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The analysis and evaluation of counter-arguments in judicial decisions

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Title: Selecting counter arguments in legal and non-legal argumentation.

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1. Introduction

A dialectical approach to argumentation implies that the analysis and assessment of the argumentation is not just aimed at the arguments that are put forward in favour of a standpoint, but at its counter arguments as well. Ralph Johnson and Trudy Govier, during the OSSA-Conference of 1997, discussed requirements that are to be met when dealing with counter arguments. This discussion was triggered by Johnson's proposals concerning the treatment of counter arguments in his book *The rise of informal logic* (1996). Both argumentation theorists agree that the evaluation of argumentation depends on the arguments in support of the standpoint as well as on the responses to counter arguments.

One of the questions they focus on is which counter arguments should be made part of the justification of the standpoint. This question is relevant for the evaluation of legal argumentation and for the evaluation of judicial decisions in particular. Since the court has the obligation to go into the essential counter arguments of the legal parties, the court has to select which of the counter arguments of the parties they should address in the justification of the decision. As far as Dutch case law or jurisprudence cater for general selection criteria of counter arguments at all, these only serve to examine the motivation within the context of the judicial procedure. It is, however, less clear which counter arguments should be incorporated in the motivation to make a decision acceptable for a broader audience.

In my contribution I shall try to assess in how far the suggestions made by Johnson and Govier pertaining to the selection of counter arguments in everyday argumentation are applicable to legal argumentation as well. I will also show that the pragma-dialectical approach of argumentation offers clues for the adequate selection of counter arguments in both everyday argumentation as well as in legal argumentation. Finally, I will illustrate the practical consequences of the proposals on the basis of a decision by the Supreme Court of the Netherlands.

2. Johnson's and Govier's suggestions

In *The rise of informal logic* (1996) Johnson states that the defence of a standpoint is incomplete if it is only pro-argumentation that has been put forward. The protagonist of a standpoint should also address counter arguments that have been put forward. First of all, these counter arguments may consist of arguments which express objections against the pro arguments. Secondly, they may consist of arguments which are in favour of alternative positions. For the appraisal of argumentation this implies that it should not be limited to the evaluation of the acceptability of the premises that support the conclusion, but that it should extend to addressing both types of counter arguments.

The evaluation of the arguments which directly support the standpoint is what Johnson and Govier call the evaluation of the 'logical tier' of argumentation. The evaluation of the way in which counter arguments play their part is called the evaluation of the 'dialectical tier' of argumentation.

Discussions dealing with conditions of soundness or cogency of a core argument usually refer to the logical tier. Johnson and Govier assume that the argumentation on the logical tier is adequate if the arguments are rationally acceptable to the audience, if they are relevant to the conclusion and if they offer sufficient grounds for the conclusion. They assert that discussions on the conditions of adequacy on the dialectical tier are rare. They suggest the following initial statements of conditions of adequacy on the dialectical tier:

1. How well does the argument address itself to alternative positions?
2. How well does the argument deal with objections?

These statements leave open the question as to what it is that constitutes an adequate treatment of alternative positions and objections. In order to be able to answer that question, Govier distinguishes between making an *Exhaustive Case* for a position and making a *Good Case* for a position. As far as she is concerned, an arguer has put forward an *Exhaustive Case* if, in short, he or she has:

1. Stated a cogent main argument for that position; and
2. attended to all alternative positions and objections that have been raised before time (t), and has represented them fairly and accurately; and
3. rebutted every such objection or alternative position with a cogent argument.¹

Johnson and Govier assume that it is usually impossible to construct an Exhaustive Case dealing with all possible objections and alternatives. Instead of an *Exhaustive Case*, a *Good Case* is much more realistic. This means that a distinction will have to be made between counter arguments which do need to be addressed and those that do not. Govier proposes to determine this distinction on the grounds of the *dialectical significance* of a particular counter argument. In her view, the defence of a standpoint is sufficient if it deals with at least all counter arguments that are dialectically significant. According to Govier the following may serve as determining factors, sometimes taken together, when it comes to deciding whether a counter argument is dialectically significant:

1. The counter argument is logically serious; if it were to hold, the position would be refuted or the argument would be show

worthless.

2. The counter argument is put forward by influential or prestigious people (experts).
3. The counter argument is taken seriously, or seems, so far as the arguer can tell, to be taken seriously by the audience to whom the argument is addressed.

What it is that the audience considers as a serious counter argument is, according to Johnson, however, difficult to determine. Firstly, there may be serious counter arguments which in the eye of the audience are considered of no importance. Secondly, it is not clear how to determine whether the audience considers a certain counter argument of any importance at all.

Johnson is, moreover, of the opinion that the arguer should not limit himself to the objections which have actually been put forward but should also anticipate counter arguments which may be raised at a later stage: 'There are generally objection types that he or she can be expected to respond to- and it is his or her dialectical obligation to do so'. He does not, however, indicate how to determine which counter arguments may be expected to be dialectically significant.

The discussion between Govier and Johnson leaves some questions unanswered. Not only can we conclude that it is as yet unclear which are the determining criteria when it comes to pin-pointing dialectically significant counter arguments. Neither is it clear whether it is possible to use one set of criteria for the selection of both actual significant counter arguments and the counter arguments which should be anticipated. These uncertainties should stimulate a further investigation into criteria which will enable us to ascertain which counter arguments merit response. In the following I will try to find out whether we can make use of pragma-dialectical evaluation criteria which have been developed by Van Eemeren and Grootendorst (1992, 1996).

In doing so I will concentrate on the selection of (possible) objections. Govier and Johnson do not indicate a hierarchical order when discussing objections and alternative positions, yet I think there may be one. Since the protagonist has the obligation to defend his own standpoints, the burden of proof rests with him as well, as far as the alternative positions he puts forward are concerned. The burden of proof rests less heavy when it comes to the objections because they are relevant only for the defence of the standpoint put forward by the other party. This implies that objections should be addressed first when dealing with counter arguments, to address alternative positions only at a later stage.

After having given suggestions for pragma-dialectical selection criteria, I will compare the criteria which have been proposed by Johnson and Govier and their pragma-dialectical extension with the criteria which are to be met when assessing counter argumentation in a judicial context.

3. Argumentation schemes and their critical questions

In their pragma-dialectical argumentation theory Van Eemeren and Grootendorst state that the soundness of argumentation depends on, among other things, the application of the argumentation scheme used in the argumentation. The argumentation scheme is a more or less conventionalized way of representing the relation between what is stated in the argument and what is stated in the standpoint. This is to say that in the argumentation a certain principle of defence is employed in order to transfer the acceptance of the premises to the acceptance of the standpoint. Van Eemeren and Grootendorst distinguish between three main categories of argumentation schemes: one argumentation scheme is based on a relation of concomitance (symptomatic argumentation), a second argumentation scheme is based on a relation of analogy (similarity argumentation) and a third is based on a relation of causality (instrumental argumentation)². Each argumentation scheme should meet its own correctness conditions. These conditions correspond to the critical questions that are associated with the argumentation scheme concerned. Let's take a closer look at the following argumentation:

(1) I think Bill is unreliable, because he keeps silent about his extramarital affairs (And keeping silent about extramarital affairs is characteristic of unreliability)

The argumentative relation between the standpoint and the argument in this example is based on a relation of concomitance. The argumentation scheme runs as follows:

- | | | |
|--------|--|--------------------------|
| 1. | Bill (X) is unreliable (Y) | For X, Y is valid |
| | | Because |
| 1.1 | Bill (X) keeps silent about his extramarital affairs (Z) | For X, Y is valid |
| | | And |
| (1.1') | Keeping silent about extramarital affairs (Z) is characteristic of unreliability (Y) | Z is characteristic of Y |

The following critical questions inherent in this argumentation scheme may serve as a systematic guideline for judging the soundness of the argumentation:

1. Is (Z) really characteristic of (Y)?

2. Is it possible for (Z) to be characteristic of something other than (Y)?

3. Are there more characteristics (Z') necessary for X to attribute characteristic Y to X?

It seems to me that these critical questions are, however, not only useful to determine whether the argumentation adequately supports the standpoint. If an arguer is aware of the critical questions inherent in a particular argumentation scheme, he can then employ these critical questions to select the counter arguments that have been put forward. The pragma-dialectical rules for a critical discussion imply that a standpoint cannot be regarded as conclusively defended if the defense does not correctly apply a certain argumentation scheme³. This leads to the dialectical obligation that the arguer should at least address the counter arguments which could be regarded as a criticism passed on the argumentation scheme he has employed.

These critical questions can thus serve as a means to decide which counter arguments should be addressed; they are a criterion for selecting dialectically significant counter arguments.

Let us assume that the discussion on Bill's (un)reliability has triggered a substantial number of counter arguments and that, moreover, Govier's 'expert' criterion gives no clue as to their dialectical significance. In that case our critical questions may serve as a means to select and refute, for instance, the following counter arguments:

(2) 'It is nonsensical to assume that keeping silent about extramarital affairs is a sign of a sense of political responsibility, because...'

(3) 'It is not very convincing to argue that his unreliability only becomes apparent if it appears that he has also withheld important information on his investment schemes, because...'

Here both counter arguments that the arguer responds to, refer to the critical questions that are relevant to symptomatic argumentation. The counter argument in (2) refers to the question 'Is it possible that keeping silent about affairs (Z) is characteristic of something other than unreliability (Y)?' The counter argument in (3) refers to the question 'Are there not more distinguishing marks (Z') necessary for X to have to be able to attribute to X characteristic Y?'

It is, I think, defensible that the obligation to address these counter arguments is a result of the discussion rule which prescribes that the argumentation scheme must be used properly. Counter arguments that criticise the employment of the scheme should, therefore, be regarded as dialectically significant, rather than, counter arguments that ignore the use of the scheme such as 'It seems to me that we should assume Bill is not unreliable because that is wisest, politically speaking'.

4. Counter arguments in judicial decisions

In the justification of judicial decisions too it has to be decided which counter arguments should be addressed. Dutch law requires judicial decision to be motivated. A key requirement is for the motivation to be both acceptable and verifiable. As far as the verification of the motivation is concerned, jurisprudence and case law provide the requirements which will have to be met. The obligation not to ignore any of the essential propositions of the parties is only one of the justification requirements which are a clear example of the dialogical obligations of judges. One could say that a party which claims that the judge has overlooked an essential proposition does, in fact, state that a dialectically significant counter argument has not been addressed. If the obligation is violated, this may result in a judicial decision being quashed. Since standard practice has ruled that the judge is not required to address all propositions put forward by the parties, it is of great importance to ascertain which propositions are indeed essential.

Advocate General Martens (HR 7 March 1980, NJ 1980, 611) states that the Supreme Court has never established, in general terms, what should be understood by the term essential propositions. Martens concedes that it is indeed hard to establish a hard and fast rule, yet he proposes the following minimum requirements:

1. the proposition under consideration must be have its foundation in the procedural standpoint of the party concerned;
2. the proposition under consideration must be upheld in appeal;
3. the proposition under consideration must, moreover, fundamentally support the standpoint;
4. finally, it should be clear that the judge would not have reached an identical conclusion on the basis of the same motivation if he had taken into account the proposition under consideration.

The requirements as formulated by Martens resemble those of Johnson and Govier on a number of points. The first two requirements are in line with the obligations that counter arguments should be represented in a fair and correct manner. This requirement must also be met by the discussant criticising the argument. The third and fourth obligation resemble the one by Johnson and Govier which requires the argument to be logically relevant.

These requirements form the starting point when assessing the judge's argumentation in the context of verifying the motivation. It is, however, much more difficult to ascertain which counter arguments should be addressed when it comes to rendering the motivation acceptable for the parties involved. It remains, for instance, to be seen whether the motivation should address counter arguments put forward by parties other than the ones directly involved.

In much the same way it is the justification requirements of the Supreme Court which are under discussion. The duty of justification in force for lower courts, in principle, applies for the Supreme Court as well. Science of law argues that the duty of justification weighs even heavier for the Supreme Court than is the case for lower courts since it is pre-eminently the task of the first to promote development of law. It is in that light that

one may expect motivations of the Supreme Court to extend beyond what is strictly required in a decision in appeal. In connection with this task Martens (1993: 143) points out that international justification principles require the highest courts of justice to enter into a dialogue with the scientific world. In the Netherlands the Public Prosecutions Department does engage in such a dialogue in its conclusions, but tradition has it that the Supreme Court does not enter into a dialogue with either the Public Prosecutions Department or the science of law. Martens therefore concludes that the Supreme Court does not meet international justification requirements in this respect. Of late there are, however, examples of breaches of this tradition. If the Supreme Court, however, does enter into a discourse with others than the parties involved (i.e. science of law or the Public Prosecutions Department), the question remains which arguments should be addressed in the justification of the decision.

5. Counter arguments in the Wrongful birth case

I would like to illustrate that the pragma-dialectical selection criteria for significant counter arguments which I discussed earlier, seem to be useful in the justification of judicial decisions on the basis of a controversial decision of the Dutch Supreme Court: the Wrongful birth case.

As a result of a professional error made by her gynaecologist, a woman got pregnant against her will. After an operation the aforementioned doctor had omitted to replace the woman's I.U.D.. The woman is of the opinion that she is entitled to damages in so far as these are the result of a negligent act resulting in the birth of an (at that time) unwanted child.

One of the questions to be answered in this case is whether the cost of education and care are eligible for compensation. The Court of Appeal is of the opinion that these costs are only eligible for compensation in special circumstances. The parents appeal to the Supreme Court because they are of the opinion that the Court of Appeal displays an incorrect conception of law.

The Supreme Court decides in favour of the parents on this count and, in short, puts forward three arguments in support of that decision. The first argument of the Supreme Court is that the cost of education and care must undoubtedly be considered as financial damage (1. 1a. 1a) on the basis alone of the fact that the expenses which the parents will face during the child's minority will determine the family's financial scope for a number of years. The second argument is that the damages are indeed attributable to the doctor (1. 1a. 1b) because it is as a result of an error of his that a risk ensued which eventually materialized. It is on the grounds of both these arguments that the Supreme Court concludes that holding the gynaecologist liable for the damage fits in with the system of the law (1. 1a). The relation between these two arguments and the conclusion is of the symptomatic type. This argumentation scheme based on a relation of concomitance can be structured as follows:

The system of the law [Y] applies for the decision that the expenses of education and care are, in principle, eligible for compensation (X),

Because: the fact that the condition of attributable financial damages is met [Z] does indeed apply to the decision that (...) (X),

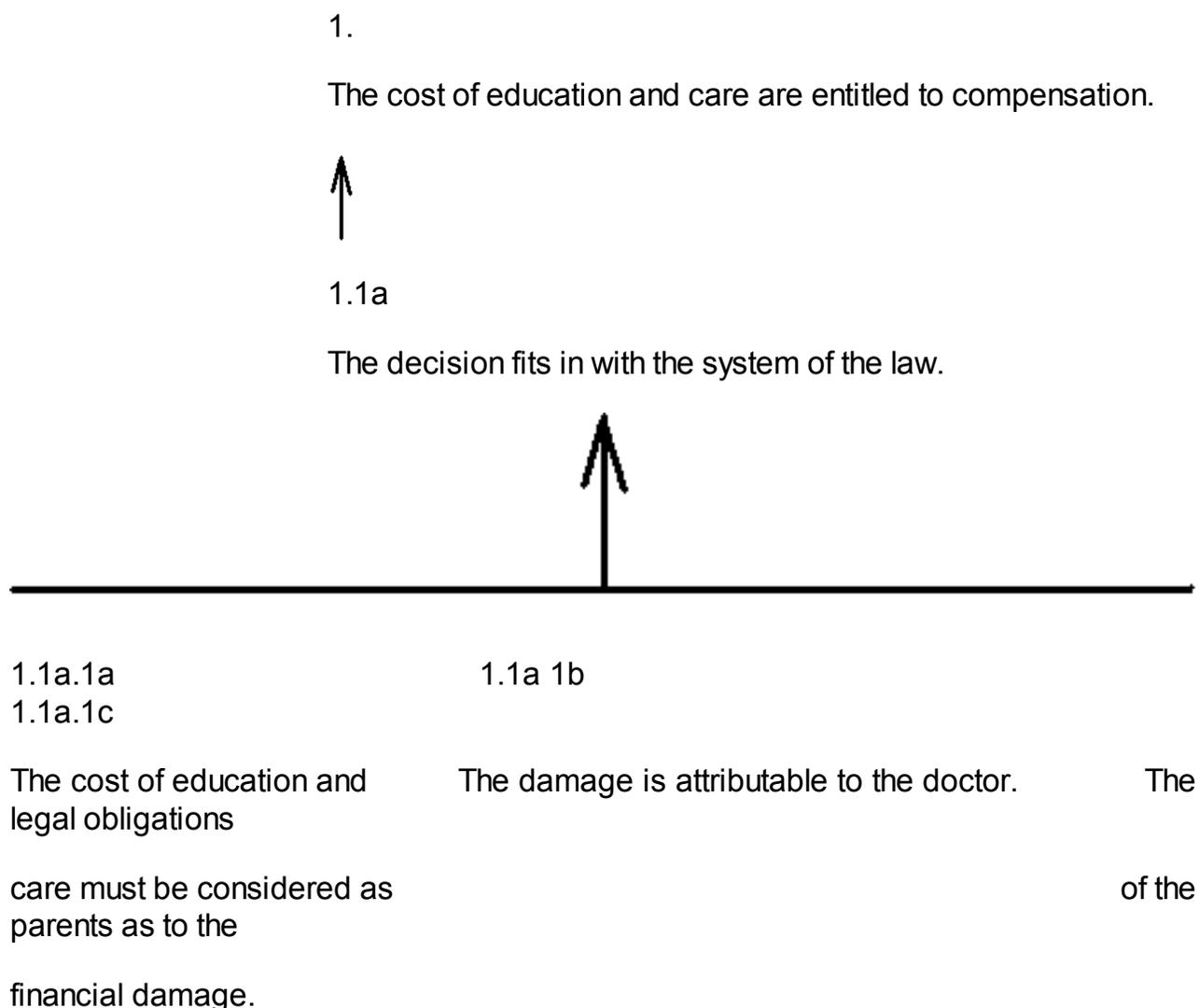
(And it is characteristic of a decision within the system of the law (Y) that conditions as formulated in the law are to be met (Z).

Then the Supreme Court puts forward a third argument as a reaction to an objection made by the Court of Appeal. This objection amounts to the following: the legal obligations of the parents as to the education and care of a child would stand in the way of awarding damages. This objection fits in with one of the questions that are associated with symptomatic argumentation:

Are there not more distinguishing marks (Z') necessary for X to have to be able to attribute to X characteristic Y?

The Supreme Court rejects the counter argument indicating another characteristic, that is to say the legal obligations of the parents as to the education and care of a child (Z'), which mean that the decision cannot be regarded as one that fits in with the system of the law. The overall structure of this argumentation is structured as follows:

Figure 1.1



education and care of

of a

child would not

stand

in the way of

awarding damages.

The coordinate argumentation justifying the (sub)standpoint that the decision fits in with the system of the law consists of two pro-arguments and the rejection of a counter argument. The counter argument is dialectically significant on the grounds of the criteria mentioned by Govier. First of all there is a logical relevance. Secondly, the counter argument has been put forward by 'experts', i.e. the Court of Appeal. There is yet another reason for assuming the counter argument to be dialectically significant: it is in keeping with the critical questions of the argumentation scheme which forms the basis of the pro-argumentation.

The Supreme Court could end the argumentation here if it were only for the verification of the motivation. However, arguments which could be regarded as argumentation to do with the acceptability of the decision are added to the motivation. In its argumentation the Supreme Court reacts to objections put forward in the conclusion, the advice, of the Advocate General. These objections amount to the following: the decision to award, in principle, compensation for the costs of education and care, can be damaging for the child. The Supreme Court rejects that objection. The reason for the Supreme Court to address this counter argument, in other words to regard it as dialectically significant, could be that the argument has been put forward by an 'expert' who, on the basis of authoritative sources, shows that this is a counter argument which should be taken seriously. This does, however, not explain why the other counter arguments put forward by the Advocate General are not addressed. It is, perhaps, better to try and explain the decision to address this counter argument on the basis of the argumentation scheme that is used. The argumentative relation between the standpoint (1) and the argument (1. 1a) is based on pragmatic argumentation⁴. The argumentation scheme of the Supreme Court's argumentation would look like this:

1. The decision to award, in principle, compensation for the cost of education and care is desirable

X is desirable
Because

1.1a that decision leads to a decision that

X leads to Y
And

fits in with the system of the law

(1.1a') and: a decision that fits in with the

system of the law is desirable

Y is

desirable

Relevant critical questions for this pragmatic argumentation scheme are:

1. Does the cause as it is presented (X) in actual fact lead to the desired effect (Y)?
2. Are there more factors (X') which have to be present together with the cause (X) to lead to the desired effect (Y)?
3. Does the cause (X) have any undesirable side effects?
4. Is it possible for the effect (Y) to be achieved by other than cause (X)?

The counter argument which is addressed by the Supreme Court is in keeping with one of the critical questions of the argumentation scheme: does a decision that fits in with the system of the law have undesirable side effects? That counter argument is then rejected. The argumentation structure of this particular part of the motivation would look like this:

Figure 1.2

1.

The cost of education and care are entitled to compensation.



1.1a

(See figure 1.1)

1.1b

The decision does not seem to have undesirable side effects



1.1b.1a

1.1b.1b

That the decision would

That the child at an

be in defiance of the
advanced age

dignity of the child, is
could suffer

in the opinion of the
psychological

Supreme Court not
damage is not

convincing.
the opinion of

convincing in

the Supreme

Court.

6. Conclusion

Johnson and Govier are of the opinion that the justification of a standpoint cannot be complete if it is only pro-argumentation which is put forward. The protagonist of a standpoint can, however, not be expected to address all (possible) counter arguments. This limitation of rationality norms holds true for Dutch law as well. In my contribution I have tried to demonstrate that the selection criteria for dialectically significant counter arguments as proposed by Johnson and Govier need extending. I have set out to show that the critical questions of argumentation schemes can be of use to arrive at an adequate selection of dialectically significant counter arguments. On the basis of a decision of the Supreme Court I have attempted to demonstrate that this tool can be of help in legal argumentation as well.

Endnotes

1 Govier (1998) also points at the possibility of acknowledging objections or alternative positions and revise or amend the own position or argument accordingly. I think Johnson (1998) is right in relating these options to the process of arguing rather than to the product.

2 Each of these schemes can be divided into a number of subtypes (Van Eemeren and Grootendorst 1992: 97). For the application of analogy argumentation in judicial

decisions see Kloosterhuis (1998). In her contribution to this conference Feteris will discuss the role of pragmatic argumentation in legal argumentation.

³See rule seven of the ten rules for critical discussion (Van Eemeren and Grootendorst 1992: 158 ff.)

⁴Van Eemeren and Grootendorst (1992: 97) regard pragmatic argumentation as a subcategory of instrumental argumentation in legal argumentation. In this type of argumentation a positive verdict is presented concerning a certain decision by reference to the favourable (or unfavourable) consequences of that decision. See also Feteris (1998). The basic argumentation scheme for this type of argumentation can be structured as follows:

Standpoint: Act X is desirable,

Because: Act X will result in consequence Y

and: Consequence Y is desirable

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