# Improving Judicial Argumentation about Evidence in Dutch Unus Testis Cases

Mackor, Anne

*Published in:*
Legal Argumentation and the Rule of Law



*Publication date:*
2016

# Improving Judicial Argumentation about Evidence in Dutch Unus Testis Cases

*Anne Ruth Mackor*[*]

## Abstract

This paper focuses on evidence in Dutch criminal law in unus testis cases. I criticize the criterion the Dutch Supreme Court has formulated and argue that the criterion that Advocate General Aben has proposed is much better. I offer suggestions for improvement and present follow-up questions.

**Keywords:** Alternative scenarios, criminal law of evidence, discriminating facts, novel facts, Rule of Law, unus testis

## 1 Introduction

Dutch criminal law of evidence is quite elaborate and detailed as far as the *lawfulness* of evidence is concerned but the Code of Criminal Procedure (CCRP) offers remarkably little guidance when it comes to assessing the *reliability* and weight of evidence and the argumentation of judicial decisions about evidence. Since Dutch criminal law of evidence hardly constrains the judiciary one can question whether it fulfils the demands of the Rule of Law.

The Rule of Law Index of the World Justice Project[1] provides data on how the general public in 102 countries experience the Rule of Law in their country. It ranks the Netherlands fifth. One criterion is constraints on government powers. The Netherlands ranks fifth on this specific criterion too. Accordingly it might sound ludicrous to claim that one can have doubts whether Dutch criminal law of evidence meets the demands of the Rule of Law, in particular the demand that the fifth criterion poses. Nevertheless, this is the statement I defend.

Dutch criminal law of evidence is negative and statutory. It is a closed statutory system because judges can only allow *sources* of evidence that are explicitly mentioned in article 339 CCRP. It is negative since article 338 CCRP states that judges are *not* allowed to con-

* Department Theory of Law, Faculty of Law, University of Groningen, The Netherlands. Email: A.R.Mackor@rug.nl.

1 http://data.worldjusticeproject.org/#/groups/NLD, site visited 29 July 2015.

clude that the fact is proved when they are *not convinced* that the defendant has committed the crime, even if there is sufficient statutory evidence.

Negative statutory systems can be contrasted with positive statutory systems and with free systems. A positive statutory system obliges judges to convict the defendant if there is sufficient statutory evidence and the judge is convinced that defendant committed the crime. In a free system of evidence judges are free in their choice of the (sources of) evidence. As a compensation for the lack of rules a free system can, but need not, put higher demands on the argumentation of the judge.

Although officially Dutch criminal law of evidence is negative and statutory, many legal scholars claim that in practice it is a free system. The statutory rules that bind judges hardly restrict them. Moreover, the Supreme Court has loosened several of these rules. Accordingly one can raise doubts whether Dutch criminal law fits the formal concept of the Rule of Law. One can have even more doubts about the question whether criminal law of evidence fits the material concept of the Rule of Law that encompasses human rights. Can one say that a defendant gets a fair trial (article 6 ECHR) when a court is hardly ever[2] obliged to motivate its choice and weighing of evidence?[3]

In this paper I focus on evidence in unus testis cases, i.e. cases in which there is hardly any evidence apart from one testimony of a witness or the defendant. In Section 2 I analyse the criterion of Dutch Supreme Court. I discuss an example and show that the criterion is too lenient and can result in 'unsafe' convictions. Next I discuss the criterion that Advocate General Aben has suggested.

Following Aben's suggestion I argue in Section 3 and 4 that judicial decisions and argumentation about evidence can be improved by making use of a scenario-based approach to criminal evidence that emphasizes the importance of alternative scenarios and discriminating facts in the assessment of hard cases. I hypothesize that although Aben's criterion is much better than the criterion of the Supreme Court it can be too lenient in some cases and too strict in others. I suggest that the criterion of 'novel facts' should be taken into account too.

2 In 2005 article 359 paragraph 2 was added to the CCRP stating that the court must offer a motivated rebuttal when prosecution or defence offer 'explicitly argued points of view'. However, the Supreme Court (HR 16.03.2010, ECLI:NL:HR:2010:BK3359) has stated that courts can address them by merely stating that it *is implausible or incredible or so improbable* that it need not be explicitly rebutted.

3 My claim is not that courts never adequately motivate their decisions but that the statute puts too few restrictions and demands on them.

## 2 Judicial Argumentation in Unus Testis Cases in Dutch Criminal Law

Article 341 paragraph 4 CCRP deals with the testimony of the defendant; article 342 paragraph 2 is about the testimony of witnesses, including the victim and the person who filed the criminal complaint. They state that the defendant cannot be convicted solely on the basis of one testimony. In this paper I focus on the testimony of witnesses, but the analysis is applicable to cases in which the main evidence is the testimony (confession) of the defendant.

Both rules are about the minimum *amount* of evidence, not about minimum demands on judicial *argumentation*. In hard cases – and unus testis cases are by definition hard cases – these seem closely connected however. Advocate General Knigge argues that a court should always motivate why it concludes that the charge has been proved if the decision is practically speaking based solely on one testimony.[4] In practice, however, this does not always happen.

### *2.1 The Supreme Court until 2009*

Until 2009 the Dutch Supreme Court stated that even though courts are not allowed to ground proof of the *charge as a whole* on the testimony of one person, they could ground the proof of important parts on the testimony. The additional evidence need not be about the core of the charge, i.e. the involvement of the defendant in the criminal conduct. As a consequence of these weak demands, until recently a court could base its decision on a testimony and on very little and seemingly irrelevant additional evidence.

**Case 1**[5]

In the Zwartewaalse incest case the proof of the charge of incestuous sexual abuse of a minor by her stepfather was based on:

1. the *testimony* of the victim;
2. a *birth certificate* offering evidence that the victim was a minor at the time of the alleged criminal fact;
3. the *statement of the defendant* that he lived in the same house as his stepdaughter at the time of the alleged criminal fact.

This case has been heavily criticised. Even though the birth certificate offers evidence for the fact that the victim was a minor, it does not contribute to the proof of the core of the

4 Knigge (HR 30.06.2009, ECLI:NL:PHR:BG7746, sub 15).

5 I take this example and the critique from Van Koppen (2011, 29).

charge, viz. that the criminal conduct of sexual abuse has taken place and that the defendant was involved. The third piece of evidence at most shows that abuse was possible, not that it (probably) happened.

### 2.2 The Supreme Court since 2009

Since 2009 the Supreme Court seems to advocate a slightly stricter interpretation.[6] The Supreme Court now demands that the testimony should be '*sufficiently* supported by' and 'stand in a *not too distant* relation to' additional evidence. However, the Supreme Court does not explicate what 'sufficient support' or 'a not too distant relation' is. It has stated that it is impossible to offer a general formulation and claims that 'all depends on an assessment of the concrete case'.[7] As a consequence, the Supreme Court still offers no guidance to lower courts about how they should assess the amount, relevance, reliability and the weight of additional evidence.

### 2.3 Aben's Criterion

Advocate General Aben argues that additional evidence must have the capacity to *discriminate* between the scenario of the charge (S) and the most reasonable alternative scenario (AS).[8] The amount of support the additional evidence offers to S is the degree with which the *probability* of S increases or decreases in comparison to the best or most reasonable AS.[9] In Case 1 the additional evidence does not discriminate. It does not make the charge that defendant sexually abused his stepdaughter more (or less) probable than the AS that the defendant did not abuse her.

The purpose of Aben's analysis is to investigate whether the Supreme Court *in fact* uses this criterion. He concludes that some decisions of the Supreme Court fit his criterion, but that in some cases this is unclear. His colleague Knigge argues that Aben's criterion cannot explain all decisions of the Supreme Court. Knigge mentions three decisions of the Supreme Court about cases in which defendant was convicted even though the additional evidence did not discriminate.[10]

My aim is to investigate whether Aben's criterion is a good criterion and thus whether the Supreme Court should accept it.

---

6 HR 30.06.2009, ECLI:NL:HR:BH3704 and ECLI:NL:HR:BG7746.
7 HR 26.01.2010, ECLI:NL:HR:BK2094.
8 Aben (HR 15.11.2011, ECLI:NL:PHR:BQ8600).
9 Aben (2010) defends Bayesian indirect probabilistic reasoning.
10 Knigge (HR 11.12.2012, ECLI:NL:PHR:BY4834 sub 4.11).

## 3 Scenarios and Alternative Scenarios[11]

Aben's view is in line with story-based and bayesian approaches to the assessment of evidence. Both approaches compare different hypotheses or scenarios. In doing so they make use of indirect reasoning, i.e. reasoning from a scenario or hypothesis to evidence, arguing how likely it is for the evidence to occur if the scenario or hypothesis is true.[12]

A scenario offers a story about 'what happened'. A complete scenario contains a scene or setting, a central action, an actor, if possible a motive or goal, and consequences. Different scenarios tell different stories. We can distinguish (at least) two categories of scenarios, viz. guilty scenarios and not-guilty scenarios. Within both categories many different scenarios are possible. Usually, the charge is a stripped version of a combination of scenarios.

According to the scenario-approach adducing evidence that supports S is not sufficient to prove it. Only if there is no reasonable AS that is also consistent with all evidence it is rational to accept S as true. The evidence must be consistent with S and inconsistent with AS or at least the occurrence of the evidence should be much more likely in S than in AS.

In order to determine the quality of a scenario two types of questions have to be answered, viz. about the *coherence* of the scenario and about the *anchoring* of the scenario.

### *3.1 Coherence*

The first question to be answered is how the assessment of the coherence of a story can contribute to answering an empirical question. Fairy tales can be quite coherent but utterly false, so what does coherence have to do with questions of fact? The long answer is that there are at least four reasons, which I discuss below.[13] The short answer is that although assessment of coherence takes place prior to the evidence about the specific case, it does take into account *general empirical* knowledge.

#### 1 Internal Consistency

Consistency is an important criterion since an inconsistent story cannot be true. A testimony might be internally inconsistent or inconsistent with earlier versions of the testimony.

Inconsistency does not only imply S cannot be true; it also affects the reliability and the credibility of the testimony. Note, however, that there can be explanations for inconsistency that can result in repair of both the inconsistency of S and the credibility of the

11 This section is based, among others, on Bex (2009) and Van Koppen (2011).

12 The third, argumentative approach uses direct reasoning, i.e. from evidence to a scenario, arguing how probable it is that the scenario is true given the evidence.

13 The categorisation of reasons is taken from Bex (2009, 91, 92), but my interpretation is slightly different.

testimony. For example when a defendant lies out of shame[14] initial inconsistencies need not undermine the reliability of the testimony.

## 2 Possibility and Plausibility

A scenario that, like a fairy tale, postulates events or generalisations that are empirically impossible or at least very unlikely, is inconsistent with our general knowledge. Therewith S becomes improbable or even impossible. In such a case the only way to save S is to adduce specific evidence that shows that the event is an exception to the generalisation or that the generalisation is not true.

To distinguish a scenario that is improbable because of inconsistency with *general* knowledge from one that is improbable because it is inconsistent with *specific* evidence about the case, we call the former implausible and the latter improbable.

## 3 Completeness

Only if a scenario contains a description of the scene, action, actor, motive or goal and consequences of the action it is complete. The less complete a story is the more *story gaps* it has. Description of the motive is not always possible since we do not always know why someone acts the way he does. Moreover, the motive is normally not part of the charge and need not be proven.

## 4 Detailedness

Detailedness does not concern the question whether a story contains all components but whether the content of the components is sufficiently detailed. The more details there are in the components, the less story gaps the scenario contains.

Accordingly, story gaps can be due to incompleteness, to lack of detail or both.[15] For example, a story that does not describe the consequences of the act is incomplete, but it can be detailed about other components of the story; a story that contains all components can lack detail in the description of one or all of its components.

Details are important because they offer opportunities for anchoring, i.e. for confirmation of the details, but also for falsification. Even seemingly irrelevant details can play a role.

14 HR 02.02.2010, ECLI:NL:HR:2010:BJ7266.

15 Story gaps must be distinguished from evidential gaps. The latter concern those parts of S that are unsupported by evidence. Both the number and the place of evidential gaps can be relevant. The unus testis rule states that at least one detail of the scenario should be anchored in evidence from another source than the testimony.

**Consistency versus Coherence**

There is an important difference between consistency and coherence. Incompleteness and lack of detail do not make a scenario or testimony internally inconsistent or inconsistent with general knowledge. On the contrary, the less you state, the less risk you run that your statements are inconsistent. Persons who lie sometimes offer little detail because they are hard to remember and because it is hard to keep track of all implications of a detailed story and thus it is hard to keep it consistent.

Even though an incomplete and/or less detailed story can be consistent it lacks coherence since there are fewer logical relations between the statements that describe the events and thus fewer causal relations between events expressed in these statements than in complete and detailed scenarios.

### *3.2 Anchoring*

Above I have distinguished questions about coherence from questions about anchoring. However, they are less distinct than is sometimes suggested. Since the anchoring of scenarios can never be in 'reality' itself, but only in statements about reality anchoring questions too are, in the end, about the *coherence* of statements with a larger set of statements. Accordingly anchoring of S takes place via the available specific evidence about the case in general common sense and/or scientific knowledge.

In unus testis cases, the scenario is largely anchored by means of the testimony as the *source* of evidence and the content of the scenario is largely based on or even identical to the *content* of the testimony. Therefore not only the content but also the reliability and the credibility of the testimony should be critically assessed. The reliability and thus the acceptability of the testimonial evidence can be anchored in the general (but not unproblematic) rule that witnesses generally speak the truth and via additional evidence that shows that this particular witness has no reason to lie and that his memory and senses are unimpaired.

The unus testis rule, however, is not a rule about the reliability and credibility of the testimony but only about the minimum amount of evidence needed. Accordingly only if the testimony is thought to be reliable and credible enough to prosecute the question arises whether the scenario can be anchored only via the testimony or also via additional evidence in our general knowledge of the world.

In unus testis cases additional evidence can do several things.

1. It can v*erify or confirm* S. For example, according to S the person who committed the crime wore a beige cap, the additional evidence (e.g. police report) states that the defendant wore a beige cap.

2. It can be *consistent* with S. For example, according to S the person who committed the crime wore a beige cap, the additional evidence holds that the defendant wore a light coloured cap (or vv).
3. It can *falsify* S. For example, according to S the person who committed the crime wore a beige cap, the additional evidence states that the defendant wore a dark cap.
4. It can make S more or less *probable* than AS. Most evidence does not straightforwardly falsify S, it only makes S more or less probable. If a scenario is not straightforwardly falsified, different scenarios must be compared in order to determine the relevance and weight of evidence and therewith the strength of a scenario. In section 4 I discuss an example of this.

Evidence that falsifies S shows that S cannot be true and this is reason to drop (or adapt) S directly, without a need to compare it to any AS. However, the fact that evidence is consistent with or confirms S does not allow us to conclude that S is true. It is possible that the same piece of evidence is also consistent with or confirms an AS. That is why S must be compared to AS.

## 4 Discriminating Facts and Novel Facts

### *4.1 Discriminating Facts*

In Section 3.2 we concluded that the fact that evidence confirms S is not sufficient to accept it as true since it is possible that the same piece of evidence is consistent with or confirms an AS. Unlike the Supreme Court's criterion of 'sufficient support' Aben's criterion of discriminating facts points at this important insight. Evidence can discriminate in two different ways. I call them hard and soft discrimination.

Additional evidence offers *hard* discrimination if it falsifies, i.e. is inconsistent with one scenario and at the same time is consistent with or confirms the other. Additional evidence offers *soft* discrimination if it does not straightforwardly falsify one or both scenarios but makes one scenario more probable than the other.[16] In a judicial context it is not sufficient that S is simply 'more' probable than AS; the guilty scenario should be much more probable than the not-guilty one.[17]

16 I leave out the question whether it is sufficient to compare two scenarios that are contrary or mutually exclusive (cannot both be true) or whether they should be exhaustive (cannot both be false). Aben and Berger (2010, 86) claim that contrariety is sufficient. Fenton et al. (2014) convincingly argue that scenarios should be both exclusive and exhaustive.

17 'Proof beyond reasonable doubt' is not a criterion of Dutch criminal Law. However, see Knigge (HR 02.02.2010, ECLI:NL:PHR:2010:BJ7266).

In Case 1 (Section 2.1) the additional evidence does not offer 'sufficient support' because it does not discriminate between S and AS. Even though a birth certificate is important for the proof of the fact that the alleged victim was a minor, it is irrelevant to prove the abuse and/or the involvement of the defendant: the fact does not discriminate between S and AS. The same holds for the evidence that defendant lived in the same house as the victim.

**Case 2**[18]

In this case the defendant was accused of threatening the victim with a pocketknife. The charge was largely based on the testimony of the alleged victim. The defendant pleaded not guilty. He admitted that he had met the victim at the time and place of the alleged crime, but he denied that he had threatened him.

The conclusion that the charge had been proved was based on:

1. the testimony of the victim;
2. the official report of a policeman stating that defendant had been found to carry a pocketknife shortly after the alleged threat.

Can the additional piece of evidence discriminate between scenarios? If so, how? Defendant did not deny that he had a knife with him. Also, it is a fact of general knowledge that many persons carry a pocketknife and most of them do not use it to threaten other persons. The additional evidence that defendant had a pocketknife with him seems in itself insufficient since the likelihood that defendant carries a pocketknife if S is true does not seem (much) higher than if AS is true.

However, there were further facts:

3. The defendant stated that he had not taken his knife out of his pocket.
4. In his testimony the victim had given a detailed description of the knife, which turned out to be correct.
5. It was considered unlikely (and not contested by the defence) that the victim could have seen the knife on another occasion.

Even though these facts together still do not support the core of the charge, viz. the threat, they nevertheless discriminate and make S more probable than AS. They make it likely that defendant had taken the knife out of his pocket. Since defendant had denied this fact and therefore had not offered an (innocent) reason his AS becomes less probable in comparison to the scenario of the charge. Moreover, his statement becomes incredible and thus unreliable, at least on this point. At the same time the testimony of the victim becomes

18 The case is taken from Aben (HR 26.01.2010, ECLI:NL:PHR:2010:BK2094).

more reliable since he offered a risky prediction about the knife and the prediction turned out to be correct.

### 4.2 Novel Facts

This takes us to the question whether Aben's criterion is a good criterion for unus testis cases. Even though it seems to do a good job in case 2, I hypothesize that it might be too weak in some cases and too strong in others. I suggest that the criterion of 'novel or unknown facts'[19] should play a role too.[20]

In case 2 the victim made a risky prediction about the knife. The prediction was confirmed and the fact discriminated against AS. However, not all novel facts based on risky predictions turn out to be discriminating facts. The detailed description of the knife is not discriminating if defendant does not deny that he had taken it out of his pocket. Conversely not all discriminating facts are novel facts. Sometimes defendant first appeals to his right to remain silent and only later produces an AS that perfectly fits the evidence that is by then available to him. In doing so he avoids making risky claims that could be falsified and turn into discriminating facts against his scenario.[21]

Thus, testimonies and scenarios can be more or less 'ad hoc' or 'risky'. An ad hoc scenario is a scenario set up to avoid 'risky' predictions. The scenario can be anchored via evidence that is already available to the person making the 'prediction'. Scenarios and testimonies are like scientific theories in this respect: theories that produces risky predictions that are not falsified, but that are – on the contrary – confirmed, are better than theories that offer no risky predictions at all.

In criminal cases it is not always possible to offer a scenario or testimony that allows for risky predictions. However, if it does and if the predictions are confirmed, that seems relevant *even if these predictions do not discriminate*. If a testimony is detailed, with some of the details implying risky predictions which are confirmed, these predictions, even if they do not discriminate, add to the reliability of the testimony. The reliability of the testimony adds to its probative value and thus to the probability that the scenario sketched in testimony is true.[22]

On Aben's criterion additional evidence that confirms a risky prediction but that does not discriminate against AS would not suffice to convict a defendant. I hypothesize that in some cases this might put too high demands on the additional evidence.

19 Facts need not be new, they only need to be novel, i.e. unknown to the person making a prediction.
20 Aben (2014, 429) briefly mentions the notion of novel facts but does not assign a role to them.
21 See HR 16.3.2010, ECLI:NL:HR:BK3359 for an example.
22 See HR 02.02.2010, ECLI:NL:HR:2010:BJ7266 for an example.

This would be especially so if the defendant (re)constructs an AS only after the content of the testimony of the alleged victim and the additional evidence were known to him. Then he could create an AS in such a way that facts loose or gain discriminatory force. In such cases it seems that the fact that additional evidence discriminates or looses its discriminating character should not always be sufficient to acquit.

A question thus is whether there are cases in which additional evidence suffices to convict even though it does not discriminate. I hypothesize that this might be so if the testimony is deemed very reliable because of the risky confirmed predictions it contains. Conversely, there might be cases in which the fact that the additional evidence discriminates is nevertheless insufficient, either because the discriminating facts are not novel, or because the testimony is deemed not very reliable, or both.[23]

## 5 Conclusion

The Dutch Supreme Court's criterion of 'sufficient support' and 'not too distant relation' is too vague, too lenient and even misleading. It does not mention the need to compare scenarios and to attempt to falsify scenarios and the importance of discriminating facts. The criterion seems to be at odds with the Rule of Law and the right to a fair trial. Courts would do better to pose Aben's question: does the additional evidence discriminate, i.e. fit better with S than with the most reasonable AS?

However, I have hypothesized that Aben's criterion might be too strict in some cases and too lenient in others. I have suggested that courts should also take into account the question whether the additional evidence was a known fact or a novel fact, based on a safe or on a risky prediction.

## References

Aben, D.J.C. (2014). Matters of fact. *Strafblad* December 2014, 421-431.

Aben, D.J.C. and Berger (2010). Bewijs en overtuiging, Deel 2 (Evidence and Conviction, Part 2) *Recht en Expertise* 2010-3, pp 86-90.

Bex, F.J. (2009). *Evidence for a Good Story*. Dissertation University of Groningen.

23 Knigge (HR 07.09.2010, ECLI:NL:PHR:BM9859) briefly states that the more reliable the testimony is, the lower the demands on additional evidence can be and vice versa.

Fenton, N. et al. (2014). When 'neutral' evidence still has probative value (with implications from the Barry George Case). *Science and Justice* 54, 274-287.

Van Koppen, P. (2011). *Overtuigend Bewijs* (Convincing Evidence). Amsterdam: Nieuw Amsterdam Uitgevers.