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# A Trial Advocacy Postscript to the *Daubert* Hearing

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The primary focus of this symposium has been Evidence law, specifically the impact of *Daubert* and Federal Rule of Evidence 702 on the admissibility of expert testimony. Both the *Daubert* hearing and the subsequent panel discussion demonstrate that the Supreme Court's 1993 *Daubert* decision has had a major impact on federal Evidence law and practice. Like Mr. Black, many plaintiffs' attorneys use the list of factors in *Daubert* as a framework for structuring the direct examination of their experts. Like Mr. Smith, numerous defense attorneys rely on the new reliability standard as the basis for attacking opinions by plaintiffs' experts, particularly opinions on specific causation. Like Judge Rosenbaum, federal trial judges appreciate that appellate courts will invoke *Daubert* and Rule 702 to review their ruling on the admissibility of expert testimony. As the hearing at this symposium illustrates, judges and attorneys have had to master the *Daubert* evidentiary standard with its novel terminology such as "falsifiability" and "peer review."

The thesis of this short article is that although the hearing exemplifies the impact of the new evidentiary test, it also demonstrates

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that skilled, knowledgeable litigators such as Messrs. Black and Smith still rely on traditional techniques to develop their arguments under the new evidentiary standard. Not all of the litigants' arguments are explicable in terms of those techniques, but Messrs. Black and Smith not only employed many conventional techniques at the hearing but did so with great effectiveness.

#### I. THE PLAINTIFF'S CASE

*Daubert* certainly leaves an imprint on the plaintiff's case. At one point, Mr. Black methodically marches Dr. Greenland through each of the *Daubert* factors and attempts to show that to some extent, each factor has been satisfied here. However, it is equally clear that Mr. Black is also employing traditional trial techniques to persuade the judge. He utilizes conventional techniques in both affirmatively presenting the plaintiff's case and negatively attacking the defense case.

##### A. The Plaintiff's Affirmative Case

To begin with, Mr. Black invites the plaintiff's witness, Dr. Greenland, to present a paradigmatic epidemiological argument with a two-by-two table. The table has four boxes or quadrants: one for exposed persons who developed vision problems, a second for exposed persons who did not develop the disease, a third for unexposed persons who contracted blindness, and a final for unexposed persons who did not develop the disease. The table enables Dr. Greenland to compute a relative risk, comparing the proportion of exposed persons who contract the disease with the proportion of unexposed persons who similarly contract the disease.

However, Mr. Black is not content to have the witness advance a technical argument. Rather, even though Mr. Black is presenting this testimony to a judge rather than a jury, he remembers that like jurors, judges are human beings<sup>1</sup> and has Dr. Greenland restate the technical argument in simpler, lay terms.<sup>2</sup> After Dr. Greenland's testimony about the two-by-two table, Mr. Black immediately — and repeatedly — invites Dr. Greenland to state the common sense version of the argument: If: (1) a disease was previously rare; (2) after the

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<sup>1</sup> See generally JAMES R. DEVINE, NON-JURY CASE FILES FOR TRIAL ADVOCACY (1991) (pointing out that most of the advocacy guidelines applicable to jury trials would also apply at the bench proceedings described in this text).

<sup>2</sup> See Andrew E. Greenwald, *In the Beginning – Examples of Winning Opening Statements*, 25 TRIAL 72, 73 (1989); Jerold M. Ladar, *Direct Examination: Tips and Techniques*, 87 CASE & COMMENT 7, 12, 13-14 (1982).

introduction of a drug there is a marked outbreak of the disease; and (3) virtually all the persons experiencing the disease are individuals who were exposed to the drug, there is a permissive inference of general causation. Exposure to that drug can cause that disease. In the words of one of Mr. Black's questions, "There was a rare disease so that you essentially have zero in the not exposed box, but you have [many] instances of the disease occurring in an exposed population."

Mr. Black goes beyond establishing a plausible inference of causation; he also examines the witnesses about the history of Thalidomide to reinforce his point. In essence, Mr. Black utilizes the traditional technique of arguing by analogy.<sup>3</sup> Initially, during his cross-examination of the defense witness, Dr. Toscano, Mr. Black confronts the witness with Dr. Taussig's 1962 *Journal of the American Medical Association* entitled "The Study of German Outbreak of Phocomelia." During the cross-examination, Mr. Black draws striking parallels between the instant case and Thalidomide. In both cases, the disease had previously been rare and there was a sharp spike in the incidence of the disease among persons who ingested the drug. And in both cases, there was neither a formal epidemiologic study nor a clear understanding of the biological mechanism of causation. Yet, in Thalidomide, a scientific consensus quickly emerged that the use of the drug could cause limb defects in children. Mr. Black leveraged the history of Thalidomide to pressure Dr. Toscano to acknowledge that it is sometimes permissible to infer general causation absent both a comprehensive epidemiological study or a theory regarding the mechanism of injury. By covering the history of Thalidomide early in the cross-examination, Mr. Black makes it difficult for Dr. Toscano to dogmatically insist on either formal epidemiological research or a validated theory of mechanism. Mr. Black then powerfully reiterates the argument during Dr. Greenland's later testimony. In response to one of Mr. Black's questions, Dr. Greenland testified: "The evidence became so overwhelming because it was so incredibly rare to see this condition in general, and then suddenly you have an outbreak, many, many cases coming in. And every time you investigate those cases, you find this exposure." During both Dr. Toscano's cross-examination and Dr. Greenland's direct testimony, Mr. Black makes it clear that he appreciates the need to translate technical, scientific arguments into common sense terms to convince lay decision-makers.

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<sup>3</sup> See generally James McElhaney, *Analogies in Final Argument*, 6 LITIG. 37 (1980) (explaining argument by analogy); Craig Spangenberg, *Basic Values and the Techniques of Persuasion*, 3 LITIG. 13 (1977) (describing how to successfully use analogy in argument).

B. *The Negative Attack on the Defense Case*

Just as he resorted to traditional trial advocacy techniques in constructing his own case, Mr. Black turns to conventional arguments in negatively attacking the defense case. One type of argument long recognized in class rhetoric is *reductio ad absurdum*,<sup>4</sup> challenging the validity of a line of argument by pointing out that the argument leads to absurd consequences. In the context of the cross-examination of experts, the attack can take a number of forms — several of which Mr. Black employed during his cross-examination of Dr. Toscano.

One form of the argument is noting that the opponent's argument leads to unpopular or seemingly indefensible conclusions. After Dr. Toscano described his personal standard for assessing the sufficiency of evidence of general causation, Mr. Black's questioning leads Dr. Toscano to testify that judged by that standard, there is insufficient proof that cigarette smoke causes lung cancer — a position that most judges and most jurors would probably find troubling. The message that Mr. Black is conveying to the judge is that the defense witness is an agnostic who employs an unreasonably high standard of proof for general causation. Judge Rosenbaum evidently found Mr. Black's message persuasive. Following Mr. Black's cross-examination, his Honor presses Dr. Toscano into admitting that in all his research, Dr. Toscano has yet to find sufficient evidence of "a potential disease-causing agent that causes some illness."

Another variation of the argument is listing the authorities who have taken a contrary position and whose analysis the expert is at least implicitly rejecting.<sup>5</sup> At one point when Mr. Black is questioning Dr. Toscano about a *Journal of the American Medical Association* article by a Johns Hopkins researcher, with some encouragement from Mr. Black the defense witness makes somewhat dismissive remarks about both the journal and the Johns Hopkins Medical School. Mr. Black realizes full well that that testimony may not sit well with judges or jurors who may have respect for that publication or school. This variation of the argument has more *ad hominem* implications. The suggestion is that the witness is either so arrogant or so biased that he or she will not seriously consider competing views voiced by respected authorities. It would be argumentative for the cross-examiner to accuse the witness of being arrogant or biased, but Mr. Black is careful not to overstep the line. Mr. Black makes his point without succumbing to the temptation to be argumentative.

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<sup>4</sup> ROBERT J. KREYCHE, LOGIC FOR UNDERGRADUATES 232 (rev. ed. 1961).

<sup>5</sup> DAVID COHEN, ADMIT THE ACT AND WIN THE CRIMINAL CASE 238-42 (1970).

## II. THE DEFENSE CASE

### A. *Reliance on Common Sense Arguments*

In one respect, the design of Mr. Smith's defense case of Alpha is very similar to that of the plaintiff's case. Just as Mr. Black adheres to the trial technique of selecting arguments that resonate with common sense, Mr. Smith attempts to construct arguments with common sense appeal.

Two such arguments are illustrative. First, during his cross-examination of the plaintiff's witness, Mr. Smith points out that Alpha, Beta, and Gamma were the subjects of different patents. He next notes that if the drugs received different patents, to some extent they must have differed biologically or chemically. He then forces Dr. Greenland to concede that he, Dr. Greenland, did not know the precise differences among the three drugs. Although Dr. Greenland countered that in his judgment the similarities among the drugs were more important than any differences, Mr. Smith succeeds in planting a doubt whether all three drugs were similarly capable of causing the illness that the plaintiff developed.

Secondly and in a similar vein, Mr. Smith hammers at the small number of subjects in the data set the plaintiff relies on. Early in Dr. Toscano's direct examination, Mr. Smith elicits Dr. Toscano's testimony characterizing the number of subjects as "quite small" or "very small."<sup>6</sup> Later Dr. Toscano elaborates, explaining why the small size of the study is so critical. He testifies that people vary widely in their susceptibility to disease and that a larger, better-designed study could easily have yielded different results. Again and again, at Mr. Smith's urging Dr. Toscano insists that there simply is not "enough data" or information to draw a confident conclusion as to general causation. This line of argument puts Mr. Smith in an excellent position to emphasize the plaintiff's burden of proof in his legal argument.

### B. *Concentrating the Attack on the Achilles Heel of Specific Causation*

In another respect, Mr. Smith also makes use of traditional advocacy techniques. The presentation of a case in court differs fundamentally from a law school examination. Although the student who identifies

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<sup>6</sup> 1 PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, *SCIENTIFIC EVIDENCE* § 15.04[b], at 795 (4th ed. 2007) (stating that courts can bar statistical estimates based on samples when the samples are judged "quantitatively too small").

the most conceivable theories often attains the highest grade on an examination, it is conventional wisdom that in litigation a “shotgun” approach is often ineffective or even counterproductive.<sup>7</sup> By the time the litigator reaches the third “even if” argument, the decision-maker may begin to think that the attorney lacks faith in any of the arguments he or she is advancing.<sup>8</sup> Thus, the traditional view is that the attorney ought to limit the number of arguments he or she presents. By way of example, one of the country’s leading trial advocacy authorities, the late Professor Irving Younger, often said that at most an opponent should mount three attacks during a cross-examination.<sup>9</sup>

A related traditional technique is to identify the weakest link in the opposition’s case and focus the attack there. Find the Achilles heel — the jugular issue<sup>10</sup> — and exploit it. If that weakness is an essential part of the opponent’s case, a frontal assault on that weakness can carry the day.

It is evident that Mr. Smith took these bits of conventional wisdom to heart in sculpting the defense case, especially his attack on specific causation. As his cross-examination of Dr. Greenland progresses, it becomes clear that Mr. Smith has identified specific causation as the Achilles heel of the plaintiff’s case. Mr. Smith aggressively targets specific causation.

His cross-examination on that topic is both dogged and effective. At one point Dr. Greenland testifies that the use of Gamma “could” cause the illness. Listening intently, Mr. Smith picks up on the witness’s use of that verb. He immediately follows up with the question, “If I recall correctly your answer, you said that they could . . . be an effect — but you didn’t say it probably is?”

In another part of the cross-examination, Dr. Greenland makes a somewhat ambiguous assertion in an answer. Once again Mr. Smith insists that the witness clarify his testimony: “And it is might or maybe, not more likely than not. It’s a might or maybe. Is that correct?”

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<sup>7</sup> See David Kendall, *Advocacy: The Need for a Theme*, CHAMPION, June 1998, at 14, available at <http://www.nacdl.org/CHAMPION/ARTICLES/98jun02.htm>.

<sup>8</sup> Steven H. Goldberg, *What Your Opening Statement Should and Shouldn’t Do*, CRIM. JUST., Fall 1987, at 12.

<sup>9</sup> RONALD L. CARLSON & EDWARD J. IMWINKELRIED, DYNAMICS OF TRIAL PRACTICE: PROBLEMS AND MATERIALS § 10.2(F), at 302 (4th ed. 2010).

<sup>10</sup> See Emily Heller, *Focus on the ‘Jugular’ Issue*, NAT’L L.J., June 2, 2003, at S12 (discussing a trial strategy of focusing on the most compelling facts or focusing on the “jugular issue” instead of a “capillary” issue), available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=900005387731>.

Mr. Smith continues to press the attack on recross-examination. After some questioning about specific causation, the recross proceeds:

Q    So would it be fair to say in this case we don't know that in fact the exposure of Alpha to Mr. Schuman actually ended up being in the causal chain in his disease?

A    We don't. But, you are using these terms with certainty. We certainly don't know.

Q    I didn't mean with certainty. More likely than not.

A    Yes, in that case, at some point it becomes too ambiguous for me to say anything.

Mr. Smith intensifies the attack on specific causation by contrasting the data on Alpha and Gamma. Mr. Smith presents Dr. Toscano's testimony that "the data seemed to indicate that Gamma has a much greater adverse effect than Alpha," the drug produced by the defendant. Based on that data, Dr. Toscano inferred that "the Gamma is much more toxic than the Alpha . . . ." Indeed, Dr. Toscano asserts that the available data indicates that Gamma may be six times as toxic as Alpha. Ultimately, Dr. Toscano testified that even positing general causation, it was invalid to infer that the plaintiff's use of Alpha was the specific cause of his illness.

This testimony would certainly put the defense in a strong position to: (1) argue that the plaintiff's specific causation testimony did not satisfy *Daubert*; and (2) then move for summary judgment on the ground that the plaintiff had not presented a legally sufficient case on an essential element of his cause of action.

#### CONCLUSION

The attorneys involved in this demonstration are two of the most experienced, knowledgeable litigators in the United States in dealing with expert testimony. They understand the technical, scientific issues, but they are so court wise that they are not content to couch their arguments in formal, technical terms even at a hearing in the jury's absence. Throughout the hearing, they strive to have their witnesses testify in simpler, lay terms and develop the arguments to appear to be common sense contentions.

The performance of Messrs. Black and Smith in this hearing is not only a testament to the strength and power of the traditional trial techniques utilized during this hearing. Perhaps even more importantly, it should give us increased faith in the ability of legal

decision-makers to evaluate expert testimony. The greatest risk of confusion arises when the attorneys present the testimony in formal, technical terms that may be difficult for legal decision-makers to comprehend. However, as Sir Karl Popper famously remarked, in the final analysis the scientific method is simply “common-sense writ large.”<sup>11</sup> If more litigators follow the example of Messrs. Black and Smith and endeavor to make the common sense basis of scientific inferences clear to the decision-maker, we can have greater faith in the caliber of the ultimate decision.

The caveat is that striving for that ideal requires considerable effort on the part of the litigator. The litigator must spend the time to learn the science deeply and then work diligently with the expert to enable the expert to make the common sense nature of the inference manifest to the decision-maker. The presentations by Messrs. Black and Smith at the demonstration hearing exemplify the required effort. As Alexander Pope cautioned, “A little learning is a dangerous thing. Drink deep, or taste not of the Pierian spring. There shall draughts intoxicate the brain, and drinking largely sobers us again.”<sup>12</sup>

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<sup>11</sup> KARL POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* 22 (1959). Thomas Huxley voiced the same notion when he wrote that science is “organized common sense . . .” Thomas Huxley, *Science Is Organized Common Sense*, BRAINY QUOTES, <http://www.brainyquote.com/quotes/quotes/t/thomashuxl102235.html> (last visited Nov. 18, 2012).

<sup>12</sup> ALEXANDER POPE, *AN ESSAY ON CRITICISM*, pt. II, 11, 215-18 (1711), available at <https://tspace.library.utoronto.ca/html/1807/4350/poem1635.html>.