

*March 2015***IN THIS ISSUE**

*Scott Kozak discusses how plaintiffs in mass toxic tort cases improperly use so-called “historical experts” to distort the evidentiary record, and offers suggestions on how to exclude or limit such testimony at trial.*

## Use and Abuse of “Historical Experts” in Toxic Tort Cases

**ABOUT THE AUTHOR**

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Toxic tort cases, especially mass toxic tort cases, frequently involve allegations of exposure or contamination from one or more constituents over a period of years, if not decades. Often, plaintiffs are not just minors, but adults that claim exposure to various contaminants at or from a young age (including *in utero*), and resulting damages and injuries that manifest themselves decades later. Increasingly, plaintiffs' attorneys employ "historical experts" to provide a narrative framework for their clients' claim, painting a picture – ostensibly through citation of objective facts – of how various industries have dealt with contaminants and the history of scientific and medical review. This article provides a brief overview and primer on these types of "experts," and provides some arguments against their use, discussing articles authored by one of the more well-known plaintiffs' experts.

### **What is a "Historical Expert?"**

While historical experts are something of a modern phenomenon, the essential qualifications of historical experts is largely uniform from a plaintiffs' attorney's perspective. Historians identified as testifying experts routinely have a background in public health, have written putatively "objective" articles or books focused on one or more industries that involve contaminants (e.g., tobacco, lead, vinyl chloride), have a great deal of familiarity with core documents applicable to virtually any case involving the contaminant/substance at issue and frequently hold professorships at well-regarded educational institutions.

Plaintiffs' attorneys employ historical experts to provide a narrative on which they can hang their theory of liability, testifying in four general areas:

- (1) a historical overview of the subject industry and/or contaminant, from its inception through the current day;
- (2) a review of major scientific and regulatory findings and disputes;
- (3) enumeration of current identified health risks; and
- (4) identification of "key" documents or testimony.

These four areas of testimony are designed to paint an overwhelmingly negative picture of an industry or contaminant, providing the jury with a detailed background plaintiffs' attorneys hope will serve to augment, if not overwhelm, *case-specific* evidence. Testimony will necessarily be slanted by selective citation to historical facts supportive of plaintiffs' case and unfavorable to industry, allowing the expert (and by extension, the jury) to infer bad motives and actions on the part of industry participants. Frequently, the testimony will serve to undercut defense references to government regulations and industry compliance with regulatory frameworks by intimating that the industry and government were in bed with each other, ostensibly for the benefit of the industry and economy, not victims like the plaintiff(s).

Historical experts clothe themselves in academic garb, regularly portraying themselves as reciters of the factual records, objective to the core. They argue that they discuss and present facts as they find them, negative and positive, to provide a “complete picture” for the jury. However, in practice, the plaintiffs’ historical expert essentially engages in Monday-morning quarterbacking, reviewing selective facts in hindsight and extrapolating from them a biased narrative. In doing so, the expert has free reign to demonize industry or dismiss otherwise proactive activities by showing that they either did not work or were later deemed ineffective or insufficient based on later scientific discoveries or analysis. The plaintiffs’ historical expert further reaps the benefit of current knowledge, allowing him or her to apply modern standards to actions that were frequently taken years if not decades earlier. Historians discussing lead, for example, will frequently discuss modern scientific associations with Attention Deficit-Hyperactivity Disorder or cognitive impairments, alongside current standards enunciated by the Centers for Disease Control, and apply them to the lead industry of the early 1950s or 1960s, decades before lead was a regulated air pollutant.

As a result of this testimony, the jury tends to focus on the testimony they have just heard, and the state of knowledge now. The defendant, on cross-examination, is thus forced to either argue the inaccuracy or incompleteness of the offered testimony or its lack of relevance to case-specific facts, or

wait until the defendant’s case in chief to present alternative historical testimony.

### **How Plaintiffs Historical Experts See Themselves**

Two of the most active and prolific plaintiffs’ historical experts are David Rosner and Gerald Markowitz, professors at Columbia University and CUNY-John Jay College, respectively. Drs. Rosner and Markowitz have written several books together analyzing, among others, the tobacco, vinyl chloride, silica and lead industries. Their books, as may be expected, carry the nakedly slanted titles of “Deadly Dust,” “Dying for Work,” “Lead Wars: The Politics of Science and the Fate of America’s Children,” and “Deceit and Denial: The Deadly Politics of Industrial Pollution.”

In an excerpt authored by Drs. Rosner and Markowitz titled “The Historians of Industry,” both men characterized their areas of expert testimony as answering the key questions that arose out of the Watergate affair:<sup>1</sup>

Who knew what and when did they know it? Did industry executives understand that specific substances could cause disease? If so, when did they learn of the dangers, and when did they begin to warn their workers or consumers of their products that they were at risk?

They further characterize competing historians as “dipping into the corporate till,

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<sup>1</sup> Gerald Markowitz and David Rosner, *The Historians of Industry*, *ACADEME*, November-December 2010, Vol. 96, No. 6.

testifying on behalf of the tobacco industry, the lead industry and other producers of toxic products.”<sup>2</sup> Rosner and Markowitz believe – and unambiguously assert – that their role is to tell the “true” story of an industry, providing a “true” examination of the facts:

[T]he historian’s skills are bound up in an ability to contextualize, to weave together and make sense out of many discrete pieces of information that, alone, usually contain ambiguous and unintelligible random facts. By placing such facts in a broader historical context and drawing from a variety of sources both directly and indirectly related to the subject, the historian takes what may seem to be idiosyncratic events and makes them intelligible, part of a continuance stream of information that reveals infinitely more than any one document can possibly reveal. Hence, the skilled historian can take many documents and tie them together or take a single document and make it intelligible...[historians] have the ability to draw out meaning whether through the words, pictures or sounds in the document itself or from the events and literature that it speaks to.<sup>3</sup>

Consider what Dr. Rosner is giving himself the license to do: select seemingly random or unconnected pieces of evidence, if not unsubstantiated knowledge arising from his experience and background alone, and weave them into a cohesive *story*, not a factual record, that he can then present as *expert* testimony.

Dr. Rosner then characterizes an attorneys’ role:

In contrast, attorneys, so often as not, see the historical record very differently: they attempt to find discrete documents that either “tell the whole story” – “smoking guns,” so to speak – or that reveal the true intent or knowledge of individuals.”<sup>4</sup>

Under this reasoning, attorneys that cite to documentary evidence setting forth “intent” or “knowledge” are engaging in subterfuge, leaving Dr. Rosner in the position of having to “explain the complexity of historical narratives,” as only he and his fellow historians are “sensitive to the incomplete nature of the historical record.”<sup>5</sup> Where a lawyer sees uncertainty given the evidentiary record, a historian is there to interpret the data in a holistic fashion, using his expertise to “connect the dots.”<sup>6</sup> On cross-examination, historical experts will make these precise arguments, potentially

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<sup>2</sup> *Id.*

<sup>3</sup> David Rosner, Gerald Markowitz, *The Trials and Tribulations of Two Historians: Adjudicating Responsibility for Pollution and Personal Harm*, MEDICAL HISTORY, Vol. 53 at 286 (2009).

<sup>4</sup> *Id.* at 287.

<sup>5</sup> David Rosner, *Trials and Tribulations: What Happens When Historians Enter the Courtroom*, 72 Law and Contemporary Problems, 137, at 153 (Winter 2009).

<sup>6</sup> *Id.* at 154.

undermining the utility of evidence proffered on cross-examination.

### What to Do

Historical experts need to be challenged on the traditional two fronts: pre-trial exclusion/limitation and cross-examination.

Dr. Rosner has provided defense counsel with a guide to the types of attacks he recommends historians guard against in depositions and at trial, which provides some guidance to cross-examination themes that can gain some traction with the jury:<sup>7</sup>

- (1) That there is always a reason to gather more and more information before telling government, workers, or the public of the possibility that a substance was harmful (carcinogenic, potential negative cognitive effects, etc.) in low doses;
- (2) Science is a slow, cumulative process that demands that information about danger not be revealed until scientific proof exists and after “controversy” over that proof is laid to rest;
- (3) Industry always had a valid reason to doubt the accuracy of any finding;
- (4) History is a complex process in which clarity is rare and confusion is the norm;

- (5) Historians who draw conclusions indicating industry malfeasance are sloppy, simplistic or biased;
- (6) Objectivity in historical analysis requires that equal weight be provided to all sides in an argument and that no judgments be made, and even disinformation, including all self-serving statements be presented as legitimate;
- (7) Every conflicting piece of information should be reported, irrespective of its importance to the historical questions being asked;
- (8) Incomplete knowledge is equivalent to controversy about that knowledge;
- (9) One should ignore evidence of responsibility in favor of evidence of ambiguity or innocence;
- (10) Positive peer review or post-publication reviews are invalid unless reviewers have read all the primary documents;
- (11) Any sign of “presentism” – defined as influence of “contemporary problems or issues” is bad, except when it exonerates industry; and

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<sup>7</sup> *Id.* at 157-58.

- (12) When all else fails, quibble endlessly about adjectives, nouns, or adverbs used to describe or summarize corporate behavior, then seek to sidetrack arguments and raise phony issues.

Note how Dr. Rosner's own words evidence bias. To him, the issue is always one of clarity versus confusion, or responsibility versus ambiguity or "innocence." He is against "exoneration of industry" or "phony issues." This sort of explicit bias is what defense attorneys will encounter in reports, in deposition and at trial, with historians such as Dr. Rosner seeking to use the veil of history to either shield the bias or make the issue one of weight, as opposed to admissibility.

Given this, and the roadmap above, what else should defense attorneys do to challenge experts like Dr. Rosner at the pre-trial stage? Motion in limine and *Daubert* arguments should focus, *inter alia*, on the following points:

- (1) By simply regurgitating or reorganizing facts in the evidentiary record, historians are not testifying based on any specialized experience or superior knowledge beyond that of the average juror.

This argument basically posits that a jury, when faced with facts arising from admissible evidence proffered by plaintiffs and defendants, can properly organize those facts and draw their own conclusions. Such organization and analysis require

no specialized training in history; a historian serves only to add a meaningless gloss to the facts and runs the significant risk of applying a bias to the evidence improperly underpinned by alleged "expertise."

- (2) Conclusions by historians to fill in "gaps" in the historical record, or which claim to identify and explain historical actors motivations or "real meaning" constitute conjecture and speculation, not expert testimony.

This argument directly attacks the primary motivation for plaintiffs' historical experts – to spin the facts in a manner favorable to plaintiffs, ascribe nefarious motivations to industry, and to fill in historical blank spots with the historian's sense of what was known, what was taking place, and what the participants were doing or intended.

- (3) The probative value of the testimony is outweighed by the potential prejudice.

This is the standard catchall argument, but goes to the heart of the above objections. Jurors are there to receive and interpret facts and derive factual and legal-based conclusions. Attorneys are there to make evidentiary arguments and to present evidence. The court is there to ensure that only relevant, probative and admissible evidence



is submitted to the jury. Allowing a historical expert to provide essentially extra-evidential and oftentimes speculative opinions and evidence undermines all aspects of the trial system and is grossly prejudicial.

The final question, then, is will these efforts be successful? Some case law does provide support for exclusion of historical experts. The case of *In re Rezulin*,<sup>8</sup> a product liability action against the diabetes drug Rezulin, included the exclusion of an expert's testimony on the "history of Rezulin" as providing merely a narrative of the case that a jury would equally be able to construct.<sup>9</sup> The court rejected the expert's explanation that he was going to provide "an historical commentary of what happened," holding that an expert is not needed to comment on documents and conduct that can be read and interpreted by the jury.<sup>10</sup>

Courts have also previously excluded the testimony of both Rosner and Markowitz on the grounds that their opinions are "within the ken of lay jurors" and that they improperly attempt to "introduce expert opinions as to the intent and motive of [d]efendants."<sup>11</sup> In that case, where vinyl chloride was at issue, the court held that Dr. Markowitz's expertise was "limited purely to the interpretation of the documents in evidence in this case" and merely "opines as

to what the documents mean."<sup>12</sup> Conspiracy opinions offered by Markowitz were accordingly disallowed.

Similarly, in *Roney v. Gencorp, et al.*,<sup>13</sup> the Southern District of West Virginia applied the *Daubert* and *Kumho Tire* analysis, excluding opinions of Markowitz regarding the intent or state of mind of a corporate defendant. There, the court held that any opinion that "imputes actions or understandings of one or two companies at a meeting to all of those who may have been present at a meeting" was effectively – and improperly – risking an imposition of liability to a corporate defendant based simply on membership in an industry association.<sup>14</sup>

## CONCLUSION

In products liability and mass tort litigation, the "expert" historian is becoming a primary driver of plaintiffs' cases. While not always successful, pre-trial arguments must be made to prevent or limit their testimony. Should such an expert be allowed to testify, evidence must be marshaled to counter the expert's effectiveness.

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<sup>8</sup> 309 F.Supp.2d (S.D.N.Y. 2004).

<sup>9</sup> *Id.* at 551.

<sup>10</sup> *Id.*

<sup>11</sup> *Quester v. B.F. Goodrich Co., et al.*, Cause No. 03-509439 (Cuyahoga Cty. Ct. of Common Pleas (Ohio), Jan. 15, 2009). For additional references, including further discussion of the *Quester* case and discussion of his interactions with Rosner and Markowitz, I

recommend reviewing Nathan A. Schachtman's piece "Narratives & Historians for Hire" at [schachtmanlaw.com/narratives-historians-for-hire/](http://schachtmanlaw.com/narratives-historians-for-hire/).

<sup>12</sup> *Id.*

<sup>13</sup> Cause No. 3:05-cv-00788 (S.D.W.Va., Sept. 18, 2009)

<sup>14</sup> *Id.*

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