Harmonisation in Forensic Expertise

An inquiry into the desirability of and opportunities for international standards

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6 How Psychologists Should Help Courts

Peter J. van Koppen

1 Two prostitutes and their pimp

In a recent case in the Netherlands a pimp was accused of battering two of his prostitutes and raping one of them. Although the police knew of the pimp's violent character, the case presented them with a problem: the prostitutes had also accused the pimp of forcing them to sell their bodies, yet both continued to work in their trade after the pimp was arrested. Were they just making their whole story up or was this characteristic of prostitutes, even battered prostitutes? To answer these questions, the police called in a psychologist the day before the case served in the district court.

The prosecution chose this psychologist because she had done some research on prostitutes. She read the police record of the statements made by the prostitutes, and spoke to each of them for an hour. The following day she testified in court upon the results of her short investigation. First, she said that the girls demonstrated a pattern of behavior familiar from her studies of prostitute behavior: “The story they told tallied with the behavior of pimps I have encountered before. [...] I was not surprised by what I heard and read”. Second, she told the Court that the girls were speaking the truth: “They were not hesitant and were strikingly consistent during our conversation. In addition, their statements were nearly synonymous. [...] I have encountered very few deceitful statements in my research on prostitutes. [...] nor did I get the impression that the things that happened were exaggerated. [...] Their consistency leads me to conclude that what the young ladies have told is true”.

Statements like the one made by this psychologist are quite common in the Dutch legal system, yet, they are wrong by any standard, legal or psychological. I will return to this later.

In the Netherlands psychologists are routinely called upon -- by the investigative judge, prosecution, defence, or court -- to testify about a number of subjects. The most common is testimony concerning the sanity of the accused during the course of the crime, a task usually performed by clinical psychologists most of whom are employed by government agencies. I leave that subject to another chapter in this book. The present chapter deals with psychologists who testify on subject matter that is re-

1 These and all following quotes are translated from Dutch.
lated to assessing the quality of evidence presented to the Court. This kind of testimony almost always concerns the usefulness of witness statements and to a lesser extent statements made by the suspect. In this chapter I focus on the standards that have been or should be set for psychological expert testimony. I use Dutch examples for demonstration purposes.

2 The Dutch standards for expert witnesses

Only very recently, the Dutch Supreme Court set standards for the testimony of expert witnesses. Under Dutch law this is quite novel, since the decisions about the facts are left almost completely to the inferior—district and appellate—courts.2 In 1989 the Supreme Court ruled in a case in which an expert witness used anatomically correct dolls to assess the veracity of a statement made by a minor in a sexual abuse case. The Court decided that if the defence seriously contests the method used by the expert, the Court should clearly explain why it chooses to admit the expert’s opinion as evidence all the same.3 At the beginning of 1998 the Dutch Supreme Court expanded this decision by reversing an appellate court decision in a case in which an orthopaedic shoemaker had given an expert opinion on shoeprints. The Supreme Court ruled that since the accused challenged the qualifications of the expert, the appellate court should have investigated (1) whether the expert was also an expert on shoeprints; (2) if so, what methods he used to reach his opinion; (3) why he considered this method reliable enough; and (4) to what extent the expert was able to use this method competently.4 These guidelines may seem meagre to the Anglo-American-Saxon lawyer; they are profoundly new to Dutch criminal procedure. Using the rules set by the Dutch Supreme Court I will assess the testimony of psychologists in court. I will also show how poor the Dutch standards are and conclude by giving an extended list of standards for expert witnesses.

3 Psychologists versus forensic psychologists

A large part of the work of psychologists consists of making predictions. We call something a prediction if we make a statement about something we cannot observe based on what we can observe. For instance, psychologists estimate an individual’s intelligence based upon his score on a ques-

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3 HR 28 February 1989, NJ 1989, 748 (anatomisch correcte poppen; anatomically correct dolls).

4 HR 27 January 1998, NJ 1998, 404 (Schoenmaker blijf bij je leest; Let the cobbler stick to his last).
tionnaire. Prediction can be about the future (how dangerous an offender may become in the future), the present or the past. The quality of a prediction depends mainly on the quality of the instrument used to make the prediction. For instance, we know that predictions on intelligence based upon a proper intelligence test outperform the clinical judgement of a psychologist.\textsuperscript{5}

Predictions in one context differ from predictions in other contexts. Predictions made in a therapeutic setting – usually referred to as diagnosis – are quite different from predictions made in a forensic setting. In therapy the diagnosis resembles the diagnosis a general practitioner makes. If I go to my general practitioner with a stomach ache, he can probably not make a straightforward diagnosis because this is a notoriously difficult symptom. The doctor then does two things: he tries to eliminate the most dangerous possibilities, like acute appendicitis, and once these have been ruled out, he gives you a medicine and asks you to come back next week. This manner of making a diagnosis is typical for physicians and therapists. It is vital not to miss anything that might be acutely dangerous, but other than that the diagnosis only has temporal value; if the medicine he gives me today does not help, he can give me another one next week.

\textbf{Table 1} \quad \textit{The structure of the diagnosis made by the general practitioner with stomach-ache as the presenting symptom}

\begin{center}
\begin{tabular}{|l|c|c|}
\hline
\textit{True disease of patient} & Appendicitis & Something else \\
\hline
Appendicitis & Correct & False negative \\
Something else & False positive & Correct \\
\hline
\end{tabular}
\end{center}

The structure of the problems associated with the medical diagnosis is illustrated by Table 1. The most important aim of the diagnosis is to not miss appendicitis, that is to not make a \textit{false negative} diagnosis. Avoiding false negatives is considered to be in the best interest of the patient. In the same vein the diagnosis of a psychologist in his role of therapist is temporary, and aimed at avoiding false negatives.

In the forensic setting the role of prediction is quite different.\textsuperscript{6} If the psychologist writes a report for the Court, the ‘diagnosis’ is final from the perspective of the psychologist. Once the report has been submitted to the Court, it may play a role in the Court’s decision. The psychologist is given no further opportunity to adapt the conclusions to new insights in the case. More importantly, the psychologist is there to aid the Court’s decision, not

\textsuperscript{5} See e.g. P.E. Meehl, \textit{Clinical versus statistical prediction: A theoretical analysis and a review of the evidence}, Minneapolis: University of Minnesota Press 1954.

to help witnesses or suspects. Since the work of the psychologist is aimed at aiding the Court, it should depart from the point of view of the Court. This view is governed by doctrine and precedents, including the principles that the suspect is to be considered innocent until proven guilty and that it is better to free twenty guilty suspects than convict one innocent individual. The criminal justice system, then, is aimed at avoiding false positives rather than false negative predictions (see Table 2). If a psychologist wants to serve the Court while evaluating the statement of a witness who accuses the suspect, the psychologist should also try to avoid false positives (see Table 3).

Table 2  The structure of the decision by the Court

<table>
<thead>
<tr>
<th>True state of affairs</th>
<th>Suspect is guilty</th>
<th>Suspect is not guilty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Suspect is guilty</td>
<td>Correct</td>
<td>False negative</td>
</tr>
<tr>
<td>Suspect is not guilty</td>
<td>False positive</td>
<td>Correct</td>
</tr>
</tbody>
</table>

Table 3  The structure of the diagnosis of the forensic psychologist

<table>
<thead>
<tr>
<th>True state of affairs</th>
<th>Opinion of psychologist</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Witness speaks the truth</td>
</tr>
<tr>
<td>Witness speaks the truth</td>
<td>Correct</td>
</tr>
<tr>
<td>Witness does not speak the truth</td>
<td>False positive</td>
</tr>
</tbody>
</table>

This difference between predictions in the therapeutic context and the forensic context becomes problematical if psychologists serve as expert witnesses while they do not understand this crucial difference. Most psychologists are used to the clinical setting where the perception of the client is central to the interaction between psychologist and client, and the truth of the client’s statements of minor importance. A therapist who is very interested in what really happened to his client may hurt their relationship which is based on trust, and impair the therapeutic process; for the forensic psychologist the only point of interest is what really happened. Also, the therapist is trained to show empathy with his client. If a therapist is hired

to evaluate a statement made by a witness for the Court, empathy with the witness is incompatible with the independent role the expert has to play.\(^9\)

In addition the diagnosis of the forensic expert needs to meet much higher standards than the diagnosis of the therapist. In a therapeutic setting each diagnosis is temporary and if during consecutive sessions the diagnosis proves to be wrong, it can be changed without any harm being done. In criminal cases in the Netherlands psychologists are usually only called in if there is a problem with the evidence. In most cases this means that there is little evidence other than the witness statements which are subjected to then laid before the expert psychologist for an opinion. In such cases the expert testimony may mean the difference between conviction and acquittal. For this reason the expert opinion should meet much higher standards than the diagnosis of the therapist. If, for instance, a psychologist comes to the conclusion that a witness is speaking the truth, he must be pretty sure of this.\(^{10}\)

\section*{4 The expertise of the psychologist}

Let us return to the Supreme Court decision in the shoemaker case and compare it to the opinion given by the psychologist in the case of the prostitute mentioned earlier. The psychologist gave evidence on two questions: is the behaviour of the prostitutes typical for battered prostitutes and do they speak the truth?

The first criterion set by the Supreme Court is that the expert must have expertise in the field concerned. The psychologist has done research on prostitutes. This means that she must have expertise on the type of behaviour displayed by battered prostitutes in different kinds of situations. But that was not the question asked by the Court; rather, the Court wanted to know whether displaying certain behaviour indicates that the prostitutes have been battered. That question is considerably different from the research done by the psychologist. This is a common error made by psychologists, in other cases as well. Sexually abused children, for instance, tend to have behavioural problems, start wetting their bed again, and often have nightmares. But how diagnostic of child sexual abuse is wetting the bed at a later age?

A somewhat less obvious version of this error also occurs in sexual abuse cases, as the following example illustrates. A nineteen-year-old girl—I will call her Linda—accuses a much older man of sexually abusing her for some years. The suspect admits their sexual relationship, but claims it has been of a much shorter duration and, more importantly, that it was a consensual relationship. A clinical psychologist is called in to study the file

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\(^{10}\) See the extensive discussion of the so-called diagnostic value of evidence in W.A. Wagenaar, P.J. van Koppen and H.F.M. Crombag, \textit{Anchored narratives: The psychology of criminal evidence}, London: Harvester Wheatsheaf 1993.
and talk to the girl. After making several other errors in her report – which I will not discuss here – she concludes that Linda is speaking the truth because she is suffering from posttraumatic stress disorder. This diagnosis is derived from the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV), a publication of the American Psychiatric Association which is used worldwide for the classification of psychiatric disorders. The DSM-IV also lists a large number of criteria all of which have to be met before a patient can be diagnosed as suffering from posttraumatic stress disorder.

As is typical in the therapeutic setting, the psychologist diagnoses Linda loosely as suffering from this disorder, without making clear to the Court the bases for her diagnosis. A much larger problem, however, is the fact that the psychologist argues that *because* Linda is suffering from posttraumatic stress disorder, it is very likely that she suffered from the sexual trauma inflicted upon her by the suspect. How does the psychologist know? The first criterion in the DSM-IV for posttraumatic stress disorder is: "The person has been exposed to a traumatic event in which both of the following were present: (1) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others; (2) the person's response involved intense fear, helplessness, or horror". How does the psychologist know that Linda suffered a trauma? Simply, because Linda told her. This is an acceptable basis for making this diagnosis in a therapeutic setting, but if the psychologist then uses the diagnosis to convince the Court that Linda was sexually abused, the reasoning has become completely circular. This kind of expert opinion is particularly dangerous. Because psychologists never tell the Court how they reached their diagnosis, the circularity of the testimony remains completely hidden from the Court.

The psychologist in the case of the prostitutes also gave an opinion on the veracity of the stories told by the two girls. Asked in court what she knew about CBCA, she answered: "This abbreviation means nothing to me". Since CBCA is the method most frequently used for evaluating the veracity of witness statements, the psychologist clearly is no expert on the credibility of witness statements. We only know that because the defence asked her. Dutch courts almost never start questioning the expert with the

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12 Ibid., pp. 427–429.
13 Ibid., p. 427.
14 Even for the Dutch Supreme Court. See HR 18 November 1995, *NT* 1996, p. 666, in which the court accepted such an expert statement as valid evidence.
15 Abbreviation of Criteria-Based Content Analysis, discussed below.
simple request: “Please start by telling us why you think you are an expert”.

5 Methods for evaluating witness statements

The second, third, and fourth criteria set by the Supreme Court in the shoeprint decision are related: all concern the method used by the expert. The method should be explained, should be reliable enough to warrant the conclusions given, and the expert must be able to use this method competently. The most common methods for evaluating witness statements are lie detection, which is not used in the Netherlands, and Statement Validity Analysis (SVA). SVA aims to assess the truthfulness of a witness statement by two methods: Criteria-Based Content Analysis (CBCA) to evaluate an interview with the alleged victim and the Validity Checklist (VCL) to evaluate other information. Evaluations by psychologists using SVA or CBCA alone are done on a rather large scale in the Netherlands. I will first discuss the CBCA and then turn to the VCL.

5.1 Criteria-Based Content Analysis

The CBCA is based on the assumption that a true statement can be distinguished from a false statement because someone who tells about something that really happened tells another story than someone telling about something that did not happen. The method was expressly developed for children who were allegedly victims in sexual abuse cases, but nowadays is also used for the evaluation of alleged adult victims.

In applying CBCA it is of major importance that others have exerted as little influence as possible on the statement. In addition, the interview itself must comply with high standards (and avoid asking leading questions in particular). For this reason, the witness should be interrupted as little as possible and should tell the story as far as possible in free recall. This method of questioning is essential to the CBCA. The interview must then

17 Dutch lawyers commonly say ‘reliable’ when they mean the validity of a method.
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be typed out verbatim and the criteria of the CBCA applied to the written version of the interview. The most important reason for this is the absence of a fixed scoring scheme for the CBCA. The method fully depends on the detailed and argued analysis of the statements, using 19 criteria. The research on CBCA has had mixed results until now. The gist of the argument is that CBCA has some scientific potential but has too low a diagnostic value to be used in a forensic setting. Ruby and Brigham summarise the state of affairs as follows:

"The CBCA may have the potential to enhance the objectivity of the investigation and prosecution of allegations of child sexual abuse. It might also aid in protecting those who are unfortunate enough to be at the receiving end of an unfounded child sexual abuse allegation. But much more empirical validation work is necessary before it can adequately fulfill such a role."  

Yet, psychologists present results of their CBCA analyses without any hesitation to the courts and without mentioning the discussion on the instrument in the scientific community.

6 Validity check list

Some argue that CBCA is only valid enough if it is supplemented with the VCL. Raskin and Esplin are of the opinion that useful statement assessment should be more than just scoring a statement of the 19 CBCA criteria. The CBCA should be applied to material drawn from a properly conducted interview in which is gathered enough material to allow use of the criteria. In addition information must be gathered outside the interview. Since children differ in cognitive abilities and these differences influence the scoring of the criteria, information about these abilities and other personality characteristics of the interviewee is also needed. Alternative hypotheses on the genesis of the story as told by the child must be investigated as well. The story may be an error because of earlier suggestive interviews by parents or

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others, because of deficient memory of the child, or because of other pressures on the child. The VCL has been developed for evaluating the latter elements. The VCL consists of four clusters:

a. psychological characteristics of the child;
b. interview characteristics of the child and the examiner;
c. motivational factors relevant to the child and others involved in the allegations; and
d. investigative questions regarding the consistency and realism of the entire body of data.

Research on the validity and usefulness of the VCL is very scarce and is limited to casuistic illustrations. Consequently, it is not clear what role to assign to the psychological characteristics or motivational factors of the child in evaluating the veracity of the statements made.

Using the VCL introduces another problem in expert opinions because it is at odds with the role assigned to expert witnesses in court in the Netherlands. The expert’s role is limited to informing the Court about subjects which are not part of the common domain of knowledge of members of the judiciary and which can be discussed using knowledge common to the scientific domain. As soon as the psychologist’s opinion is not based on psychological scientific insights or enters into the domain of the judge, he should keep quiet. In using the VCL both happen.

The VCL is neither based on sound empirical research nor limited to psychological insights. Especially Cluster D can pose problems. Take a case in which the psychologist interviews a child that is allegedly victim of sexual abuse. After the CBCA analysis, the psychologist considers the child’s story to be rather trustworthy and then dives into the case file to answer Cluster D of the VCL. There the psychologist finds additional clues for the veracity of the child’s story and concludes that the child is speaking the truth. In this case, the Court might decide that the child’s statement is supported by the expert’s opinion and the clues in the case file constitute sufficient evidence for a conviction. In doing so, the Court in fact, through the use of the VCL by the psychologist, makes ‘double’ use of the evidence present in the case file. This is a very real danger because in the absence of a clear-cut scoring scheme for the CBCA and the VCL psychologists tend to remain too vague to allow a thorough analysis of their statements and judges tend to limit their reading to the conclusions of the experts’ reports.

In addition, the VCL requires the psychologist to step outside his domain. In one report in a sexual abuse case, for instance, the psychologist in answering Cluster A of the VCL argued that the child’s story was supported


by the fact that around the time the alleged abuse supposedly started, she suffered from hyperventilation. I have been unable to find research supporting a relationship between hyperventilation and sexual abuse in either the psychological or medical literature.

6.1 Methods of own design

Although the VCL and more especially the CBCA are the methods most frequently used by psychologists for evaluation of witness statements, some have methods of their own. I already discussed the psychologist in the case of the prostitutes, who considered telling a story without hesitation, telling it each time in the same manner, and her own impression sufficient to support the conclusion that the witnesses were telling the truth.

Another example is the case in which a father is accused of, among others things, raping his daughter several times over a period of four years. A psychologist talks with the daughter, whom I will call Janet. The psychologist concludes:

"From a behavioural scientific point of view, the following conclusions can be drawn. Based on the results and analyses above, Janet's statement concerning the sexual abuse by her father must be qualified as believable."

This psychologist's analysis can be summarised as follows. This list is remarkable because this particular psychologist commonly uses CBCA to evaluate children's statements. The cited conclusion was based on the following:

1. Janet shows symptoms that indicate posttraumatic stress disorder.
2. Janet's mother reports that she observed a change in her daughter's development.
3. Janet suffered from medical problems, i.e. neck trouble.
4. The psychologist observed that Janet's story sounded plausible.
5. Janet recounts her story in the form of a script.
6. There is only a short period of time between discovery of the abuse and reporting to the police.
7. The statements made by Janet about her abuse could damage the relationship with her boyfriend.
8. Janet ran away from home.
9. Janet accused nobody but her father of sexually abusing her.
10. Janet has disclosed the abuse more implicitly than explicitly.
11. Janet reports that at first she "felt good" about her father touching her (in a false statement whereas the psychologist would expect the alleged victim to be completely negative about her father).
12. There is no evident motive for filing a false complaint.
The use of Criterion 1 by this psychologist has been discussed above. In using Criterion 2, this psychologist falls prey to the error I already discussed. Criteria 3, 7, and 12 fall outside the domain of psychology. Criterion 4, of course, is fully circular: the statement is true because the psychologist thinks it is true. Telling a story in the form of a script, Criterion 5, seems to be more indicative of an untrue than a true story. As for Criteria 6, 8, 9, and 10: these are more in the domain of the Court, since there is no research to support these criteria. With Criterion 11 this psychologist finally uses one, but only one, of the CBCA criteria.

I wrote a report of the request of the defence pointing out the problems with the criteria used by this psychologist. In a rebuttal the psychologist explains our disagreement by adding that experimental psychology and clinical psychology have their own philosophies, methods and techniques, so that results from experimental psychology are not valid.

7 Experts and counter experts

Assessing the validity of witness statements by a psychologist is almost the only field in which psychologists in the Netherlands report at the request of the public prosecution. In most other cases psychologists are called in by the defence to investigate methods used by the police in interviewing witnesses and suspects and, notably, in eyewitness identification of the suspect.

8 Interviewing witnesses

Most of what there is to say about psychological expert testimony about interviewing witnesses has been said above. Nearly all of these expert opinions relate to cases of child sexual abuse. In the last few years a new category of cases has been added: ‘repressed memory’ cases in which adult females claim that they repressed any recollection of past sexual abuse and only recently recovered the repressed memory of the abuse. Both the

30 There are some exceptions. One example, from my own experience, is the case in which a man spontaneously went to the police to confess to a murder of a young woman and during the interrogation confessed to three more. The examining magistrate was worried that the confessions might be false, so he asked me to at least assess the quality of the police interview, using the videotapes. I could reassure him: the interrogations were quite sound.
31 There is one other terrain which I will leave out of the discussion here, namely expert testimony on the scent line-up performed by tracker dogs. It is an interesting area, since most of the principles which apply in identification procedures apply to the scent line-up as well. See P.J. van Koppen (1995) Sniffing experts: Theory and practise of scent line-ups, *Expert Evidence*, 3, pp. 103–108.
32 This has led to a great controversy, the ‘Memory Wars’, both in the Netherlands and elsewhere. See J.D. Read and D.S. Lindsay (ed), *Recollections of trauma: Scientific evidence and clinical practice*, New York: Plenum 1997, especially E.F. Loftus, ‘Dispatch
number of repressed memory cases – allowing for the size of the population – and the type of cases are the same in the Netherlands, the United States and Great Britain.\textsuperscript{33} In the repressed memory cases the same thing happens as in other sexual abuse cases: psychologists are called in,\textsuperscript{34} who then declare the statement made by the alleged victim to be sound and truthful on feeble grounds.\textsuperscript{35}

Cases of this kind tend to be handled wrongly by the police often resulting in grave problems for the victim as well as the suspect and their family.\textsuperscript{36} I recently wrote a report for the Minister of Justice on how to prevent repressed memory cases from getting out of hand.\textsuperscript{37} Formal guidelines for the police and the prosecution, based partly on my report, are now under preparation. Hopefully, problems with repressed memory cases and the expert testimony given in them will be prevented in future.

9 Interviewing suspects

Until recently, Dutch psychologists were hardly ever involved in evaluating questioning of suspects by the police. Two developments changed this. First, the police increasingly videotape interviews in major cases. This makes subsequent analysis of what happened possible. In other cases, analyses have to be based on the interview record. These records always consist of a summary in the form of a monologue by the suspect, written down by and in the words of the interviewing police officer. Only in rare

\begin{itemize}
\item Often by the attorney of the alleged victims, since in these cases a criminal procedure is often accompanied by a civil suit for damages.
\item See e.g. the case discussed in P.J. van Koppen and H.L.G.J. Merckelbach, De waarheid in therapie en in rechte: Pseudoherinneringen aan seksueel misbruik (The truth in therapy and in law: pseudomemories of sexual abuse), \textit{Nederlands Juristenblad}, 1998, 73, pp. 899–904. See more general on the Dutch situation H.F.M. Crombag and H.L.G.J. Merckelbach, \textit{Hervonden herinneringen en andere misverstanden} (Recovered memories and other misunderstandings), Amsterdam: Contact 1996.
\end{itemize}
cases interview records do give real insight into what happened in the interview room.

Second, the police in Zaanstad, together with someone who calls himself a communication expert, developed a method to induce virtually every suspect to confess. This method, commonly known as the ‘Zaanse’ interrogation method, is based on the one proposed by Inbau and Read, supplemented with sound and unsound police practices and covered with a quasi-scientific sauce of neurolinguistic programming. The strongest public reaction was caused by the case in which the suspect was put under pressure by covering the walls and ceiling of the interview room with photos of the very bloody crime scene and of his wife and children. Although the Minister of Justice has forbidden the method, parts of it are still in use by the police. In cases of this kind psychologists are called in to demonstrate to the Court the influence the interview method has had on the confession by the suspect.

As a rule, expert testimony in cases like this is less problematical than in cases in which a psychologist is called in to assess the veracity of statements. The main reason apparently being that in the latter type of case the psychologist is hired to solve a problem of the Court or the prosecution. They are more interested in the psychologist’s conclusion and less interested in how he reached his conclusion. Anticipating this, psychologists usually refrain from explaining their methods and reasoning extensively. In cases where the psychologist is asked – usually by the defence – to comment on police interviews, their reasons for evaluating the police methods as correct or incorrect are the heart of their testimony.

39 Inbau, F.E., J.E. Reid and J.P. Buckley, Criminal interrogation and confessions, Baltimore, MD: Williams & Wilkins 1986.
41 See also European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) (1998) Report to the Netherlands government on the visit to the Netherlands carried out by the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) from 17 to 27 November 1997. Strasbourg: Council of Europe.
42 The Dutch Supreme Court is, as usual, more lenient. See HR 22 September 1998, NY 1999, p. 104 (Zaamse Verhoormethode; Zaandam Interrogation Method).
The same seems to apply to cases in which psychologists testify on other kinds of police behaviour, for instance eyewitness identification procedures. Maybe explaining methods and reasoning is easier in these cases because well established standards exist for eyewitness identifications.

### 10 Eyewitness identification

Cognitive psychologists testify most often about problems relating to eyewitness identification. Much is known about proper identification procedure and the police in the Netherlands have clear-cut instructions for conducting such procedures. Still the police generally proceed incorrectly. The most common error is the use of a one-person showup instead of a proper line-up when the witness knows the perpetrator from the crime scene alone.

A witness confrontation is used to assess whether the appearance of the suspect corresponds to the memory the witness has of the appearance of the perpetrator. The witness memory may be vague, so a good confrontation procedure answers two questions: (1) is the witness’ memory of the perpetrator good enough; and (2) does the memory correspond to the appearance of the suspect. This dual objective is achieved by confronting the witness with a line-up of people who all conform to the general description of the perpetrator. One of these is the suspect; the others are innocent foils unknown to the witness. The witness’ task is to indicate the one person in the line-up he recognises, if he recognises anyone at all. The result of a properly conducted line-up has a very high diagnostic value. It is essential, however, to ensure that if the witness points out the suspect, he does so solely on the basis of his memory of the perpetrator. All other cues that could indicate to the witness which person in the line-up is the suspect must be eliminated. For this reason the behaviour and clothing of the persons in the line-up should not differ, nor should the policeman who guides the witness during the line-up know who the suspect is.

Apart from live line-ups, confrontations can be conducted in two other manners: (1) videotaped line-ups or photospreads; and (2) a one-person showup. These serve other purposes. Mug shots are photos of known

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44 I did not conduct a survey, but base this assertion on discussions in the rather small community of psychologists who testify in court.


criminals. If done properly, these are only shown to witnesses in investigations in which the police have no idea where or how to find the perpetrator. The police show the witness a selection of photos of known criminals who conform to the description given by the witness. If the witness points one out, that individual always becomes a suspect. This leads to a suspect-driven search, which has the potential of generating a miscarriage of justice. For this reason mug shots should not be used as evidence by the Court.

The one-person showup should be used in one situation and one situation only: when the witness already knew the perpetrator before the crime took place. The identification then took place at the scene of the crime and showing the suspect to the witness only serves to prevent administrative errors ("Is this the neighbour you meant?"). If the witness knows the perpetrator by name, this procedure is unnecessary. If used with a witness who only saw the perpetrator at the scene of the crime, the one-person showup is much more likely than properly constructed line-ups to yield false identifications. The one-person showup is much too suggestive, because with this procedure the police are telling the witness: "We've got the perpetrator. You merely have to confirm it". If, in a proper line-up, the eyewitness has no good recollection of the perpetrator or the suspect is innocent, he is most likely to identify an innocent foil, which can be detected as an error. The one-person showup does not have such a provision.

In Dutch police practice most identifications are attempted using the one-person showup. This seems to be a structural problem that is caused by two things. First, although the principles of a line-up are simple, organising one is time-consuming. People from a model agency must be hired to serve as foils. They must be present at the same time as the witness, the suspect, his attorney, the prosecutor, and a number of policemen not involved in the investigation, and then the show must be run by the book. A one-person showup is much easier. Besides, Dutch courts are very lenient about how identification procedures are conducted. In conducting an identification parade it is essential to ensure that the witness bases the identification of the suspect solely on his memory of the perpetrator, care must be taken to eliminate all other cues that could lead to the witness to identify the suspect. Courts, however, routinely accept procedures which violated one or more of the requirements.


The police regularly make every conceivable error in identification procedure. A 1998 case provides one example of such. In that case a witness saw five men in a car. One of them had a gun. Five suspects had been arrested and the police officer running the investigation showed to the witness each suspect in succession in a one-person showup. Each time, the witness identified the suspect. It is, however, still not answered which of the suspects had held the gun. The police report reads as follows:

"After Dekkers had been confronted with each of the suspects, he stated that he recognised all of them. He had not yet indicated which of the suspects had held the gun, however. Then I asked him to indicate which suspect had held the gun. Dekkers said he was not sure and hesitated between numbers 1 and 3. I, subsequently, informed Dekkers that both other witnesses had indicated the first suspect. I told him he need not doubt and that he could identify number 1 with confidence. Dekkers then stated that the first suspect had held the gun."

In cases like these the defence time and again calls in cognitive psychologists to explain to the Court what went wrong.

11 Standards for expert psychologists

By way of conclusion, I offer a list of standards for psychological expert testimony. This list has been drawn up mainly with a view to problems encountered in the Netherlands, but I see no reason why they should not apply to expert testimony abroad.

The Dutch Supreme Court has established some standards for expert testimony, but the examples given above make it clear that these standards need to be expanded and supplemented.

In assembling the list I assume that an expert writes a report for the Court in addition to providing oral testimony. This does not mean that other standards should apply to oral testimony. Complying with these standards, however, is much easier if the expert provides the Court with a written report. Explaining methods and research, for instance, requires reference to and consultation of scientific publications, something that is not feasible in a courtroom. In addition, it is easier to formulate precise conclusions behind a quiet desk than during the trial.

1. The psychologist should be an expert on the subject matter on which he testifies and should explain in his report why he considers himself an expert.
2. The expert witness should show awareness of the limitations of his role. He should not enter into the domain of the Court.
3. Psychotherapists should never offer opinions on the value of evidence.
4. Psychologists who serve as expert witnesses should limit their testimony to subject matter to which psychology is relevant.
5. The psychologist should show that his testimony and the underlying research are relevant to the case in point.

6. The psychologist should show that he is competent to apply the specific method to the specific case.

7. Expert testimony encompasses application of scientific knowledge to particular cases. For this reason the expert should apply sound empirical research, must tell the Court which results of research he has applied, and why the research is relevant to the specific case or its circumstances.

8. In applying sound research, the scientific knowledge, which the expert presents to the Court, must be evaluated according to:
   a. whether it is grounded in scientific methods and procedures;
   b. whether it is based on empirical research rather than on the expert’s subjective belief or unsupported speculation;
   c. whether the theory or method applied by the expert has been subjected to peer review and publication;
   d. whether the methods used are valid enough to serve as a basis for the Court’s decision;
   e. whether the expert gives an accurate account of the discussion in the scientific community.  

These, and perhaps other, guidelines are urgently needed in the Netherlands and probably in other European countries as well. Maybe developing such guidelines is an excellent task for the flourishing European Association for Psychology and Law.

References


European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), *Report to the Netherlands government on the visit to The Netherlands carried out by the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) from 17 to 27 November 1997*, Strasbourg: Council of Europe 1998.


51 The reader will recognise some standards set by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals Inc* 113 S.Ct. 2786 (1993).
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How Psychologists Should Help Courts – Peter van Koppen


van Koppen, P.J., Recovered crimes: Sexual abuse reported to the police after therapy, Leiden: Netherlands Institute for the Study of Criminality and Law Enforcement (NSCALE) 1998, (Advice to the Minister of Justice), (translation of P.J. van Koppen, Hervonden misdrijven: Over aangiftes van seksueel misbruik na therapie, Leiden: Nederlands Studiecentrum Criminaliteit en Rechtshandhaving (NSCR) 1997, (Advies aan de Minister van Justitie)).


Wigmore, J.H., The science of judicial proof as given by logic, psychology, and general experience, Boston: Little Brown 1937, 3rd ed.