelandic Supreme Court in 1920, the Icelandic judicial system has been based on only two judicial levels, i.e. the district court level and the Icelandic Supreme Court.¹⁰ Until the Judicial Reform of 1992 there were nine specialised courts operating on the first level, along with the regular district courts.¹¹ In addition, in Reykjavík, the function of the District Court was divided between a Criminal Court (Ice. *Sakadómur*), Town Court (Ice. *Borgardómur*) as well as the District Commissioner's Office (Ice. *Borgarfógeti*) which at the time still had some judicial functions.¹² This court system which, to a large extent originated from the 17th and the 18th century, was indeed a complex one and in some ways ineffective (i.e. some of these specialised courts were rarely or never in operation due to a lack of cases). Part of the Judicial Reform of 1992 was thus to abolish most specialized courts and replace them with a court system composed of 8 independent district courts with a universal material jurisdiction.¹³ Thus the Icelandic district courts can be said to function as civil courts, criminal courts, administrative courts, commercial courts, family courts, even as constitutional courts at times.¹⁴ These courts were to have the opportunity to organize their judges into informal chambers where practical, but it was foreseen that this would in all likelihood only be the case in the larger courts (particularly in the District Court of Reykjavík).

In the same period steps were taken to simplify the Icelandic court system, a great number of 'quasi-judicial' administrative commissions was erected, usually following models from Denmark and Norway. These commissions have been entrusted to resolve legal disputes of many sorts, either by giving opinions or by rendering binding and enforceable administrative decisions. In many ways they serve the same functions as specialised courts in other legal systems. However, the important difference is that decisions made by these commissions

10 Outside the district of Reykjavík, District Commissioners were district court judges as well as being the head of the police and district prosecutors. The Supreme Court of Iceland, having i.a. a regard to an opinion of the European Human Rights Commission, held this system to be unlawful in 1990 (*Cf.* Supreme Court Reports 1990, p. 2). What followed was the temporary erection of independent district court judges which had in any way be envisaged by the Judicial Reform that was to come into force in 1992.

11 *Cf.* Jóhannesson, Ólafur, *Lög og réttur*, Reykjavík 175, bls. 331-333.

12 Until the Judicial Reform of 1992 various acts of the District Commissioners, e.g. registration and publications of contracts (Ice. þinglýsing), seizure (Ice. aðför), liquidations (Ice. gjaldþrotaskipti), were defined as judicial acts which could be appealed to the Supreme Court. Under the present system all acts of the District Commissioners are defined as administrative acts that can, however, be challenged before the District Courts under specific rules of procedure that will not be discussed here.

13 At the present only two specialised courts exist: The Labour Court (Ice. Félagisdómur) and the Landsdómur which is entrusted by the Constitution of 1944 to decide upon charges of infringements committed by ministers of the Republic.

14 It is well established case law that the District Courts are competent to review the constitutionality of parliamentary legislation. In Iceland there is no judicial or administrative organ that deals specifically with constitutionality of legislation during or after the legislative process.

can in all instances be challenged in court. Hence, the establishment of the said commissions does not ultimately prevent complicated or specialised factual matters to be taken to court. The proliferation of ‘quasi-judicial’ commissions parallel to the simplification of the judicial system, merits a discussion that cannot be taken further here.

The Icelandic judiciary is exclusively composed of professional judges appointed for life, either by the Minister of Justice or by the President of the Republic after being nominated by the Minister. District court judges are appointed only after a reasoned recommendation made by an independent commission, although the Minister is not bound to accept that recommendation. To be eligible as a district court judge a person must be at least 30 years old, have an official examination in law or a comparable law degree and have obtained three years practical experience as a lawyer.¹⁵ The background of Icelandic judges is quite various. Some have spent most of their working life within the court system, often starting off as deputies,¹⁶ some have practiced law as advocates, others have worked within the public administration or as academics.¹⁷ As a rule, one district court judge presides in proceedings. Juries have not existed in Iceland since the time of the Icelandic Commonwealth (930 - 1262 A.D.) and the use of laymen as judges came to full stop with the Judicial Reform of 1992.¹⁸ In civil cases of special importance or in criminal cases, where the conclusion is dependent upon the assessment of oral testimony, three professional judges may take the bench. The Supreme Court has either three or five judges on the bench for each case. For especially important cases the bench may comprise seven justices.

Icelandic Law of Civil Procedure is based upon the principles of oral procedure and party autonomy which is not, however, unrestricted. On the district court level, proceedings are typically initiated by serving the

15 Art. 12 of the Court Act No 15 of 1998 (*Ice. lög nr. 15/1998 um dómstóla*).

16 The Icelandic deputies system was dealt a serious blow when the Icelandic Supreme Court found it unconstitutional and contrary to Art. 6(1) of the European Human Rights Convention for deputies to handle criminal cases (*Cf. Supreme Court Reports 1996, p. 1444*). The system was abolished with the Law no.15/1998 on the Judiciary that came into force in July 1st 1998.

17 There is no reliable empirical data regarding the background of Icelandic judges. Given the fact that there are only 35 district court judges and 9 supreme court judges in Iceland I feel, however, confident enough to make this statement based on my intuition and experience. For comparison, interesting empirical research regarding the background of Danish judges can be found in an annex to the report of the Danish Court Commission of 1996 (*Dan. Domstolsudvalgets Betænkning*), *Betænkning Nr. 1319*.

18 Until the beginning of the 18th century Icelandic courts were to a large extent composed of laymen (i.e. not officials of any kind). In 1719-1732 the Danish King (being the king of Denmark, Norway and Iceland) decreed that the procedure of the Norwegian Code of 1687 (*Norske Lov*) should also apply to Iceland until the enactment of a separate Icelandic Code. This Icelandic Code was however never enacted and the procedure of the Norwegian Code became the basis for Icelandic Procedural Law until the 20th century. One result of this change was that the function of laymen as judges was dramatically diminished and limited to certain fields. Thus, until 1992 two laymen would participate along with a professional judge during the proceedings of the so-called Landmark Court which dealt with cases concerning the delimitation of real property.

defendant(s) with a written submission which contains a description of claims, facts, legal grounds as well as a summons to appear before the court. At the given time the plaintiff will file the case by forwarding her submission with supporting evidence other than testimony. If the defendant appears before the court and decides to hold a defence, she will be given a time limit to state her claims, facts and legal grounds in a separate submission which is to be filed with supporting evidence. All these documents constitute the *case dossier* which at this stage will be assigned to a specific judge in charge of the case from that time onwards.

In their written submissions the parties might declare their intention to gather further evidence. Further evidence gathered under proceedings might include the opinion or assessment of *court-appointed experts*, in other words experts who are to be appointed by the judge to answer specific questions which require specialist knowledge or experience. The function of these experts will be explained more thoroughly below. There is *no principle of discovery* under Icelandic Law. However, if a party neglects to submit documents at her disposal or (oral) explanations, this can influence the judge's assessment of the evidence. As a rule, the parties can continue to gather evidence during the proceedings if this is done without undue delay.

When the gathering of the evidence has been concluded by the parties, the judge will prepare and decide a time for the final hearing (or trial) of the case. At this time the presiding judge will also examine whether it is necessary to call experts to the bench. During the final hearing (Ice. *aðalmeðferð* which literally translates as 'the principal proceedings of the case') parties and witnesses will appear and give oral statements of facts. Written testimonies are not allowed under Icelandic Law. Since witnesses are only supposed to describe facts—and not give their opinion or assessment of these facts—expert witnesses are, in principle, not permitted. Hence, in order to produce an expert's opinion a party must in principle move to have the court appoint an expert. However, these court-appointed experts can be called as witnesses to explain their opinions and reports in greater detail. Directly after the testimony of witnesses, the parties (usually their advocates) will plead the case orally. In civil cases judgements are to be rendered within a period of four weeks and in criminal cases within a period of three weeks. In all cases judgements must be written and contain a description of claims and arguments of the parties, the facts and lastly the findings of the Court and its ruling.

3 The Legal Basis for Experts on the Bench

The legal basis for expert judges is in Art. 2(2) of the Civil Procedure Act of 1991 (CPA):

Where the facts of a case, on which the parties base their claims, are disputed, and the judge considers a specialised knowledge necessary to resolve it, the

judge can call to the bench two persons with the relevant specialised knowledge.¹⁹

In the Criminal Procedure Act of 1991 a reference is made to CPA, making the provisions of the CPA applicable to criminal procedure in this respect.

In Art. 3 of the CPA, some general requirements made of expert judges are stipulated. These requirements are mostly in conformity with the general requirements made of professional judges with the exception that the experts do not need to have any legal qualification or experience. It is further mentioned in the said article that it is a civic duty, with some minor exceptions, to respond to a call to the bench.

In Art. 4 of the CPA it is stipulated that experts shall become part of the bench no later than at the beginning of the final hearing (i.e. the trial). Therefore it is (usually) the professional judge alone who proceeds until the final hearing starts. The presiding judge shall inform the parties as to the identity of the experts she intends to call for. The purpose of this is to make it possible for the parties to submit their objections regarding the fitness and impartiality of the expert, if they deem that appropriate. The article describes various formalities concerning the nomination of an expert judge which need not be discussed here.

Pursuant to Art. 4 the experts participate in the proceeding and the resolution of the case. They have same rights and obligations as the professional judge in respect of deciding the case. The professional judge, acting as a foreman of the court will direct the proceedings alone and rule on all procedural matters. Pursuant to the said article the foreman will also decide the experts' fee.

Hence a court may be composed of two non-legal experts and one professional judge. In theory, the professional judge might therefore find herself in minority when deciding the merits of the case. In practice this situation is extremely rare although not unheard of.²⁰

The experts who are called to the bench will have to meet the same requirements of impartiality as the professional judge, *Cf.* Art. 5 of the CPA. If the competence of an expert is disputed it would be function of the foreman (the professional judge) to rule on the issue.

4 The Calling for an Expert — A Prerogative or an Obligation?

As discussed above, it is the professional judge in charge of the case who makes the decision whether to call experts to the bench. The professional judge will therefore both assess the need for experts, what kind of expertise is required and finally which individual she calls for. There is no officially approved pool of

19 My translation. The authentic Icelandic text is as follows: 'Ef deilt er um staðreyndir sem eru bornar fram sem málsástæður og dómari telur þurfa sérkunnáttu í dómi til að leysa úr getur hann kvatt til tvo meðdómsmenn sem hafa slíka sérkunnáttu.'

20 *See*, for example, the Supreme Court Reports 1945, p. 98 and 1950, p. 20. In the former case the Supreme Court decided against the expert judges and overruled the District Court. In the latter the Supreme Court confirmed the District Court decision thus disagreeing with the foreman of the District Court.

experts for this purpose as opposed, for example, to the experts serving as judges to the Sea- and Commercial Court of Copenhagen (*Dan. Sø- og Handelsretten*) or the *experts judiciaires* in France. It is important to notice that the parties have no powers in this respect although they will often express their opinion of the record. The parties can object to the nomination of a specific expert to the extent that they consider that the person not to meet the general prerequisites for nomination, such as a lack of necessary qualifications or a breach of the rules of impartiality.

Thus, at first sight, it might seem that permission to call experts to the bench is simply the prerogative of the professional judge, and fully subject to her discretion. This first impression is nevertheless misleading as can be inferred from the following examples.

E sued for compensation because of an injury resulting from a motorcycle accident in 1990. E had, however, also suffered injuries on his legs in a traffic accident in 1986. During the proceedings it was disputed whether the articular disk of E's left knee had been damaged in the accident 1990 or earlier in 1986. Both parties referred to medical opinions in this respect. The Supreme Court ruled that in these circumstances it had been necessary for the district court judge to call experts to the bench to re-evaluate the medical data submitted. As a result of this fault the judgement of the District Court was annulled. (Supreme Court Reports 1997, p. 1472)

H sued T, an insurance company, for compensation because of an accident which occurred when H – driving a motorcycle on the rear wheel only (i.e. "spinning" the bike) for the length of 100-140 m – hit a traffic island. T denied any responsibility on the ground that the accident had been the result of H's serious negligence. H pleaded that he had not raised the bike intentionally and gave detailed explanation as to why the bike had accidentally raised itself. In judgement in 2000 the Supreme Court ruled that it had been necessary for the District Court to call for an expert on motorbikes to assess the claim that a motorcycle could be driven on its rear wheel for 100-140 m by accident. The judgement of the District Court was subsequently annulled for a rehearing in the District. The District Court, now i.a. composed of two experts, rendered consequently a new judgement which was also appealed to the Supreme Court. The Supreme Court noted that one of the persons called to bench as experts had a license to drive a motor cycle but pointed out that there was no evidence that this person had any further expertise or experience in driving bikes. According to the Supreme Court a simple driving license was not enough to constitute an expertise in this regard. Consequently the judgement of the District Court was annulled for the second time. (Judgement 7th February 2002 in Case No 302/2001)

In sum, Icelandic case law reveals clearly that the discretion of the district court judge as to whether a case requires the input of special knowledge by experts is subjected to the full review of the Supreme Court. Thus, not only will the Supreme Court review whether there is a need for an expert on the bench, it will also assess what type of expertise is required and whether the individual chosen is qualified. The district court judge's margin of discretion can therefore be said

to be limited to the selection of specific individuals within a group of qualified experts in a certain field.²¹

5 The Interplay between Expert Judges and Court-Appointed Experts

As briefly mentioned above, Icelandic law does not, unlike Anglo-Saxon legal systems, allow expert witnesses.²² Expert evidence is therefore to be produced through experts, usually one or two, who are appointed by the court. This can take place before the initiation of a law suit (since it may well depend upon the findings of the experts whether a law suit will be initiated at all); under proceedings before the district court or even during appeal proceedings before the Supreme Court.²³

There are no express limitations as to which issues a party can ask a judge to appoint an expert to give an opinion. It can however be inferred from the CPA (Art. 60, Para 2) as well as the case law of the Supreme Court that issues requiring only general knowledge or education will not give rise to an appointment of an expert. The same applies to questions of legal nature. A party must also demonstrate that the questions she intends to submit to the expert are of relevance to her interest. Lastly the motion for the appointment of experts will have to meet various formal requirements not to be discussed here.

If all requirements are met a district court judge will appoint one or two persons with the relevant expertise, often two experts from different professions. The parties can agree upon specific experts, but in the absence of such agreement the choice is up to the judge. The experts will have to satisfy rules regarding impartiality and follow certain procedures provided for in the CPA (*Cf.* Art. 61 to 63) which may perhaps be referred to as ‘mini-proceedings’. The mini-proceedings are to ensure the equality of the parties as well as enlightening all relevant facts. If the rules of this procedure are breached the expert opinion might be disregarded by the court. Any dispute regarding these mini-proceedings can be taken to the district court, such as matters of impartiality, whether questions have been duly answered, reasoning complete and other issues. An appointed expert or experts will conclude by submitting a reasoned report which is subsequently delivered to the party who requested the appointment. This party

21 If, on the other hand, the district court judge decides to call for experts where there is no such need this will only result in a reprimand comment by the Supreme Court with no effects to the validity of the district court proceedings.

22 This rule is an exception to the general principle of Icelandic Law permitting the parties to submit any type of evidence they choose. As a result many examples can be found where courts have shown considerable lenience to the presentation of expert witnesses, especially in criminal cases. That is not to say, of course, that these witnesses, although permitted to appear, have carried any great weight in the decision making of judges. Often, expert opinions would also be expressed in letters and reports that are submitted as a part of the case file.

23 An expert opinion might even be sought after a judgement of the Supreme Court with the purpose of trying to have a case re-opened.

will also have to pay the expert a fee. Any party to the mini-proceedings can ask the Court for an appeal opinion. In that case the court will appoint two or three experts who will review the first expert opinion following the same procedure. This opinion will, however, be the final expert opinion on the matter.²⁴

In many legal systems, the existence of a report from court-appointed experts would mean that an issue demanding specialised knowledge has been duly clarified by an impartial expert making further expert assessment unnecessary. Under Icelandic Law this is not the case. Pursuant to Art. 66(2) of the CPA it is the function of the judge to assess the value of an expert opinion as evidence. Hence the judge must be able to understand and review the opinion of the court-appointed experts. In practice, this means that when parties dispute the conclusion of court-appointed experts the professional judge is usually forced to call experts to the bench.

It can be quite expensive for a party to obtain an opinion from court-appointed experts. If the party loses the case it will usually have to bear its own legal costs, including those resulting from reports of court-appointed experts. It is therefore reasonable for parties to try to minimize the work of the court-appointed experts, for example by submitting few and precise questions and by agreeing upon complicated issues of minor pecuniary interest. It is, however, well established case law that a party cannot neglect to gather the necessary expert evidence and rely on the court to bring in experts to the bench. Hence, if the appropriate expert evidence is lacking, this will result in the case being dismissed *ex officio*.²⁵

6 When are Expert Judges Required?²⁶

An experienced district court judge once told me that he called experts to the bench only when he did not understand the facts of a case from the cases file. This rule-of-thumb encapsulates the rationale of the provisions in question — the experts are there to bring to the bench the specialised knowledge the professional judge does not possess. As mentioned above, case law is clear as to the necessity of calling an expert to the bench when there is dispute over an opinion by court-appointed expert. Aside from these instances, it is impossible to provide an exhaustive list of cases where experts are required. What follows are some examples where it would be obligatory for a district court judge to call experts to the bench.

24 It may be added that the courts can ask for the opinion of the Icelandic Commission of Doctors (*Ice. Læknaráð*) irrespective of any opinions delivered by court-appointed experts. Cf. the Doctors' Commission Act No 14 of 1942 (*Lög nr. 14/1942 um Læknaráð*).

25 Cf. Supreme Court Reports 1985, p. 142 and Supreme Court Judgement of 20th September 2001 in case No 10/2001.

26 This question has been analysed in detail in Icelandic legal literature. See in particular: Stefán Már Stefánsson, *Meðdómsmenn*, Tímarit lögfræðinga, 1983, Símon Sigvaldason and Markús Sigurbjörnsson, *Dómar um almennt einkamálaréttarfar*, Reykjavík 2003 and Skúli Magnússon, *Er þörf á breytingum á reglum um sérfróða meðdómsmenn?*, Guðrúnarbók, Reykjavík 2006.

Sales of Property and Real Estate

A common type of case brought before the Icelandic courts concerns defects in goods or real estate. In many cases the parties would disagree as to whether a property is up to standards, about the causes of a defect and when it came about, not to mention the pecuniary damages resulting from a defect. In these cases the plaintiff would have to base her claim on some sort of expert material, although not always a report of court-appointed expert. Consequently, it is generally necessary for the professional judge in these cases to call experts to the bench, usually experienced carpenters, engineers or other technicians from the building industry.

The Assessment of Diligent Practice

Many cases, both civil and criminal, revolve around the question of what constitutes correct or diligent practice. This demands knowledge of the relevant profession and practice in question. For example, if a tort case concerned an accident that happened aboard a fishing vessel, experienced captains or pilots would usually be called to the bench. Similarly, if a claim for compensation is based on a doctor's malpractice, doctors with the same type of specialization would usually be called for. The same applies for the diligent practice of accountants, advocates, builders, etc. in both civil and criminal cases. In these cases the defendant would typically be of professional standing, accused of breaching rules of diligent practice. The experts called to the bench would usually be of the same profession as the defendant. In a small society like Iceland it can be difficult to find experts with no ties to the defendant or the institutions to which she has links.²⁷ This may also lead to the risk of undermining the credibility of the court when the professionals at stake are renowned for loyalty to their colleagues or even brotherhood. These problems have to be resolved case by case.²⁸

Calculation of Compensation

In many cases which involve a claim for compensation of some sort, the amount of compensation is based on presumptions that can only be evaluated by a relevant expert. A claim for compensation for defective real estate might be based upon repair costs or upon market prices. Under Icelandic Law, claims for compensation for permanent personal injury are based on physical impairment (assessed by physicians) and by financial loss (mainly assessed by non-medical experts).²⁹ Actually, most calculations of compensation demand some sort of expertise. Fortunately, parties often agree upon these issues (usually to avoid excess legal costs) allowing the professional judge to proceed the case unaided.

27 For example, most doctors in Iceland have or have had some ties with the National Hospital of Iceland.

28 As a last resort a professional judge may consider to call only one expert and request the president of his court to order one professional judge to take the bench with alongside the presiding judge (*Cf.* Art. 2, para 3 of the CPA). In this way it may be guaranteed that professional judges are in the majority.

29 *Cf.* the Compensation Act of 1993 No 50.

Book keeping and Accountancy

An increasing number of cases involve complex financial actions which cannot be properly understood without some knowledge in accountancy. These cases will however only exceptionally justify the calling for experts. For example, in complicated tax cases accountants may have been interpreting detailed and technical rules of tax law. Although the legal framework will perhaps look unattractive to the professional judge, she will have to get to the bottom of it on her own. If, on the other hand, a case concerns directly different interpretations of auditing practices it would be necessary to call for appropriate experts.

The Custody of Children etc.

Custody cases are subject to separate rules of procedure that give the judge an increased control over the gathering of the evidence. The same applies to cases which are filed by the local children welfare authorities (Ice. *barnaverndarnefnd*). In most of these cases expert opinions, mostly of psychologists, are part of the case file. It is common in these cases for parties to object to findings of these experts on various grounds. In many of these cases experts are therefore called to the bench. In these cases, however, there is an increasing trend to omit calling for expert judges when objections to expert opinions are not based on any expert material or are manifestly unfounded.³⁰

7 The Supreme Court and Expert Judges

The power to call experts to the bench only applies to the district courts and not to the Supreme Court.³¹ As has already been discussed, the Supreme Court will review whether it was necessary to call for experts in the district, whether the right type of experts were chosen and whether the individuals called for were duly qualified. If these requirements are satisfied the Supreme Court typically states, when considering expert evidence, that “experts were part of the bench in the District Court and that their assessment of the evidence has not been repudiated.” Hence, if a party wants to attempt to have a district court judgement, where experts were part of the bench, overturned on appeal, she will usually have to obtain some new expert evidence under appeal proceedings. New evidence here would usually be reports from new court-appointed experts. In these cases the Supreme Court might choose to rely on the new expert evidence instead of opinion of the expert panel in the district.³²

30 Cf. Magnússon, Skúli, *ibid* note 26, p. 459.

31 By way of comparison, note that under Danish Law the Appeal Court (*Dan. Landsretten*) can call experts to bench. As discussed earlier the Icelandic judicial system is based only on two levels, the district courts and the Supreme Court.

32 There are also some examples where the Supreme Court has requested the opinion of the Icelandic Commission of Doctors (Ice. *Læknaráð*) in accordance with the Doctors' Commission Act No 14 of 1942 (Ice. *lög nr. 14/1942 um Læknaráð*) and subsequently overruled the District Court.

8 Some Critical Assessment

As discussed above the Icelandic regime of expert evidence makes use of two separate systems. On the one hand there are court-appointed experts. On the other experts are called for to become part of the bench. During the final hearing (the trial) it would be one of the main functions of these expert judges to ask witnesses the appropriate questions with regard to specialised matters. In particular, expert judges would put questions to court-appointed experts who appear before the Court to give clarifications to reports they have submitted. When deciding the merits of the case, the experts play a key role in deciding the facts of the case and reviewing all expert material submitted by parties, in particular reports made by court-appointed experts. In short, as a rule of thumb, any sort of expert evidence in the case file (reports, testimony, etc.) requires the presiding judge to call experts to the bench.

The Icelandic rules regarding *court-appointed experts* avoid the gathering of expert evidence to become a sort of 'ping-pong' procedure where the parties keep accumulating expert opinions without any sort of closure being foreseeable. In addition, these rules ensure that a court-appointed expert will not be acting as 'a partisan' of the party who made the motion for his or her appointment. If one is a strict adherent to the adversarial system, the downside is, of course, diminished control of the parties over the production of expert evidence. In practice, however, the parties to the litigation will be able to submit all sorts of expert material along with reports made by court-appointed experts. Hence, the practical significance of the court-appointed experts is, first and foremost, that their opinions carry greater weight due to their impartiality and the procedure they follow. The system of court-appointed experts does therefore not result in the absolute exclusion of other types of expert evidence which might leave the procedure somewhat fossilized in this respect. In comparison to a unlimited system of expert witnesses, this system of court-appointed experts seems to be clearly superior, at least from the standpoint of the professional judge,

By allowing the professional judge to call appropriate *experts to the bench*, all types of expert material and opinions, inter alia opinions of court-appointed experts, can be reviewed directly by the Court. These expert-judges have the whole case file before them and will listen to all testimony given during the final hearing (the trial), including clarifications given by court-appointed experts, listen to the arguments of the parties, etc. This system gives the professional judge a direct access to the appropriate professionals. Instead of reading a bunch of expert opinions and materials the professional judge will have the opportunity to discuss the case directly with two appropriately qualified persons who have studied the case file and been present during the final hearing. This cooperation, i.e. that between the professional judge and two relevant experts, combines factual and legal know-how which is necessary for arriving at a reasoned conclusion in cases of specialised nature. In no circumstances will a professional judge (or a group of laymen in a jury box) be left alone to review and decide between conflicting expert opinions.

A positive by-product of having lay-experts on the bench is that a connection is built between professional judges and various types of professionals. In my own, relatively short experience as a judge, I have had the pleasure to work with

various professionals, such as motor mechanics, building engineers and various building experts, art dealers, various types of physicians and psychologists. For the district court judge this is usually a positive experience and prevents her from losing touch with real life, so to speak. It also gives various laymen an insight into the machinery of justice in much of the same way as would jury duty. In stark contrast to jurors, these laymen are, however, answering questions they are specifically qualified to deal with.

Perhaps the most serious criticism that can be directed against the Icelandic system relates to the selection and appointment of the expert who are called to the bench. As mentioned above, the recruitment of professional judges is subject to special administrative procedures. Conversely, the experts taking the bench are simply chosen and called for by a presiding judge in relation to a specific case. These experts have not undergone any official scrutiny concerning their qualifications or been approved by public authorities as have professional judges. Is it justifiable to allow these laymen to take the bench upon a simple decision by the presiding judge? Personally I am of the opinion that the method (or the perhaps the absence of method) used in Iceland for choosing these experts is too liberal. An argument can be made for the introduction of a system comparable to the Danish system for experts in maritime and commercial cases, i.e. to establish a pool of approved experts who have undergone some sort of scrutiny and formal recognition. This undertaking could be carried out by the Icelandic Court Commission (Ice. *Dómstólaráð*). The professional judge would then be obliged to choose an expert from among these individuals. Only if no one amongst these experts were fit for the case in question, an *ad hoc* appointment could be made, preferably by the Icelandic Court Commission upon request from the district court judge in charge of the case.

The second and more serious line of criticism relates to the revision of the Supreme Court. As already mentioned, the Supreme Court does not have the power to call experts to the bench. As a consequence the Supreme Court, composed solely of lawyers, is hardly in a position to review conclusions made by lay-experts in the District Court. Hence, it might be maintained that review on appeal level is made impossible with regard to specialised issues decided by expert judges in the District. To some extent this criticism does not pay sufficient attention to the fact that the Supreme Court reviews all legal questions concerning the experts, i.e. whether they are qualified for the case, etc. It is therefore only the substantive opinion of the experts that is not reviewed by the Supreme Court. In that respect the situation is in fact not so different from systems where jury decisions are reviewed by appeal courts. Nevertheless, it may be considered whether the Supreme Court should have the option to call for an assessor (or assessors) who could advise the Court when reviewing district court decisions. This approach is of course not problem-free, in particular with regard to the parties' right to contradict a possible opinion by the assessor. Another solution would be to allow the Supreme Court to quash a district court judgement if it believes the conclusions of the expert judges in the District to be

manifestly unfounded.³³ This would lead to a new process taking place in the District Court, possibly with a new set of experts on the bench.

The third line of criticism is rather directed against the Icelandic Court system as a whole. By its broad and flexible provisions relating to expert judges the makers of the judicial system believed that they could make do without specialised courts, thus keeping the court system simple as well as saving money. However, the justification for specialised courts is not always complicated factual questions but sometimes also complicated legal ones. How well equipped is the Icelandic Court system when it comes to ever increasing specialised legal matters, e.g. in the domain of Tax Law, Administrative Law, Competition Law or Human Rights? I have suggested elsewhere that the authority to call for experts should be widened as to allow for *legal experts* (e.g. from academic circles) being called for, if necessary.³⁴

In spite of the somewhat problematic issues brought up here, Icelandic lawyers, not least practicing advocates, seem to be content with the present system.³⁵ Although a close look reveals that the system is not at all beyond criticism I believe we should be careful not to throw the baby out with the bathwater. The present system of experts is, in spite of all, flexible, practical and serves Iceland, with its small population and non-specialised judicial system, in an efficient way. In my opinion it would be a great loss if this system were to be abolished entirely. Whether the Icelandic model is suitable for other states, in particular those with bigger populations, is however a different question.

33 It may be mentioned, in comparison, that the Supreme Court has this authority when it considers whether the District Court's (with or without experts on the bench) assessment of oral testimony has been manifestly unfounded. *See* Art. 159(4) of the Criminal Procedure Act No 19 of 1991 (*Ice. lög nr. 19/1991 um meðferð opinberra mála*).

34 *Cf.* Magnússon, Skúli, *ibid* note 26, p. 466-470.

35 I do not know of any criticism being put forward in this respect in professional or even academic circles over the past decades.