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SCIENTIFIC EVIDENCE – FROM A "DEFERENT" TO A "NOVICE" JUDGE: Comments on *Lorenzo Zoppellari's* paper entitled *"The acquisition of scientific evidence between Frye and Duabert. From ad hominem arguments to cross-examination among experts"*

I.

In this very interesting paper, the author deals with the relation between law and science or, more specifically, about the role of scientific evidence in courts. He discusses the problem of that relation by primarily considering two issues. First, he looks at the general attitude of judges towards such evidence and, secondly, the argumentative strategies followed by parties to a dispute when they are confronted with expert testimony based on scientific evidence and which favors the opposing party.

The author describes the evolution of judges' attitudes towards scientific evidence through two American cases, the 1923 *Frye* and the 1993 *Daubert* rulings. It transpires that, in the first part of 20th century, judges tended to act in a subordinated, "passive" way with respect to expert knowledge in the sense of deferring to the official (i.e. "neutral" or "universally" valid) knowledge of the scientific community. It is perhaps no wonder that, in a world apparently ruled by "objective" science, judges never questioned scientific theories, but were more or less alert to *ad hominem* arguments if the parties attacked the reliability of the expert.

The author highlights an epistemic change after WW2, especially from the 1960's onwards, where the objectivity of scientific theories began to be questioned. This period saw the questioning of human rationality as such (Horkeimer, 1947), the scientific paradigm shifted (Kuhn, 1962), and the objectivity of science turned to be based on falsification theory (Popper, 1959). The official authorities in society, including scientists and experts, were no longer taken

for granted. *Ubi societas ibi ius* and, accordingly, all these social changes were reflected in the modern social role of law and courts. The law has increasingly assumed a social role that had been once left to other social systems of value, such as religion, morality, tradition, customs, but also science. The crises of various parallel social norms, as well as scientific norms, was reflected in courts which became the last resort for resolving all sorts of social disputes. This seems to be an important reason why judges, through various procedural rules, were pushed into the position of being more active concerning expert testimonies. Even so, judges cannot replace requisite scientific knowledge with respect to scientific evidence.

Consequently, the *Daubert* judgement, which merely reflects the *Zeitgeist*, saw judges being forced to become "gatekeepers" by evaluating scientific theories. This is not what judges themselves would want, but what they necessarily do since they must come to a decision that is not only lawful but also legitimate and by following the proper procedural steps (Luhmann, 1969). These procedural steps not only allow parties, but sometimes even judges in inquisitorial criminal systems, to propose that certain scientific evidence be considered and which they freely evaluate at the end.

II.

Regarding my comments on the paper itself, I would begin from its very last idea that the examination and cross-examination of experts could even be improved by "allowing experts to examine each other", which is otherwise prohibited by the Italian and American legal systems. As a matter of fact, the idea seems to be interesting as it would definitely improve the epistemic value of scientific evidence, making judges' decisions easier and better, and benefiting parties to disputes and society in general. In fact, this is the case in Slovenia where, according to Art. 334.1 of the Criminal Procedure Act, also "[t]he injured party, legal representative, attorney

and expert may put direct questions to witnesses and experts subject to approval from the presiding judge." This is pursuant of the principle of material truth, according to Art. 17 of that Act, providing that "[t]he court and state bodies participating in criminal procedure shall establish completely and according to the truth the facts relevant for passing a lawful decision." If this is allowed in the criminal procedures of a more inquisitorial framework, it is not the case in civil proceedings with a more adversarial framework.

However, I understand the procedural reservation with respect to experts examining other experts, since the courtroom should not be an offshoot of a university or academy (i.e. scientific community) where different theories are debated. What is typical for such is a certain kind of procedural discipline. If such reservation does not seem to be justified from an epistemic point of view, it seems to be from a dialectical argumentative aspect. Dialectically speaking, in adversarial proceedings we have two parties (a protagonist and an antagonist) who confront their positions with the goal of winning the case. For that reason, they often resort to eristic techniques and try to find experts who would support their position. If such experts are allowed to examine other experts, there is a risk that they would jeopardize the epistemic value of their testimony by subordinating it to its argumentative value. In inquisitorial criminal proceedings, the judge might choose to nominate his or her own expert who does not have an eristic imperative on his or her shoulders. Only in this sense, and thus one which is tailored quite narrowly, could I envisage experts examining other experts following the presiding judge's approval.

There could also be another point, apart from the idea that experts should participate in cross-examination. Given the modern loss of scientific "objectivity" and the transfer of university debates to courtrooms, the epistemic frustration of judges might be alleviated by other manners. Judges could find some degree of consolation in various standards of proof: e. g., if scientific evidence is not clear, or there are different views with none prevailing, in criminal proceedings

the standard of beyond reasonable doubt could be used, while in civil proceedings the standard of the preponderance of evidence might be employed, etc. Moreover, in the criminal context, there are a number of principles, such as presumption of innocence, *in dubio pro reo*, etc., which can help the judge with the said epistemic frustration.

Finally, I have a few suggestions as to how the text's coherence might be improved. First, the author did not want to bother the reader with the facts and specific argumentation strategies in the two cases discussed, *Frye* and *Daubert*. However, in order to follow the line of argumentation closely, it would benefit from at least a short summary of what the case was about, which scientific evidence was employed, what were the specific argumentation strategies of the parties to the cases (with respect to *ad hominem* attacks and cross-examination of the experts), and how the judges reacted and eventually decided the case. I do not want to convey the impression that the theoretical analysis of the two approaches is not important or interesting in itself, but it loses the requisite practical exactness without some kind of factual background.

Second, since Douglas Walton is mentioned with respect to the *ad hominem* argument used to attack the experts in the old *Frye* framework, it might be useful to add Saunders' views that, although *ad hominem* arguments are generally fallacious, they are not such in the context of law. He believes that they can be used here,[1] as in the *Frye* case, to attack the credibility of an expert. Whilst mentioning Walton, it would also be useful to discuss his argument from expert opinion (Walton, Reed, Macagno, 2008: 310), where what is particularly interesting are his critical questions relating to expertise, field, opinion, trustworthiness, consistency, and back evidence. In this respect, one might be able to determine the kind of evolution that has occurred from *Frye to Daubert*, and, perhaps, any additional critical questions that could be posed.

[1] "… considerations that are irrelevant and perhaps even misleading in areas of purely rational discourse, such a philosophy, may be relevant and enlightening in law. With its mixture of rational debate of legal issues, inquiry into factual issues, and concern with demands of justice, law may tolerate a wider variety of arguments." (Saunders, 1993: 345).

Last, but not least, the author might also like to add a rhetorical point. Whilst Goldman's *expert/novice* metaphor is said to apply to *Duabert*, this epistemic relationship between the judge and the expert could be juxtaposed with the situation in *Frye*, where another metaphor can be discerned. Perhaps this could be framed as the expert and the lay person? By introducing the rhetorical figure of *antitheses* (Garner, 2002: 160), I believe that the contrast between the two metaphors would make the first even stronger and more persuasive.

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