



Universiteit
Leiden
The Netherlands

Betrouwbaar getuigenbewijs: totstandkoming en waardering van strafrechtelijke getuigenverklaringen in perspectief

Dubelaar, M.J.

Citation

Dubelaar, M. J. (2014, February 6). *Betrouwbaar getuigenbewijs: totstandkoming en waardering van strafrechtelijke getuigenverklaringen in perspectief*. Meijers-reeks. Kluwer, Deventer. Retrieved from <https://hdl.handle.net/1887/23625>

Version: Corrected Publisher's Version

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/23625>

Note: To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The handle <http://hdl.handle.net/1887/23625> holds various files of this Leiden University dissertation

Author: Dubelaar, M.J.

Title: Betrouwbaar getuigenbewijs : totstandkoming en waardering van strafrechtelijke getuigenverklaringen in perspectief

Issue Date: 2014-02-06

Summary

RELIABLE WITNESS EVIDENCE

Perspectives on the production and assessment of witness testimony in criminal cases

Introduction

This study focuses on the use of witness testimony in Dutch criminal procedure, whereby the question is asked whether the existing framework for criminal procedure and modes of operation in criminal legal practice require adaptation in light of truth-finding. The acquisition of knowledge with the aid of witness testimony is namely not without problems. The law also recognizes this. The realization that deficiencies may be attached to witness testimony has had repercussions on provisions of the Code of Criminal Procedure, which stems from 1926. However, since the promulgation of the code, legal practice and scientific knowledge about witness testimony has not stood still. Particularly in the last decennia, knowledge about deficiencies which may be attached to witness testimony has increased greatly. These new insights have however not led to substantial adaptations of the legal system. Furthermore, criminal legal practice has developed in another direction than the legislator initially intended in 1926, for which reason part of the envisaged and still existing legal guarantees with regards to witness testimony have become eroded. Because of the strong accentuation of written documents, Dutch criminal justice is under suspicion of not having the right instruments at its disposal to optimally test the content of testimony and therewith adequately guarantee the quality of criminal legal truth-finding.

The aim of this study is to determine to what extent the existing framework for criminal procedure and practical modes of operation require adaptation. The central question therewith is as follows. Do existing scientific insights and current criminal legal practice give cause, for the purpose of truth-finding, to further regulate or adapt the manner in which witness testimony is produced and assessed in Dutch criminal procedure and if so, in which manner? This question encompasses at least a number of sub-questions: (1) What is witness testimony and under which circumstances can it contribute to criminal procedural truth-finding? 2) How is the concept of testimony of a witness defined in Dutch criminal procedure and which requirements are set in statutory law and the case law of the Supreme Court for the production and assess-

ment of witness statements? 3) How does the production and assessment of witness statements take shape in practice and how may the related modes of operation be evaluated in light of truth-finding? 4) How does criminal legal practice bear to the applicable regulations and what are hiatuses and possible solutions in this regard?

The leading perspective from which Dutch criminal procedural is reviewed in this study, is that of truth-finding. Discovering 'the' truth and determining the credibility of witness testimony in a criminal legal context is not purely a legal matter, but is, to an important extent, steered by factors about which non-legal disciplines can provide more insight. In this manner, legal epistemology provides, amongst other things, insight into what witness testimony is by nature and the circumstances under which it may generate 'justified belief'. (Legal) psychology offers knowledge of the factors which influence perception and memory and the extent in which witnesses are able to give testimony which adequately describes reality. Forensic linguistics and communication sciences can provide knowledge about the production of testimony during interrogation and the manner in which it is reported. This study maps and connects the different insights. The collected insights subsequently offer a framework to further review the statutory procedures and modes of operation in practice with regards to the production and assessment of witness testimony.

The study is subdivided in four parts, which for the large part are parallel to the four research questions formulated above. Part I regards the general problem of witness testimony as a source of knowledge and the repercussions thereof on the criminal procedural context in a broad sense. In this part, the interdisciplinary playing field of witness testimony is explored. The analyses from this part form the perspective from which the Dutch system and practice will be reviewed in the rest of the study. Part II is oriented on the level of the national system, whereby the actual statutory framework and the case law of the Supreme Court concerning the use of witness testimony is made central. Part III regards legal practice, whereby modes of operation with regards to the production and assessment of witness testimony in Dutch criminal legal practice is discussed. Part IV provides an answer to the central research question and recommendations for the improvement of the production and assessment of witness testimony.

Part I – Witness testimony as an instrument of truth-finding

Central to Part I is the question as to the nature of witness testimony and the circumstances under which witness testimony (can) contribute(s) to criminal legal truth-finding. In order to answer this question, truth-finding as an aim of criminal procedure and theories about criminal legal evidence and proof are discussed in the second chapter. Subsequently, the role of witness testimony in the process of truth-finding is further explored in the third chapter. The

fourth chapter clarifies where the differences lie, broadly speaking, in the processing and assessment of witness testimony in criminal procedural contexts. The fourth and fifth chapters are devoted to the psychological insights with regards to the production respectively the assessment of witness testimony.

In the *second chapter*, it becomes clear that the aim of criminal procedure is truth-finding, whereby correspondence with reality is the ideal. This encompasses determining the facts and basing the judicial decision on those facts. The reality is that the past is not fully knowable and that the judicial evidentiary decision is, to an important degree, a construction. Nevertheless, truth does function as a test for the veracity of the determination of the facts in the judicial verdict and procedures can be evaluated in light of that truth-finding by assessing to what extent they contribute to an accurate determination of facts. That evaluation takes place in the second and third part of the study, where the law and practice regarding the use of witness statements is looked at.

The *third chapter* shows that dependence on testimony of others for the procurement of knowledge about reality is substantial. Many of our convictions and knowledge we hold to be true are based on assertions of our fellow man. This is no different in criminal procedure. In most criminal cases, witness testimony is indispensable in determining what truly happened. Testimony essentially regards assertions about reality, whereby the listener is invited to accept the assertion as true, on the basis of the 'position to know' of the declarant. Particularly under the influence of legal psychology, issues regarding witness testimony as a source of knowledge have become more acute. Witnesses may after all – without being aware of that – give incorrect testimony as a result of deficiencies attached to human perception and memory. Further analysis of the issues with testimony however shows that the problem does not only lie with the witness. For acquiring knowledge on the basis of testimony it is after all not only necessary that the witness gives accurate testimony, but also that the listener is able to correctly assess this. There is however no consensus regarding the circumstances under which testimony generates justified belief. Furthermore, subconscious processes on the part of the listener may lead to an incorrect assessment of the veracity of the testimony. The fact that the use of witness testimony as evidence is not unproblematic, however does not have to lead to defeatism. Under the right circumstances, witnesses may well be able to give truthful testimony, but it is necessary to (keep) look(ing) for ways to limit possible deficiencies in statements to a minimum and optimize the process of assessment.

From the *fourth chapter*, it becomes apparent that the manner in which attempts are made to overcome problems with witness testimony, differs in legal systems. A distinction can be made in this regard between the Anglo-American and the continental procedural model. In the Anglo-American procedural model, the accent is mainly on immediate transfer of information

and witnesses are in principle heard at trial before their statements may be used in evidence. In the continental procedural model, the emphasis is originally more on written documents which are collected or produced in the pre-trial investigation and are included in the case file. The judge may base his decision on these documents without hearing the original source at trial, on the condition that the rights of the defense have been respected. At first glance, the Anglo-American procedural model seems better equipped to test the content of witness testimony, because witnesses appear at trial much more often and are heard in the presence of the trier of fact who must decide about the quality of the testimony. Miscarriages of justice on the basis of witness testimony however occur both in Anglo-American as well as continental legal systems. The Anglo-American procedural model has its own truth obstructing practices, which, amongst other things, are to be found in the manner in which witnesses are questioned at trial. Furthermore, the question is if it is necessary that witnesses are standardly heard at trial. It is in any event clear that in systems in which the focal point of the investigation lies in the pre-trial phase, guarantees must also exist in that phase.

The *fifth chapter* is devoted to the production and assessment of witness testimony from a legal psychological perspective. Thereby, attention is first paid to witness perception and memory processes. Both are the starting-point of testimony to be given. Insight in the cognitive processes of the witness is indispensable for a good understanding of the manner in which the interrogation has effect on the quality of the statement. Particularly in the reproduction of events, much can go wrong through the encoding of incorrect elements in memory which the witness, on a further occasion, remembers as authentic. Memory is namely vulnerable and sensitive to outside information. When the giving of testimony during interrogation is looked at in more detail, it further becomes apparent that the interrogator plays an important role in reconstructing the events and recording the testimony. As it is put down in writing, the statement essentially is a product of 'joint' construction. For this reason, it is important that the person who bases decisions on these statements also has insight in the process of production during interrogation. This is a necessary requirement for making an adequate assessment of the veracity of the given and recorded statements.

In the *sixth chapter* – on the basis of legal psychological literature – the factors which are relevant for the assessment of the credibility of witness testimony are listed. From this, it becomes apparent that the determination of credibility is not simple, as it is in principle not possible to deduce from the form or the content of the statement to what extent it corresponds with reality. As long as there is no objective material against which the statement can be tested, further investigation must be conducted to determine the credibility of the statement. The source of the statement forms an important point of departure for that. Is the witness capable of giving accurate statements and are there no reasons to question the sincerity of the source? Insight into the

process of production is also of great importance for the extent in which a testimony may justifiably be relied upon. It is clear however that no general framework (in the sense of a set of positive indicators for credibility), may be deduced from legal psychological literature which can be used for all types of witness testimony. It is possible however to identify a number of 'red flags' which necessitate further research. In assessing the credibility of witness testimony, it is of great importance that attention be paid not only to factors which indicate that the testimony is truthful, but also to signals that point to the opposite.

Part II – Role of witness testimony in the Dutch system of criminal procedure

The focus of the second part is the Dutch system of criminal procedure and the manner in which the production and assessment of witness testimony is regulated in that system. The accent lies on the law and Dutch procedural culture. In the seventh chapter, the characteristics of the Dutch evidentiary system are first briefly expounded. The eighth chapter is devoted to the person of the witness and the position he takes in Dutch criminal procedure. Subsequently, in the ninth chapter, Dutch procedural culture and the manner in which the immediacy principle operates in relation to witnesses is made central. The tenth chapter describes the legal framework regarding the production of witness testimony and its use of witness testimony as evidence.

Following from the discussion of the statutory evidentiary system in the *seventh chapter*, it becomes clear that many of the statutory guarantees as they were laid down by the legislator in the Dutch Code of Criminal Procedure (DCCP, have been eroded. Further, it becomes apparent that the empirical side of the judicial decision-making process has been neglected in Dutch legal literature and in the jurisprudence of the Supreme Court for a long time. Partly because of this, no legal evidentiary theory has been developed in the Netherlands. Neither the law, nor legal doctrine offers the judge much purchase in making the evidentiary decision. In the last years, there is however increasing awareness of the importance of the proof-process and related questions of reliability.

The *eighth chapter* returns to the person of the witness and discusses who is attributed the capacity of witness and how the position of the witness is statutorily regulated. The concept of the witness is currently not defined in the DCCP and no definition can be extracted from case law. Not every person who has information that is relevant to judicial decision-making is also actually regarded as a witness in a criminal legal sense. A distinction can be made in this regard between: 1) persons who are witnesses in a factual sense, on the basis of their presence at a criminal legally relevant occurrence or act and 2) the criminal procedural capacity of a witness with the rights and duties attached to that, which are allocated to a person on the basis of his performance as a witness in a criminal trial. Both these aspects intersect in case law

and theory. It is not always clear who should be qualified as a witness and to which rights witnesses are entitled. Statutory law, in art. 342 subsection 1 DCCP, does define when witness testimony qualifies as legal evidence. 'Under the testimony of a witness is understood his statement, made at trial, of facts and circumstances which he perceived himself'. In practice, the requirements that statements be given at the trial hearing and must be based on *own* perception, have been let go of. The construction that has been chosen thereby is that oral statements given at the trial hearing fall under art. 342 subsection 1 DCCP, whilst written statements fall under art. 344 subsection 1, under 2 DCCP.

The background of the erosion of the statutory concept of the 'testimony of a witness' is further addressed in the *ninth chapter*. This erosion can be attributed to the attitude of the Supreme Court in the *De auditu*-judgment, in which the Supreme Court – soon after the promulgation of the new Code of Criminal Procedure in 1926 – determined that hearsay testimony may contribute as evidence. According to the Supreme Court, official reports containing witness testimony given to police can also be qualified as such. Letting go of the requirement that statements must be given at the trial hearing has led to the use of pre-trial witness testimony as evidence on a large scale in practice. In current practice still, witnesses are rarely heard at the trial hearing. On the basis of article 6 of the European Convention on Human Rights, suspects have the right to examine witnesses, but in practice, the questioning of those witnesses takes place, as a rule, in the office of the investigating judge. Although the Dutch style of procedure has its advantages, for example for the witness who is involved in criminal procedure against his will, important objections can be raised against not hearing witnesses at the trial hearing. The trier of fact learns of the content of the testimony not from the original source, but must rely on the official report in which the testimony is recorded. This is problematic, given the findings from the first part of this study, from which became apparent that the interrogator plays an important role in constructing and recording the testimony, on which the trier of fact has no or limited sight. Because the trier of fact becomes acquainted with the case file before the trial hearing, psychological processes such as 'belief perseverance' and 'confirmation bias' are elicited, for which reason a real risk exists that exculpatory information which becomes apparent at the trial hearing, is attributed insufficient weight. Through the dominance of the case file, activity at the trial hearing is mainly aimed at verification and the own investigation of the trier of fact is in many cases limited to hearing the defendant. Whether or not further investigation takes place at the trial hearing mainly depends on the efforts of the defense. In practice, further investigation will not readily occur *ex officio*.

It would be expected that in a system in which written documents acquired pre-trial are heavily relied on, the guarantees lie in that phase. Study of the legal framework in the *tenth chapter* however shows that nothing is regulated in the Code of Criminal Procedure with regards to the taking of witness testimony by the police. There are rules governing the use of witness testimony

as evidence, but the guarantees which flow forth from them are minimal because of the manner in which the statutory provisions are interpreted by the Supreme Court. Statutory law for example requires that the trier of fact does not base his decision exclusively on one witness statement, but a relatively small amount of supporting evidence is usually sufficient. Furthermore, in the event of a conviction, the trier of fact is not required to reason on his own motion what value he has attached to inculpatory and exculpatory witness statements contained in the case file. He does have to respond to defenses which regard the reliability of witness testimony or the application of the evidentiary minimum rule mentioned above. Standards for that reasoning are however not high.

Part III – Production and assessment of witness testimony in Dutch practice

In part III Dutch practice is centralized. The eleventh and twelfth chapters review the production and assessment of witness testimony in practice and the manner in which the modes of operation may be evaluated in light of the aim of truth-finding.

The *eleventh chapter* is oriented on the production of (written) witness statements. Much is known from legal psychological research about pitfalls in interrogation, but not about the extent in which these become manifest in Dutch criminal practice. Hardly any research has been done with regards to the quality of witness interrogation by the police in the Netherlands. Little is also known about the quality of the interrogation by the investigating judge and the trial judge. This is remarkable, given the value which is attached to the written products of these interrogations in practice. The lack of attention is mainly problematic with regards to interrogation by the police because the defense can hardly exercise supervision over that. Supervision by the trial judge of the production of testimony in the pre-trial investigation is also limited. For the assessment of the product as it is presented to the trier of fact, it is important that he has a good view on the manner in which the interrogation was conducted. Witness testimony contained in an official report is after all hardly a value-free representation of the testimony and the interaction during the interrogation. Certainly in monologue form, the testimony is strongly influenced by the person recording it. The problem is that that influence does not become readily apparent in the official report. Official reports which are not made up in question and answer form, do not give insight in the conduct of affairs during the interrogation, such as which questions were asked and who first introduced what information to the interrogation. The hermetic character of the official report results in limited means to test the production of the testimony. Furthermore, it may be asked in relation to certain types of official reports – for example those in monologue form – if the content of the testimony does adequate justice to reality. Recording testimony in a monologue or a strongly condensed question and answer form give the official report

authority, because the narrative becomes stronger and more consistent. However, because of this fortification, the veracity of the testimony is brought under pressure and the assessment process of the judge may be improperly influenced because psychological processes of 'belief perseverance' and 'confirmation bias' mentioned above are facilitated.

In the *twelfth chapter*, the assessment of witness testimony by the trier of fact is discussed. Here also, it may be observed that no systematic research has been done as to how Dutch professional judges handle the selection and assessment of witness testimony. On the basis of literature and case law, certain vulnerabilities in the judicial decision making process can however be exposed. From the previous chapter, it already followed that the judge has very limited sight on the process of production, whilst cognizance thereof is of essential importance for an adequate assessment of the veracity of the testimony. This is however not the only issue. A number of theoretical yet important questions about the making of the evidentiary decision have remained unanswered. For example, it is not entirely clear which standard the judge should apply in his judgment of the quality of the testimony and how credible the testimony should be before he may use it as a basis for his decision. Also, in practice, in the assessment of evidence, the holistic approach seems to be dominant, which raises the question if the atomistic test of individual witness testimony is sufficiently conducted. The great freedom of assessment which the Dutch judge has with regards to the use of witness testimony is problematic as the question may be if judges are capable of recognizing and resolving psychological mechanisms on their own strength and if sufficient guarantees exist to obviate human error. Because the judge is only required to account for his decision about the use of witness testimony as evidence to a limited extent, not much insight is available about this.

Part IV – Additional guarantees for truth-finding

In part IV the question is asked if additional guarantees with regards to the use of witness testimony are desirable. The *thirteenth chapter* is the concluding chapter. It is clear that in practice, there are a number of weaknesses in the manner in which witness testimony is handled and that the judicial decision in this regard is a risky decision. Besides the fact that the aspect of production remains underexposed in the process of assessment, it may be established that the judge hardly has any purchase in statutory law or legal doctrine for the assessment of witness testimony. Furthermore, remarks may be made about certain modes of operation in practice. For example, at the trial hearing the accent is mainly on verification and too little on falsification. This is partly because the judge only conducts limited investigation, by hearing witnesses or the officials who conducted the interrogation. Furthermore, the judge is only required to give reasons for his decision about the evidentiary value he attributed to the testimony to a limited extent. This does not benefit the trans-

parency of the judicial decision and supervision thereof. All this gives cause to adapt the legal system and practical modes of operation.

The first recommendation is directed towards the police. In a system of procedure in which testimonies which are documented in the pre-trial phase are so heavily relied upon, it is important that the recording of the testimony takes place in a manner which is as optimal as possible. This means that official reports should be written down in question and answer form and that interrogations should standardly be recorded audio or audio-visually in order to allow for better control of the interrogation. The second recommendation is directed towards the investigating judge, whose position in the pre-trial phase has recently been fortified and who has explicitly been given the duty to supervise the balance and completeness of the investigation. It is important in this regard that he becomes involved in the investigation in an early phase so that he may actually exercise his role adequately and contribute to the direction of the investigation. Thereby, investigating alternative scenario's (or having them investigated), must be thought of in particular. The third recommendation regards the judicial trier of fact and his responsibility for truth-finding. He should engage in falsifying activities more frequently and extensively and give reasons for his decision about the credibility of witness testimony when there are indications that the testimony was not produced in the correct manner or that the testimony is possibly not accurate. The fourth recommendation is directed towards the Supreme Court which should compel the judicial trier of fact to give better reasoning and should test this reasoning more intensively. The fifth and last recommendation is directed to the legislator who should proceed with the already announced intention to create a new title for the witness in the Dutch Code of Criminal Procedure. In any event, provisions should be introduced in statutory law with regards to the manner in which police interrogations should be conducted, which should lead to greater possibilities to supervise the interrogation and the judge having more purchase in testing the manner in which the interrogation took place. Currently, the manner in which the interrogation is conducted remains too much out of the sight of the criminal jurist. Statutory regulation may improve this.

