Commentary

On Deadly Dust And Histrionic Historians:

Preliminary Thoughts On History And Historians As Expert Witnesses In Products Liability Cases

By
Nathan A. Schachtman

[Editor's Note: Nathan A. Schachtman is a partner at McCarter & English LLP in Philadelphia. He practices law with an emphasis on the defense of products liability suits, involving claims of defective drugs and medical devices and toxic exposures. Mr. Schachtman has tried cases involving drugs, medical devices and exposures to allegedly toxic substances, including asbestos, benzene, cobalt, isocyanates, silica and solvents, among others. He has tried cases and argued appeals throughout New Jersey and Pennsylvania, as well as in other states, including New York, Texas, Colorado, Oregon, New Mexico, Florida, Arizona, and Alabama. Mr. Schachtman received both his A.B. and J.D. from Rutgers University. Copyright 2003 by the author. Replies are welcome.]

Introduction

The work of Professors David Rosner and Gerald Markowitz raises important issues about the role historians seek to play in the litigation process. In writing about the social, labor, and political history of silicosis, Rosner and Markowitz interpret and draw inferences from an evidentiary display on the credibility, motives, and goals of industry, labor, and government. Their "story" is often tendentious, and rarely charitable to industry. They fairly consistently excuse or justify the actions of labor, even when those actions lacked contemporaneous (or subsequent) basis in scientific or medical fact. They excoriate the motives and actions of industry, even when supported by sound science, or when the plight of workers was ameliorated. They hint at, or announce, conspiracies to hurt workers. Every effort at industrial cost-savings is denounced; whereas little or no attention is paid to the huge expenditures made, often voluntarily, by industry to improve the health of workers.

Deadly Dust[1] is a book that resonates to the passions and prejudices of the last century. The authors argue their case that silicosis results from the valuation of profits over people. Their thesis ignores the practical, often refractory, problem of motivating or mandating workers to take appropriate measures to protect themselves. Their ascription of motives and their evaluation of causality are often devoid of any empirical support. Their jeremiad against industry's positions on scientific and medical issues is similarly unsupported and frequently demonstrably false. Witness how silicosis as a serious, prevalent fatal disease has passed into the dustbin of medical history in the Western World. Compare the rarity of disabling silicosis in the United States with the high silicosis mortality in Communist countries, where profits are outlawed and labor controls the means of production. These observations and comparisons embarrass the scholarship and the world view of Deadly Dust, but they receive virtually no acknowledgement.

We could safely leave the fate of Rosner's and Markowitz's historical scholarship to their community of academicians and historians if not for one discomforting fact. Either directly through their participation in court cases as expert witnesses, or indirectly through opinions offered or sneaked into evidence, the views of Rosner and Markowitz have become part of the passion play

that we call silicosis litigation. Their participation in the litigation process thus raises the question of exactly what is the proper role of historians in litigation.

Upon initial inquiry, historians would appear to have little or no role in the litigation process. Trial lawyers, in courthouses throughout the common-law world, try cases ranging from automobile wrecks to antitrust conspiracies by researching, documenting, and adducing evidence of historical fact. At trial, the proof of historical facts relevant to claims and defenses proceeds under a system of rules of evidence, which have evolved and have been refined over centuries in the crucible of judicial experience.

The intrusion of historians into the litigation process thus raises several important problems. First, historians may claims to have "proven" or "supported" particular factual assertions, which they could not prove in a courtroom with competent, admissible evidence. Their participation undermines the legal requirement of "primary sources" for the proof of facts. Various exclusionary rules, ranging from the rule against hearsay to the best-evidence rule, dramatically limit the scope and content of what historians might actually offer at trial.

Second, historians will usually be inappropriate witnesses because they do not contribute anything beyond what trial lawyers may accomplish through competent proofs and argument to the trier of fact. Indeed, much of what historians do in advancing a particular thesis is *argue* from an evidentiary display, which may often be interpreted in various, competing ways. Generally, we have more than enough argument from trial lawyers. How historians could be helpful to the trier of fact is thus far from clear.

Finally, if historians were allowed to offer opinion testimony, much of what they would have to say might fail to satisfy any reasonable criteria of reliability. Although a decade has elapsed since the United States Supreme Court decided Daubert,[2] trial courts have yet to address reliability challenges to historians and their opinions. The absence of published cases seems to result from the rarity of historians as expert witnesses. For the most part, historians are noted in only a few cases, typically involving issues such as state boundary disputes, navigability of rivers and riparian rights, Indian Tribal status, or Nazi deportations.[3] The common themes to these cases are the arcane proofs, serious authenticity issues, and foreign language of the documentary evidence. None of these distinguishing features is present in historical opinion on the motives, credibility, and conduct of labor or industry on the control of silicosis in American workplaces.

The Historian As Advocate

There is a disturbing tendency for historians, as well as other academics, to view service as an expert witness as a way to effect social change. Historian David Rothman recently revealed this basic motivation in his article, "Serving Clio and Client: The Historian As Expert Witness."[4] Rothman openly acknowledges the tendentious nature of historical scholarship. "Historians," he tells us, "are no more or less 'objective' in the courtroom than they are in the lecture hall or print."[5] This assessment alone should give trial courts pause in allowing historians to testify.

In arguing why historians should serve as expert witnesses, Rothman notes that litigants should have access to expertise to have their day in court.[6] To the extent that historical expertise is the proper subject of opinion testimony, and the opinion is reliably based, Rothman's point is well taken. Emboldened, however, by the prospect of turning the witness chair into the bully pulpit, Rothman explains the attraction of forays into the courtroom. Historians "may wish to bring their expertise to the support of a cause."[7] Rothman sees historian expert witnesses as "advocates and agents of change."[8]

Rothman's view of the historian as an "advocate" is by no means unique. The American Historical Association, chartered by the United States Congress in 1889, has acknowledged that the po-

litical views of historians may "inform their historical practice."[9] The Association urges hopefully that political views be "applied with integrity." The Association further contemplates that one of the public arenas for historians will be the courtroom, where historians will serve as "expert witnesses."[10] The clear implication of the Association's views is that historians will offer opinion "informed by politics," as part of their courtroom endeavor.

Rothman's conception of the historian's role in the trial process is inconsistent with long-established law of expert witness opinion. Expert witnesses are not supposed to be advocates.

We can find no clearer statement of judicial antipathy to expert witness advocacy than the famous copyright decision by Judge Learned Hand in Nichols v. Universal Pictures Corp.[11] Both sides in Nichols presented expert testimony on "dramatic writing" in an effort to prove or disprove a claim that one screenplay infringed upon another. Deprecating the lengthy, argumentative testimony from both sides' experts, Judge Hand wrote that "[i]t ought not to be allowed at all. . . ."[12] Judge Hand explained with his usual magisterial authority: "Argument is argument whether in the box or at the bar, and its proper place is the last."[13]

Other areas of expertise, besides historical scholarship, fail to satisfy the basic requirements of expert witness testimony. For instance, Judge Hand's complaints about the "literary critic" expert witness in Nichols, have been relodged against witnesses with expertise in ethics. In GST v. Telecommunications, Inc.,[14] both parties offered expert witness on the ethics of the conduct of corporate officers. Invoking the requirement of helpfulness embodied in Federal Rule of Evidence 702, the Court found the proffered testimony would not aid the jury. "It is evident that the contentious advocacy of the experts — illustrated by conclusions on the credibility of explanations regarding the business judgment of the board of directors . . . in clearly expressed, biased viewpoints — do little to aid the triers of fact on the underlying transactions."[15] The trial court discerned a serious danger that expert testimony on ethics would usurp the jury's role in applying the law to the facts found in the case.[16] Permitting such testimony would allow expert witnesses to attempt to substitute their judgment for the jury's.[17]

Of course, the substitution of an expert witness's judgment for that of a jury is precisely what all trial lawyers hope to accomplish. Lawyers can select and present expert witnesses based upon their opinions and conclusion, whereas the conclusions of juries are all-too-unpredictable. Trial courts must be vigilant to police expert witness opinion testimony in the area of history as much as, if not more than, in the area of scientific testimony.

Reliability Limits On Opinion Testimony From Historians

If juries should be subjected to the opinion testimony of historians, serving as expert witnesses, are there any protections against unreliable historical opinions? We are all familiar with the extravagant claims of revisionist historians, who endeavor to reinvent the past for some political purpose. Consider, for example, the cottage industry that decimated our forests in an effort to exculpate the late Alger Hiss.[18] The prospect of similar opinion testimony in the context forum of tort cases is no less daunting.

The American Historical Association has promulgated standards necessary for the production of *reliable* history.[19] These standards raise the important question whether courts, to the extent they permit historical testimony at all, will insist upon a showing of "reliability" before allowing widely disparate historical opinions to be presented to juries. Surely, historical opinion that is unreliable, like unreliable scientific opinion, would not be helpful to the trier of fact. Courts, employing various evidentiary standards, routinely exclude unhelpful testimony. Furthermore, few lawyers would contend that they have a right, constitutional or otherwise, to present unreliable or unhelpful testimony.

The American Historical Association's Standards provide a starting point for judicial consideration of the reliability of proffered historical testimony. The Association views itself as having a special obligation to promulgate principles of "conduct and practice among historians."[20] The Association thus acts as many medical and scientific societies that have put forward guidelines and consensus statements on methodologic issues.

The Association's Standards explicitly acknowledge that the scholarship of historians is pursued and communicated in many venues and formats, including the giving of testimony to "decision makers." Whatever the forum, scholars must be "competent in research and analysis."[21] In imposing a requirement of "integrity," the Standards require awareness of "one's own bias and a readiness to follow sound method and analysis wherever they may lead."[22]

The Association's Standards impose a standard of care with special emphasis in the context of serving as an expert witness. In public service such as providing expert witness testimony, "historians must use sources, including the work of other scholars, with great care and should be prepared to explain the methods and assumptions in their research and the relations between evidence and interpretation. . . ."[23] Given the susceptibility of competing inferences from a single set of historical data, historians "should be ready to discuss alternative interpretations of the subjects being addressed."[24]

The requirement of integrity in scholarship implies further reliability criteria for historians. Integrity requires "disclosure of all significant qualifications of one's arguments." Furthermore, "[h]istorians should carefully document their findings," and "must not misrepresent evidence or other sources of evidence. . . ."[25] The Standards impose a requirement that historians should make their "sources, evidence, and data" available to others, a requirement with obvious implications for the discovery of historians serving as expert witnesses.[26]

The limits suggested by the American Historical Association can certainly help courts evaluate historical opinions in their gatekeeping role. The Standards, however, cannot usurp the judicial function to define and apply criteria for the reliability and helpfulness of opinion testimony.

Historical Knowledge Of 'State Of The Art' In Tort Cases

In products liability litigation over designs or warnings, a supplier or manufacturer is typically held to the knowledge and expertise of an expert in the field. Unfortunately, the law offers little help in answering the obvious question of which expert, of all the experts in the world, sets the appropriate standard. In litigation over the quality of medical care, the law in many states resolves this issue by providing a defense under the "Two Schools of Thought Doctrine."[27] A physician does not deviate from the standard of care simply because many or most physicians reject the approach he or she took to the patient's problem. As long as a substantial minority of physicians would have concurred in the judgment of the defendant physician, the claim of malpractice fails. The Two Schools Doctrine has obvious implications for the standard of design or warning in products cases.

What is clear in products liability cases is that the standard of expertise must be assessed at a given time, when the product or material enters the stream of commerce. In silicosis cases, which may involve long latency periods between exposure and manifestation of claimed disease, the parties may face historical issues of what experts knew at the legally relevant time of the sale. Intellectual historians may indeed provide helpful insights into what was actually believed by experts in the past, but such historical data about past "beliefs" can answer the state-of-the-art inquiry only in part. Knowledge requires at least true, justified belief.[28] Hunches, suspicions, and hypotheses, even when published in respected books or journals, do not rise to the level of scientific knowledge that can be charged to the manufacturer or the supplier defendants. Historians, unless adequately trained and expert in scientific method and research, will be inadequate to the task of explaining whether a given belief was justified and true. Historians, motivated by

politics or ideology, may try to advance their causes by trumpeting some past scientific findings, but in the last analysis, scientific theories can not be chosen the way one chooses to be a Democrat or a Republican. Proof of "state of the art," or who knew what when, will require substantial expertise in science and medicine. Historians may have to emote on the sidelines of these debates.

ENDNOTES

1. D. Rosner & G. Markowitz, Deadly Dust: Silicosis and the Politics of Occupational Disease in the Twentieth Century (Princeton, N.J. 1991).

2. Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993).

3. United States v. Dailide, 227 F.3d 385, 387 (6th Cir. 2000) (noting Yitzhok Arad had testified frequently in such proceedings).

4. 77 Bull. Hist. Med. 25 (2003).

5. Id. at 44.

6. Id.

7. Id.

8. Id.

9. A.H.A., "Statement on Standards of Professional Conduct, 2003 Edition," available at <*http://www.theaha.org/pubs/standard.htm*>, last visited July 1, 2003 (hereafter "Statement on Standards").

10. Id.

11. 45 F.2d 119 (2d Cir. 1930).

12. Id. at 123.

13. Id.

14. 192 F.R.D. 109 (S.D.N.Y. 2000).

15. Id. 192 F.R.D. at 110.

16. Id.

17. Id. See, e.g., Pan American World Airways, Inc. v. The Aetna Casualty & Surety, 505 F.2d, 2d 989, 998 (2d Cir. 1974) (noting that, apart from the evidence of the hijacking, the evidence consisted "largely of hearsay, propaganda, speculation, and conjecture"). See also Imwinkelreid, "Expert Testimony By Ethicists: What Should Be The Norm?" 76 Temple L. Rev. 91, 114, 128 (2003) (noting that normative expert testimony will virtually always be inadmissible).

18. See, e.g., A. Weinstein, Perjury: The Hiss-Chambers Case (N.Y. 1978).

19. A.H.A., "Statement on Standards," supra.

20. Id.

21. Id. at §1.

22. Id.

23. Id.

24. Id.

25. Id.

26. Id.

27. See, e.g., Dailey, "The Two Schools of Thought and Informed Consent Doctrine in Pennsylvania," 98 Dickenson L. Rev. 713 (1994).

28. R. Nozick, Philosophized Explanations 167-288 (Cambridge 1981). ■