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Legal Arguments about Plausible Facts and Their Strategic Presentation

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ABSTRACT: Arguments from plausibility, in which an appeal is made to customary behavior, are often used in the legal practice. For example: Joran van derSloot must have murdered Natalee Holloway, otherwise he would have called an ambulance when she looked dead. As in the example, such arguments are often presented with an explicit appeal to an inference license that gives the argument a *modus tollens* structure [if he had not murdered her...]. I will address the question what motivates such a presentation.

KEYWORDS: abductive argument, argument from plausibility, causal argumentation, *eikos*-argument, presentation mode, presentation effect, strategic maneuvering, symptomatic argumentation

1. INTRODUCTION

One of the requirements for the application of a legal rule is that the specific facts that the litigants appeal to have to be justified. However, it may be problematic to do so, since these facts often happened in the past and cannot be proven on the basis of direct evidence. As a consequence, the parties in a legal procedure have to resort to arguing the likelihood or, for that matter, the unlikelihood, of how things may have gone. As early as in classical Greece, writers of rhetorical manuals have described an argumentative technique that is of help in those situations, which they called *eikos*. With this technique an appeal is made to 'imaginable behaviour,' that is behaviour of which one can imagine that people display it when they are in a certain situation. For example: 'It is likely that person X committed the crime, because he was in a situation that people do these kind of things.' According to the classical handbook called *Rhetoric to Alexander* (1428 a 25 ff.), in an *eikos* argument three kinds of situations can be referred to in order to explain the imaginable behaviour: (1) the suspect's emotions, (2) his habits, or (3) the profit that he would gain from the act.

In the modern literature not much attention has been paid to this kind of argument, except for Walton, who calls it an 'eikotic argument' or 'argument from plausibility' (Walton 2002, pp. 17, 135), which latter terminology I will adopt in this paper. A reason for this lack of attention may be that these arguments are not warranted by a specific kind

of inference license that can be an addition to existing classifications of argumentation schemes, for example the pragma-dialectical division in causal, symptomatic and analogical argumentation schemes (van Eemeren, Grootendorst & Snoeck Henkemans 2002, p. 95 ff.). The inference license in an argument from plausibility seems to be either of the causal or of the symptomatic type. According to Braet (2007, p. 73), in such an argument 'a plausible causal or symptomatic generalization about human behaviour' [my translation] is made. For that matter, elsewhere Braet (2004) only speaks of a causal generalisation, whereas Walton (2002) connects plausibility argumentation with the argument from sign (for instance pp. 107, 119, 326).

Surely, we may not take the fact that arguments from plausibility are largely ignored in modern argumentation theory to imply that they are not in use anymore. The opposite is true, as can be deduced from Nivelle's (2008) corpus of legal counterfactuals and a collection of examples that I have been building up myself. A modern example is one expressed by Natalee Holloway's father, when he was asked to comment on the tapes presented by the Dutch crime journalist Peter R. de Vries:

> *(1) Joran van der Sloot must have murdered Natalee Holloway, otherwise he would have called an ambulance when she looked dead.*

Like many arguments from plausibility, this one is presented with an explicit premise that gives the argument a *modus tollens* structure: *Y* (he must have murdered her)*, because if – Y* (otherwise: if he had not) *then X* (he would have called an ambulance)*, and –X* (implicit premise: he did not call an ambulance), which is the same as: *–P, because if P then Q, and –Q*. In contrast, Natalee's father could have chosen to present the argument in another way, such as:

> *(2) Joran van der Sloot must have murdered Natalee Holloway, because he did not call an ambulance when she looked dead.*

In this presentation no appeal is made to an explicit inference license. If we want to characterize this presentation mode, it would rather be something like "making an explicit appeal to (Toulmin's) data."

In this paper the question will be addressed why an arguer would choose one way of presenting the argument from plausibility instead of another. I will call the way of presenting the argument the "presentation mode."(For the background of this question see Jansen 2007a). I take it that rhetorical effectiveness is one of the considerations that play a role with regard to this choice. Therefore I will address this question from the pragma-dialectical framework of strategic manoeuvring (van Eemeren & Houtlosser 2002), where this question concerns the presentational aspects of single argumentation in the argumentation stage of a critical discussion. The rhetorical aim of the protagonist in this stage of the discussion is to have his argumentation accepted. The assumption is that he can use presentational means in order to obtain this result.

The method I have used for the research consists in (1) studying regularities among examples within one presentational class and in (2) reformulating examples of one presentation mode using another mode, in order to see whether this has consequences for the line of reasoning. For this purpose I made use of Nivelle's corpus and my own

collection of examples—both collections containing instances of plausibility argumentation presented with an explicit inference license that gives the argument a *modus tollens* structure. I will show that with regard to the argument from plausibility the presentation that is likely to be more convincing is the one that suggests it to be a causal argument instead of a symptomatic one. Preliminary to the discussion of this issue I will provide a short overview of presentation modes and their characteristics, where I will also picture preceding research on the presentation of single argumentation that I have carried out.

2. PRESENTATION MODES

In the introduction two presentation modes of single argumentation have been briefly discussed: the presentation with an explicit inference license that gives the argument a *modus tollens* structure and a presentation in which the explicit premise consists in what Toulmin calls the data. The latter can actually be reconstructed as an argument with the formal structure of *modus ponens*. After all, the implicit argument that is to be reconstructed in such cases consists of an 'if [data], then [standpoint]'-sentence (van Eemeren, Grootendorst & Snoeck Henkemans 2002, p. 57 ff.). The reconstructed argument then reads:

> *(2)* *Joran van der Sloot must have murdered Natalee Holloway* (Y)*, because*
> *he did not call an ambulance when she looked dead* (–X)*, and*
> *(if he did not call an ambulance when she looked dead, he must have*
> *murdered her;* if –X, then Y*).*
> (Y, because –X, and if –X, then Y = Q, because P, and if P then Q)

Of course, the same argument can be reformulated with a presentation mode that has an explicit inference license and implicit data:

> *(3)* *Joran van der Sloot must have murdered Natalee Holloway* (Y)*, because*
> *for if he did not call an ambulance when she looked dead, that is the most*
> *likely option* (if –X, then Y)*, and*
> *(he did not call an ambulance* (–X)*.*
> (Y, because if –X, then Y, and –X = Q, because if P then Q, and P)

This presentation mode still conveys the *modus ponens* structure.

The focus of this paper will be a comparison of the *modus tollens* presentation, as it is discussed in the introduction under example (1), versus the two presentation modes conveying a *modus ponens* structure, discussed above as (2) and (3).[1] The differences between these three presentation modes boil down to: (a) whether the data or the inference license remains explicit, (b) whether the inference license contains a subjunctive mood (in the *modus tollens* presentation) or an indicative one (*modus*

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[1] Of course I am aware of the fact that presentation is a much broader concept, which can also include a presentation in which the standpoint remains implicit, or can extend to the specific stylistics of the standpoint and the explicit premise, such as contraction of the antecedent ("otherwise" or "then").

ponens)[2], and (c) in which order the information is presented in the inference license and whether or not the elements contain a negation. Difference (c) is caused by the fact that an inference license that gives an argument a *modus tollens* structure is the contrapositive of an inference license that gives it a *modus ponens* structure. Therefore their variables change places (being antecedent or consequent) and are each other's negation:

Inference license in *modus ponens*	= inference license in *modus tollens*
Y, because X, and *if X then Y*	Y, because *if –Y then –X*, and X
Y, because –X, and *if –X then Y*	Y, because *if –Y then X*, and –X
–Y, because X, and *if X then –Y*	–Y, because *if Y then –X*, and X
–Y, because –X, and *if –X then –Y*	–Y, because *if Y then X*, and –X

As for the presumed rhetorical effects of the characteristics of each mode, I have argued elsewhere (Jansen 2007c) that a subjunctive mood seems to do a better job in suggesting that the inference license belongs to common starting points. I have also argued that each mode has different effects with regard to the kind of argumentation scheme that is used in the argument. I hypothesised about these effects in the case of symptomatic argumentation based on a counterexample (Jansen 2007c) and analogical argumentation (Jansen 2007b, 2008). In this paper I will focus on the argumentation scheme as well, but now with regard to plausibility argumentation. I will show that the nature of the argumentation scheme expressed in an argument from plausibility seems to change along with a change in the argument structure from the one logical type to the other. This makes the third presentational difference, (c), between the three presentation modes sketched above, the central issue of this paper. However, concerning this third difference I only focus on the order of information presented in the inference license. The influence of negations is subject to further study.

3. CAUSAL OR SYMPTOMATIC ARGUMENTATION?

The different order of the information presented in the antecedent and the consequent of the inference license in either the presentation modes with a *modus ponens* structure or the mode with a *modus tollens* structure has an important presentational effect. This effect was found after rewriting instances of the presentation mode with a *modus tollens* structure (taken from Nivelle's corpus and my own collection of examples) using the presentation mode with a *modus ponens* structure. It has turned out that whereas the presentation mode with a *modus tollens* structure gives an argument an air of causality, the presentation modes of *modus ponens* convey the impression of a symptomatic argument.

The reason for a seemingly changing argumentation scheme has to do with a time difference between the state of affairs expressed in the antecedent and the one expressed in the consequent (see also Jansen, Dingemanse & Persoon forthcoming). In the presentation mode with a *modus tollens* structure the order of information presented in the inference license goes from earlier situation to later situation. The antecedent contains

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[2] A corpus study carried out by van Wijk (2008) shows that as for the *modus tollens* presentation an indicative mood used in both the antecedent and the consequent of the inference license only occurs in arguments based on a comparison.

a state of affairs that precedes—not only in the inference license but also in reality—the one that is referred to in the consequent. This temporal difference—how tiny it may be—evokes the suggestion of causality, because it conveys the impression that the later event is caused by the earlier event. Illustrative is *If Joran van der Sloot had not murdered Natalee Holloway, he would have called an ambulance when she looked dead*. The argument suggests that if you are not guilty of a girl getting sick on the beach where you are alone with her, then the usual emotion would be to wanting the other person to get better. Customary behaviour in such a situation would be to calling an ambulance. The emotion is thus supposed to cause the action.[3]

When arguments of the *modus tollens* presentation mode are reformulated as arguments with an inference license that makes them arguments with a *modus ponens* structure, the order of information presented in the antecedent and the consequent is reversed. As a consequence, this order goes from later event to earlier event, which gives the inference license an abductive structure, by which the cause is presented as having been deduced from the effect. When the argument about Joran van der Sloot is reformulated as an argument with the presentation mode with explicit data, it has an inference license with such an abductive structure. The standpoint expresses the cause (C),*Joran van der Sloot must have murdered Natalee Holloway*, and the explicit premise the (negated) effect, *because he did not call an ambulance when she looked dead* (–E). If we reconstruct the implicit premise that underlies this argument according to the 'if [data], then [standpoint]'-structure, it gets an order from effect to cause:

> *(4) If Joran van der Sloot did not call an ambulance when Natalee Holloway looked dead, he must have murdered her.* (–E>C)

An inference that goes from effect to cause is abductive in the sense that it explains afterwards (on the basis of the effect) how things might have gone (what probably has been the cause of the effect) (Walton 2002, p. 42 ff.).[4] Since an abductive structure is non-iconic with regard to real-word-causality, it lacks the causal framework that is forced upon the reader or listener if this structure were iconic indeed (i.e. following the causal order in the real world). Therefore it rather gives the impression that the argument conveys a symptomatic relationship (see Walton 2002, p. 43, who calls an abductive argument an argument from sign). The situation referred to in the data is presented just as a sign, a symptom, an indication of the one presented in the standpoint. Such a presentation leaves open the possibility that the sign can be explained in another way or that other signs may warrant an opposite conclusion. An inference license that suggests causality is stronger,because it presents the situation that precedes the litigated action or lack of action as its cause.

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[3] With regard to the cause-effect presentation all the combinations with affirmed or negated causes and effects can occur (as I found both in Nivelle's corpus and in my own collection of examples). That is: causes can be present and absent and effects can be present and absent: *+cause > +effect*, but also *+cause > –effect, –cause > +effect and –cause > –effect*.

[4] Note that I do not use 'abduction' in a logical sense, in which it refers to the reasoning structure *If P, then Q, Q, so P*. In pragma-dialectics, arguments with an implicit premise, as they most often occur in natural language (*P, because Q*), are analyzed as logically valid arguments. Therefore the implicit premise gets the order that makes the argument valid: *If Q, then P*.

I do not claim here that when presented in the presentation mode with a *modus tollens* structure the examples are fundamentally causal arguments and that when they are presented with an inference license in *modus ponens* they are fundamentally symptomatic. Such an issue may often be hard to decide anyway, except for clear cut cases, such as a frozen pool resulting from a minus zero temperature. In other cases speakers and hearers may very well differ in their perceptions of causal relations in reality. This seems to hold specifically for the three grounds on which arguments from plausibility can be based. After all, it can rightly be questioned whether emotions, habits and profit really cause certain behaviour, since there is always human ratio that interferes. Obviously not everyone with a motive (profit) for committing a crime does really commit that crime.

What I find interesting with regard to the issue of the argumentation schemes expressed in arguments from plausibility is that the presentation mode in which they are expressed influences their perception. First, this finding explains why Braet and Walton are not very sure and/or disagree with regard to classifying the argument from plausibility (as causal or symptomatic). Second, this finding may explain on the basis of which rhetorical motives a certain presentation mode has been chosen in a certain case. Given that a causal structure is more compelling than a symptomatic one, I am inclined to think that an arguer who manoeuvres strategically has to choose the presentation mode in which the inference license conveys the impression of causality. Only in clear-cut cases of apparent causality the presentation mode of the argument is of no importance, but those are not under discussion here.

4. THE ROLE OF THE STANDPOINT

Which conclusions can be drawn from the observation that an argument from plausibility seems to be a causal argument when it has the presentation mode with a *modus tollens* structure and a symptomatic argument when they are reformulated as arguments using a presentation mode with a *modus ponens* structure? The observation holds for any instance of plausibility argumentation in Nivelle's corpus (30 items) and for any instance in my own collection of plausibility argumentation (34 items) (all items originally presented with a *modus tollens* structure). But can the findings of this little corpus study be generalized? That is: (a) can it be assumed that arguments from plausibility always convey a causal structure when they are presented with an explicit inference license that gives the argument a *modus tollens* structure? And (b) do these arguments always appear to be of the symptomatic type when they are presented with explicit data?

I start with question (b), since it can easily be pointed out that the answer is negative. Consider the following argument:

> *(5) Charles must have committed the murder* (E)*, because he had a motive* (C)*.*

The implicit premise of this argument must be reconstructed as: 'Having a motive can make one commit a murder,' which exhibits a causal 'if C, then E'-structure. So, obviously, arguments presented with a *modus ponens* structure do not necessarily rest on an inference license that has an abductive structure and therefore seems to be of a

symptomatic nature. In order to obtain this answer, we only had to think of an example with a standpoint expressing the later event and the data the earlier one.
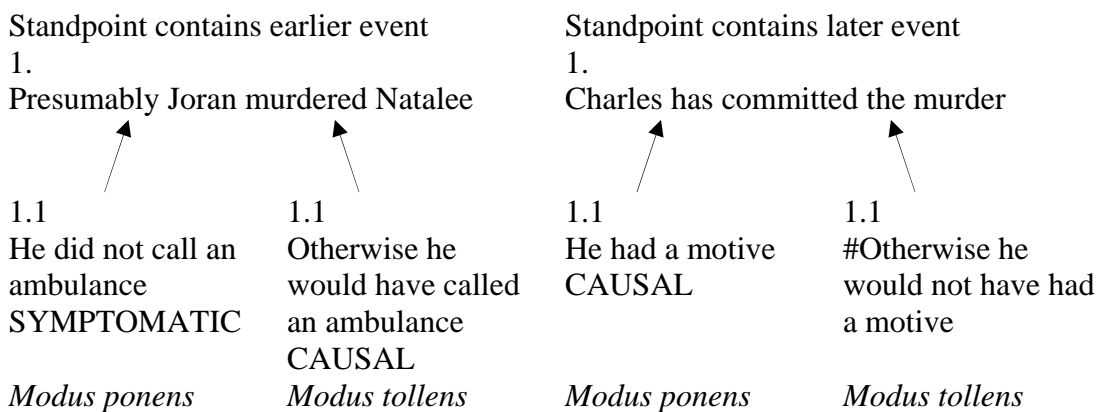
Question (a), whether arguments from plausibility always convey a causal structure when they are presented with a *modus tollens* structure, can be solved in the same way. We should see whether it is possible to formulate an example in which the inference license exhibits an abductive structure. For this we also need to think of an example in which the standpoint expresses the later event. After all: since the antecedent of the inference license in such an argument repeats (in a negated way) the proposition of the standpoint, then the effect>cause-structure can be obtained. For this we only have to change the presentation mode of example (5). However, if we do so, the argumentation becomes nonsensical:

> *(6) #Charles must have committed the murder, otherwise [if he had not committed the murder] he would not have had a motive.*

The argument now suggests that Charles committed the murder in order to get a motive, which is apparently not a line of reasoning that makes sense.

Nonsensicality is not a phenomenon that coincidentally applies to the particular above example. It holds for any reformulation of arguments with a standpoint that refers to the later event. These can never be expressed in the presentation mode that gives the argument a *modus tollens* structure. Probably the preferable interpretation of an *if...then*-clause is that from the antecedent the consequent follows, which clashes with the abductive order expressed in it. Undoubtedly the subjunctive mood also plays a role in making the above *if...then*-clause nonsensical. Evidence that supports this latter idea is that an indicative *if...then*-clause can express an abductive order: *If the streets are wet, it must have rained* (see also example (4)). However, the idea that the preferable interpretation of such a clause is indeed causal is shown by the need of the modal elements added to it.

The presentational (im)possibilities of plausibility argumentation are represented schematically below:

Standpoint contains earlier event		Standpoint contains later event	
1.		1.	
Presumably Joran murdered Natalee		Charles has committed the murder	
↑	↑	↑	↑
1.1	1.1	1.1	1.1
He did not call an ambulance SYMPTOMATIC	Otherwise he would have called an ambulance CAUSAL	He had a motive CAUSAL	#Otherwise he would not have had a motive
Modus ponens	*Modus tollens*	*Modus ponens*	*Modus tollens*

5. CONCLUSION

In this paper the presentation of an argument with an explicit inference license that gives it a *modus tollens* structure on the one hand was compared to the presentation modes with an inference license that gives the argument a *modus ponens* structure on the other hand. By reformulating instances of plausibility argumentation—ones that were originally presented in the first mode were rewritten by using the second mode—I have shown that when such an argument exhibits an inference license with a causal order in the first presentation, it exhibits an abductive order in the second. The reversed order may cause a different perception of the argumentation scheme.

It has turned out that argumentation in which the standpoint expresses the later event cannot be presented with an explicit inference license that gives the argument a *modus tollens* structure. Therefore the issue with regard to the strategic choice for a presentation mode is only relevant when the standpoint contains the earlier event. It is my hypothesis that in those cases a presentation with an explicit inference license that gives the argument a *modus tollens* structure is the better choice. The reason is that in this way an argument from plausibility is presented as a causal one, and thus appears to be more compelling than when it is presented as a symptomatic argument.

Of course, it is a provisional hypothesis that a presentation with an explicit inference license that gives the argument a *modus tollens* structure is strategically the best choice (as far as it concerns argumentation in which the standpoint expresses the later event). In order to test it, a more varied collection of examples is needed, including instances of plausibility argumentation that have a *modus ponens* structure. Studying those should give more insight in additional factors that influence the choice for a certain presentation of plausibility argumentation. Ultimately, if we want to test the empirical question as to whether a presentation with an explicit inference license that gives the argument a *modus tollens* structure is indeed favoured amongst arguers, a quantitative corpus based research has to be carried out.

Link to commentary

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