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THE BLUE BUS STOP: ON PROFESSORS' STORIES AND THE STORIES PLAINTIFFS TELL

*James Brook**

A COMMENT ON PAUL BERGMAN AND AL MOORE'S "MISTRIAL BY LIKELIHOOD RATIO: BAYESIAN ANALYSIS MEETS THE F-WORD"

In their paper, Professors Bergman and Moore—styling themselves reverends of a sort—remind us that it was the Reverend Bayes who got the whole “Bayesian” controversy going with a presentation to the Royal Society of London more than 200 years ago.¹ During the eighteenth century, European intellectual life and innovation were less likely to be found in the established universities, which were going through a period of stagnation, than in the various national and provincial academies of science like the Royal Society, which were a particular feature of the period now known as the Enlightenment.² In France, for example, apart from the preeminent French Academy of Sciences, there were something like thirty-one lesser versions of the academies scattered throughout the provinces.³ A principal function of these groups was the sponsoring of essay contests. Thus, in 1744 the Montauban Academy called for papers on “The Vanity of science without religion.”⁴ It strikes me that with a little tinkering, that title would serve well for what we are doing here today.

I do feel somewhat that, having been asked to participate in this conference and having been in attendance at the 1986 Boston University symposium on evidence,⁵ I am becoming part of an academy in this mold, now not merely provincial or even “Royal,” but international if not yet intergalactic. I also have the feeling that, if there is one thing that holds this august group together, it may be that so

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¹ Bergman & Moore, *Mistrial by Likelihood Ratio: Bayesian Analysis Meets the F-Word*, 13 CARDOZO L. REV. 589, 589 (1991).

² What little I say about the Enlightenment is taken from I. WOLOCH, *EIGHTEENTH-CENTURY EUROPE: TRADITION AND PROGRESS, 1715-1789* (1982).

³ *Id.* at 204.

⁴ *Id.* at 205.

⁵ The numerous papers from that conference have been recorded for all time in *Symposium on Probability and Inference in the Law of Evidence*, 66 B.U.L. REV. 377 (1986).

many of its members have at one point or another offered up an essay (or two or more) on what has come to be known as the "blue bus hypothetical." I assume everybody here knows what I am talking about. I have taken a whack at it in print myself,⁶ as have a statistically significant number of people here. Bergman and Moore give us the "blue cab" variant, but it amounts to the same thing.⁷ What better rite of passage, or should I say initiation stunt, than to make known one's position on this hypothetical story?

Before I proceed, I should make clear something about my own position. As it turns out, in most countries the central academies of the eighteenth century were fairly elite institutions. At least this was true in France, where initially membership was primarily reserved for the nobility.⁸ Eventually the membership base was broadened to include some people from the bourgeoisie or middle class. Most often, however, these non-noble types would be so-called "corresponding" members from the hinterlands.⁹ I clearly am such a corresponding member of this very elite evidentiary gathering. I do not teach evidence, nor am I a scholar in the field. My work is more the day-to-day, decidedly middle-class effort of teaching at least something about basic, noncontroversial probability and statistics to the current generation of law students, so that the next generation of practicing lawyers will not be as hopelessly ill informed about such things as is the present generation.¹⁰ As an interested individual from the hinterlands, however, I hope I can offer some insight into how this particular controversy—and the whole terrain of the "New Evidence Scholarship"—looks from a distance.

First, I reveal my own biases. Do I believe in statistical evidence? Do I believe in what has come to be called naked statistical evidence, and even what is now termed " 'justifiably' naked statistical evidence?"¹¹ The answer, I must declare, is yes. But it's a particular kind of yes, rather like that given by another towering figure of the

⁶ Brook, *The Use of Statistical Evidence of Identification in Civil Litigation: Well-Worn Hypotheticals, Real Cases, and Controversy*, 29 ST. LOUIS U.L.J. 293, 298-99 (1985).

⁷ Bergman & Moore, *supra* note 1, at 599. As will become clear from what follows, I am beginning to think that the most interesting thing about the hypothetical might be trying to figure out why some people concentrate on buses and others on cabs.

⁸ In my oral presentation, I inadvertently gave the impression that domination of academies by the nobility was always so. Jonathan Cohen quickly took me to task for failing to note that this was not true of the Royal Society of London. I thank him for this correction, and I thank the Royal Society for this attitude, even if it would not have made much difference to my ancestors, who were nowhere near London (and I would guess nowhere near any center of intellectual life) at the time.

⁹ I. WOLOCH, *supra* note 2, at 206.

¹⁰ See J. BROOK, *A LAWYER'S GUIDE TO PROBABILITY AND STATISTICS* (1990).

¹¹ These terms go back at least to Kaye, *The Limits of the Preponderance of the Evidence*

eighteenth century, Dr. Samuel Johnson, in a story I once heard.¹² The great man was supposedly asked, "Sir, do you believe in infant baptism?" "Yes," he responded, "I've seen it with my own eyes." It is in this fashion that I believe in statistical evidence. I've seen it with my own eyes. I certainly believe in Bayes' Theorem. I've seen it—over and over again—in the legal literature of the last few decades. For some, like Bergman and Moore, familiarity has obviously bred contempt. For me, the feeling is getting to be a good deal more like ennui.

In fact, my main reaction to the Bergman and Moore work is just that: that I have seen it all before. Frankly, I don't see anything especially new in their discussion here. They don't really make a claim of originality; their hope is obviously to drive the last nail into what they are sure is the well-deserved coffin of the whole Bayesian enterprise. To someone like me, it seems more like they are beating a dead horse, but not a horse on which the Reverend Bayes is riding. Their belief in "believability judgments"¹³ has been trotted out before but is nowhere made any more available to someone who is not exactly of the same mind.¹⁴ Professors Bergman and Moore insist that jurors make determinations based not on probability assessments, but on their beliefs as to "what really happened" and what really happened "in *this particular case*."¹⁵ Their contentions are made no more compelling—to one not predisposed to agreement—by the mere use of italics.

If there is something new going on in the Bergman and Moore effort, it is what I might call the new story line, their objections being imbedded in an insistence that attention be paid to the narrative aspects of legal controversies. This is all very much in keeping with the fashion of the times. "Narrative" is very big in legal academics these days, and so in answer I will try to enter into this spirit. Let me proceed by telling you two stories. Or rather one story and then a story about that story.

The first story is that told by a Joyce Kaminsky, who was a central figure in the case of *Kaminsky v. Hertz Corp.*,¹⁶ decided by the Michigan Court of Appeals in 1979. It is possible that many here

Standard: Justifiably Naked Statistical Evidence and Multiple Causation, 1982 AM. B. FOUND. RES. J. 487, 489.

¹² I know I've heard this story somewhere. Others tell me they've heard it too. Up to this point, I have not been able to verify its truth, or even that it is, as I believe it to be, a "classic" story whether true or not. It is a story I like, so I will repeat it.

¹³ Bergman & Moore, *supra* note 1, at 593.

¹⁴ See my discussion in Brook, *Inevitable Errors: The Preponderance of the Evidence Standard in Civil Litigation*, 18 TULSA L.J. 79, 89-96 (1982).

¹⁵ Bergman & Moore, *supra* note 1, at 609.

¹⁶ 94 Mich. App. 356, 288 N.W.2d 426 (1979).

have never heard of the *Kaminsky* case, but that—in conjunction with the fact that we all know the blue bus hypothetical backwards and forwards—will only go to prove my point. Here is Joyce Kaminsky's story. She and five others were riding in a Volkswagen south on Highway M-52 in Saginaw County, Michigan. The windshield of her car was struck by a large sheet of ice which flew off the top of a passing truck. The truck, all agree, was yellow. It bore the distinctive Hertz company logo. The car's windshield was shattered. Kaminsky was the most seriously injured of the passengers, losing her right eye and suffering serious facial lacerations.¹⁷

Along with the other passengers, she brought an action against the Hertz Corporation, charging negligence, nuisance, and products liability. It turned out, and it was stipulated at trial, that a truck identified only by its yellow color and the Hertz logo would not necessarily be one owned by Hertz, or one for which it would otherwise be responsible. Hertz owned approximately ninety percent of such vehicles. The other ten percent were owned by licensees or franchisees or were vehicles sold without removal of the Hertz logo and colors. Presented only with these facts, the trial court granted summary judgment to the defendant corporation, concluding in the words of the appellate court that "a jury could not find ownership in Hertz Corporation and that any verdict for plaintiffs would be based on guess and conjecture."¹⁸ All in all a pretty poor result for the probabilist camp, we would have to say. And, more to the point, a very poor result from Kaminsky's point of view.

But all is not and was not lost. On appeal, the Michigan Court of Appeals reversed. "In a civil case," the court opined, "the quantum of proof required as [*sic*] a 'preponderance of the evidence'. It cannot be said that the preponderance of the evidence showed non-ownership of the truck by Hertz, when the facts stipulated showed 90 percent of the vehicles bearing the Hertz logo are owned by Hertz."¹⁹ Summary judgment for the defendant could not stand.

We find instead that the Hertz color scheme and logo establish a prima facie showing of ownership or control sufficient to prevent a summary judgment. . . . That responsibility, of course, is not absolute. The named firm may introduce evidence indicating lack of control or ownership. But such explanations are for the jury to evaluate and appraise in light of all the surrounding circumstances.²⁰

¹⁷ *Id.* at 358, 288 N.W.2d at 427.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 359, 288 N.W.2d at 427.

The rest of the opinion is remarkably uninteresting. It does not quote or cite a single academic article, and the court does not seem aware that it is deciding on one of the great intellectual issues of our time.

Whether the court of appeals was "right" is, for my present point, not really the issue. I must say, however, that in my experience, most people to whom the story of this case has been told have no problem with the ultimate result. Professors Bergman and Moore apparently have no quarrel with it, even if they see it as only one of the "rare occasions" where base rate frequency evidence will carry the day.²¹ What is striking to me is how easily this case sits alongside the repeated comments of earlier evidence scholars and the new anti-probabilists, who maintain that, when faced with such evidence as that introduced by the blue bus plaintiff, "a court would not" hold the defendant liable, or even allow the case to survive a summary judgment.²² In an earlier work, I reviewed the cases usually relied on to support such a descriptive claim about what the courts were not willing to do, and I demonstrated, at least to my own satisfaction, that the cases proved no such thing.²³ My only regret now is that I myself buried in a footnote²⁴ the one case—*Kaminsky*—which, at the time, squarely confronted the naked statistical evidence conundrum.

In that earlier work I tentatively suggested that one reason the blue bus hypothetical and the *Kaminsky* case seem to engender such different feelings in the same listener may be the most obvious.²⁵ The blue bus hypothetical is just that, a hypothetical. The case before the Michigan court was real. It involved a plaintiff of actual flesh and blood and an actual injury to that flesh and actual loss of blood. In all the instances where I have discussed the blue bus hypothetical with students and other professors, no one has ever asked me how Mrs. Smith, the usual name for the hypothetical plaintiff, was affected by the incident. There seems to be an enormous concern that the defendant—a bus company after all, not usually a particularly sympathetic party—*might* have to pay for damage it did not actually cause *in this case*. Lost somehow in the shuffle, or in the hypothetical, is the possi-

²¹ Bergman & Moore, *supra* note 1, at 593 n.21. Has anyone ever suggested that the blue bus hypothetical situation, or that "justifiably naked statistical evidence," is the kind of thing that happens all the time? But then again, what of the large number of women affected by the outcome of DES litigation? See Brook, *supra* note 6, at 305-08, 340-51.

²² See the various authorities cited in Brook, *supra* note 6, at 299 n.21. More recently, this line of thinking has found a home in the work of Charles Nesson. See Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1378 (1985).

²³ Brook, *supra* note 6, at 299-305.

²⁴ *Id.* at 305 n.55.

²⁵ *Id.* at 351-52.

bility that Mrs. Smith might never receive any compensation from a company that *might very well* have caused her injuries *in this case*. It is more difficult to put Kaminsky's plight out of our minds so easily. If there is a story that needs to be heard in the "trial by mathematics" debate, it is hers as much as anyone's.

Now for my second story. As I initially promised, it is a story about the Kaminsky story, and it also happens to be one in which I played a central role. Unfortunately, it's a story that at one point relies upon hearsay about hearsay, but as Professor Richard Friedman is the one passing on the hearsay, there could not be a better source. The *Kaminsky* case first came into the academic literature in a footnote to a 1982 article by David Kaye.²⁶ As I've said, I noted the case in an article of mine in 1985. Later, in 1986, I attended the Boston University conference which was the last formal meeting of this academy. There I met Richard Friedman for the first time. At one point, after the blue bus hypothetical had been invoked for something like the tenth time, I mentioned to him that in fact there *was* an actual case pretty much on point. And, contrary to what was being said, the court *did* allow a case on such statistical evidence to go forward. By later that afternoon, Professor Friedman had located the case in the Boston University law library. He brought it to the conference meeting room. As I remember the story that he then told me,²⁷ he took the case up to the speakers' platform where yet one more anti-probabilist was about to deliver a paper containing that party's line: that such a case could not, would not, exist. He showed the *Kaminsky* case to the speaker. If the hearsay upon hearsay is to be believed, she responded with something to the effect of, "Why didn't they tell me?" Well, at least none of you can use that line again. I'm telling you here and I'm telling you now. Do with the *Kaminsky* case what you will, but at least admit that it's out there.

This is of course only anecdotal evidence, and being a corresponding member of the "mathematicists" camp I thought it would be helpful if I could bring to you some hard research data. A few days ago I took some time to do a Lexis search through the "Allrev" library. This, as you know, is a data base of many of the recently

²⁶ See Kaye, *supra* note 11, at 487-88 n.4. After delivering this comment, I was able to find out from Professor Kaye that he had first been put on to the case by a letter from Professor Richard Lempert. At least this traces the case back to Michigan.

²⁷ Professor Friedman tells me that he does not remember exactly what follows, but then he does not doubt it. If anything, he remarks that it serves as good evidence that the auditor of a statement may well remember it long after the speaker has forgotten. In any event, this is a good story and I have told it often enough that it qualifies as some kind of traditional narrative.

published law reviews.²⁸ I first searched for law review articles referencing "KAMINSKY W/2 HERTZ." I found seven items, three articles from the Boston University Law Review evidence symposium issues and four other articles of a like vein. I then searched the same files for references to "BLUE BUS OR BLUE CAB OR BLUE TAXI." Of the thirty-five items recovered, two had to be discarded. These two articles actually cited real cases (having nothing to do with the law of evidence or the topic under study) against a real company called the Blue Cab Company. That left thirty-three articles which made some references to the blue bus hypothetical or a functional equivalent.

I think I am onto something here. This tentative effort, in a field I am about to identify as "hypothometrics," yielded a ratio of fictional hypothetical to real-life case—a fantasy-to-reality ratio—of 33/7 or a healthy 4.714 to 1! Congratulations to all the participants.

Admittedly, hypothometrics is a new field, and I would not want to be taken as making too much of a claim based on this one preliminary analysis. Still, the result is striking. *Kaminsky* may not be the most important case in the area or the final word in the courts on the subject. It is, after all, just one case. But then the blue bus hypothetical is just one hypothetical. And as far as the case is concerned we can at least identify one real live person to whom its outcome is more than a matter of academic interest. The new batch of New Evidence Scholars may indeed be moving into a profitable arena with their attention to narrative. To one viewing all this from a distance, however, there is reason to be concerned about how interested they are in real stories—not the stories the scholars tell each other, but the stories of real life. It would be a shame if legal scholarship turned a deaf ear to the stories that clients relate so very well.

²⁸ The research was conducted on the morning of Friday, March 22, 1991 on the PC clone in my office at New York Law School. I would like to thank Mead Data Central, Inc. for its generously allowing access to its files, making this work possible.

