

Revisionist History

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A plaintiff historian can be exposed as an advocate. Additionally, the opposing expert historian can also admit parts of the defense.

Cross-Examining a Plaintiff's Historian

In toxic tort cases, plaintiffs typically use an expert historian to testify about what was known and identifiable by defendants at a specific point in time as they made formulation and warnings decisions.

Background of Plaintiff Experts

The primary state-of-the-art experts in asbestos litigation are Barry Castleman, David Rosner, and Rosner's co-author, Gerald Markowitz. Castleman has testified in asbestos litigation since the late 1970s. Castleman's book, *Asbestos: Medical and Legal Aspects*, is now in its fifth edition. The book synthesizes everything that he has learned in asbestos litigation. It summarizes scientific and medical literature, as well as discovery responses and company documents. Rosner and Markowitz were recruited in 2011 by plaintiff attorneys to summarize the history of knowledge about asbestos, based primarily on literature and organization documents.

Castleman updates his book every few years with new information about specific industries and defendants. He is more

likely to be subject to cross-examination about recent materials. Rosner and Markowitz initially stopped their analysis in 1976, but later they updated their literature in 1978. Castleman has reviewed corporate documents of various defendants and has book sections about them. For example, his book includes 38 sections about companies, industries, and trade organizations.

Motion to Exclude

It is difficult to exclude testimony by these experts on historical events. Although their work was solely a product of litigation, courts generally find that this criticism goes to weight, not admissibility. Courts have precluded them from testifying about other matters, such as medical causation, although they are not often offered to testify in this area. Defendants should move

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to preclude these experts from interpreting corporate documents or testifying to the state of mind of corporations. These experts were not there and do not have firsthand knowledge of the activities summarized in the documents. A jury is just as capable of interpreting these corporate documents as an expert. Defendants should also move in limine to exclude evidence of the activities of organizations of which the defendant was not a member, although the likely outcome is a limiting instruction versus exclusion.

Background and Bias

These experts have a long history of anti-corporate bias. They should be cross-examined regarding the other industries that they have criticized. For example, Markowitz and Rosner have written disparaging books and articles about corporations in various industries, including silica, polyvinyl chloride, and lead. They had attacked various industries for many years before reaching similar opinions in asbestos litigation. The list of publications of Rosner and Markowitz reveals that they are activists. The typical bias questioning of Castleman reveals that most of his income is derived from helping plaintiff lawyers suing industries. Most of his remaining time is spent on projects that do not pay much and are largely related to efforts to ban asbestos around the world. Thus, it would appear that litigation income essentially finances his activism.

Professional and Ethical Guidelines

Standards that apply to historians clearly apply to Rosner and Markowitz and are fair fodder for cross-examination of Castleman since he testifies as a historian. Under American Historical Association (AHA) standards, integrity requires an awareness of one's own bias and a readiness to follow sound method and analysis wherever the results may lead. AHA standard, Section 1. In short, "[h]istorians must not misrepresent evidence or the sources of evidence." *Id.* When a historian enters the public arena as an expert witness, the historian may face a choice of priorities between professionalism and partisanship. *Id.* at Sect. 3. As historians, they must be sensitive to the complexities of history, the diversity among historians, and the strengths and

weaknesses of their own points of view and experiences. *Id.*

If a plaintiff expert's testimony is not specific to a particular company, then the plaintiff should not impute documents to the defendant. Plaintiff experts often attempt to testify about the activities and knowledge of specific organizations, based on internal documents. For example, Rosner and Markowitz recently updated their chronology to include various documents from the trade association the Friction Materials Standards Institute (FMSI), which they had obtained through plaintiff lawyers. The FMSI members included brake-lining manufacturers, not manufacturers of the vehicles and equipment that were customers of FMSI members. Defendants should object to testimony or documents related to organizations of which their clients were not members.

Evolution of Expert Opinions

Expert historians have written summaries of the state of the art. As alluded to above, Castleman's book is now in its fifth edition. Rosner and Markowitz have updated the summary of literature accompanying their 2011 report several times. During cross-examination it should be explored with each expert how and why their summaries have changed over the years. Castleman's book has grown with each edition as plaintiff lawyers provide him with new documents. Just as the litigation began with insulation and then proliferated to low-dose chrysotile defendants, as the litigation bankrupted the original wave of defendants, the evolution of Castleman's book has traced that same path; it is based on the litigation documents. Similarly, the summary of literature used by Rosner and Markowitz has evolved as plaintiff lawyers have asked them to tackle new issues and new defendants. For example, Rosner and Markowitz revised their literature summary (Appendix) by adding references to joint compound.

Standard of Care

An expert historian should not be permitted to testify about the standard of care for a manufacturer. The historian is not an expert in the formulation or design of products. But if he or she does testify about the standard of care, defendants might secure

admissions about the increasingly peripheral nature of defendants being sued in asbestos cases. For example, Castleman admits that he would not hold a mere seller to the same standard of care as a manufacturer. If a defendant bought a component part and relied on the formulation and judgment of the component part supplier, Castleman will support that theme.

Defendants should

move to preclude these experts from interpreting corporate documents or testifying to the state of mind of corporations.

Knowledge

A plaintiff historian will testify about what was known and knowable, with the implication that the defendant knew or should have known about potential hazards. This testimony about standard of care also applies to non-parties and plaintiffs. Whatever was knowable by the defendant at trial from researching Index Medicus was also available to non-parties. Although it may be difficult to suggest that a plaintiff should have researched hazards, the plaintiff may have been a member of an organization, such as a labor union, that could have researched hazards. Some unions published periodical magazines that addressed workplace hazards. If a defendant should have researched scientific literature for each potential hazard, a plaintiff suing that defendant could have read the union publications.

The evidence considered by an expert may be generic and not specific to a defendant or even an industry. For example, the Rosner and Markowitz report covers the topic of asbestos generally and not a specific defendant or industry. A Rosner and Markowitz report and chronology are the same in every case, irrespective of the defendant or the exposure. Castleman, however, has written about specific defend-

ants and industries, including a chapter about friction cases.

Unfair Selection and Extrapolation of Evidence

An expert should be cross-examined on articles omitted from the expert's summary. Although Castleman's book cited extensive literature, there are articles he omitted and was not aware of until asked in a deposition. Compare the important literature as it relates to your client and its product with the literature that an expert cited. Since Rosner and Markowitz's Appendix is more generic and less specific than Castleman's, it is easier to find glaring omissions. For example, numerous studies confirm that because of high heat and shearing in the braking process, roughly 99.9 percent of the chrysotile in brake linings degrades into a different mineral, identified by some as forsterite. Yet the Rosner and Markowitz Appendix does not cite any of those articles. In addition, a plaintiff expert will often cite an article but cherry-pick excerpts that are helpful to a plaintiff's case and leave out excerpts that are inconvenient for the plaintiff.

In a search for solvent defendants after the bankruptcy of insulation defendants, plaintiffs have increasingly focused on low-dose exposures by end users to encapsulated chrysotile products, including friction products and gaskets. The evidence cited by plaintiff historians, however, is generally not related to such defendants. The seminal studies from the 1930s cited by plaintiff experts as establishing knowledge derive primarily from the textile industry or other manufacturing settings. Plaintiffs argue that literature about exposures and disease in textile mills should have served as notice to the low-dose chrysotile defendants of potential hazards of their products. Yet, the products and occupational settings are very different.

The first major study of end users of an asbestos-containing product that figures prominently in the direct exam of these experts is the U.S. Navy study in 1946 of potential hazards from working with pipe insulation on Navy ships. See Fleischer *et al.*, *A Health Survey of Pipe-Covering Operations in Constructing Naval Vessels*, 28 J. Indust. Hyg. 9-16 (1946). Plaintiffs argue that this study of hazards to Navy

pipe insulators (who worked with amosite insulation, which the Navy regularly specified) should have served as notice to low-dose chrysotile defendants. The study concluded that pipecovering was not a dangerous occupation, which we learned from Selikoff's studies in the mid-1960s is not correct. Someone relying on this study would not reasonably foresee hazards in low-dose chrysotile products.

Early studies are not applicable to today's low-dose claims because they involve different doses. Dose is frequency, concentration, and duration. Plaintiff state-of-the-art experts tend to gloss over dose. Plaintiff experts cite literature without regard to the dose typical in that industry, much less for that specific plaintiff. They often lack information about the dose in the specific case.

Asbestos was just one of many materials being investigated and regulated in the 1930s and 1940s. There were many other substances also drawing attention. This will counter the suggestion by plaintiff experts that asbestos was the biggest occupational disease at the relevant time period. For example, Rosner and Markowitz will admit that in the 1930s, the primary occupational disease concern was silica. Indeed, they became aware of asbestos issues while writing about silicosis. To the extent that a plaintiff cites excerpts from certain organizations, context should be provided by reading into evidence the discussions of other substances. Out of context, it might sound to a jury as if asbestos was a prominent issue receiving a lot of attention, but the same article may discuss other hazardous materials.

Regulatory

The defense can have a plaintiff expert historian explain the regulatory history. For example, in an asbestos case, the defense can cite the history of threshold limit values (TLVs) and the Occupational Safety and Health Administration (OSHA) permissible exposure limits (PEL) enacted later. A plaintiff typically will cite the Dreesen (textiles) study from 1938, which became the basis for the 5 mppcf TLV adopted by the American Conference of Government Industrial Hygienists in 1948. See W.C. Dreesen *et al.*, *A Study of Asbestosis in the Asbestos Textile Industry*, 241 Public Health Bulletin 1-127 (1938). Although a plaintiff state-of-the-art expert will testify that

these studies in the 1930s and 1940s confirmed that asbestos was dangerous, the studies also confirm that asbestos could be safely used if exposures were kept below the TLV.

Similarly, a plaintiff historian can explain evolution of the PELs. Some plaintiff materials experts testify about the number of fibers measured per cubic centimeter of air during certain activities from short-term peak exposures without extrapolating to an 8-hour time-weighted average (TWA) because they are typically well within the applicable PEL. Some plaintiff materials experts conveniently do not learn the OSHA PELs, but a historian will know them.

General Acceptance Versus First Suggestion

These experts look back in hindsight and identify the first time that concepts were articulated in the literature. The fact that something was reported in the literature does not mean that it was generally accepted. This shortcoming is compounded by the fact that the experts do not always research whether their assumption is in fact correct. Rosner and Markowitz stop their analysis with 1978, so they have not considered anything since that date. Castleman's analysis is more thorough and current, but there are also gaps in his consideration of recent literature.

A plaintiff generally will suggest that because it was knowable to textile manufacturers in the 1930s that asbestos caused asbestosis, it was foreseeable that asbestos would also cause mesothelioma to end users. This includes exposure to low-dose chrysotile. Defense counsel should find examples or analogies to show the fallacy of retroactively selecting an article and opining that as of the time of that article, a particular proposition was known. Examples of things that were believed at one point in time that were later revealed to be false should be cited. It was "known" that the sun revolved around the Earth. If a historian cut off analysis before Copernicus, the analysis would have missed the proof that the Earth revolves around the sun. Articles in the early 2000s suggested a correlation between the SV-40 virus that contaminated some polio vaccines in the 1950s and 1960s and mesothelioma. Further analysis

has not supported the theory, which was “knowable” only a decade ago.

Present day examples of things that a plaintiff expert in the future might claim to be understood today should be highlighted. It can be challenging to put in perspective what was known and reasonably believed in the 1930s about the extent of asbestos hazards beyond those that had actually been articulated and generally accepted in the scientific literature. For example, scientific articles have identified a link between cell phone use and certain brain cancers, although other studies have failed to find causation. There is certainly enough literature that in 40 years so that a plaintiff state-of-the-art expert could opine that it is already “knowable” that cell phone use causes brain cancer.

Plaintiff experts also seem to believe that the association of one disease with asbestos exposure made it foreseeable that a plaintiff might sustain a disease that had not yet been linked to asbestos exposure. For example, the disease attributed to asbestos exposure in the textile plant studies in the 1930s was asbestosis. Lung cancer was not definitively linked to asbestos exposure until the Doll study in 1955, and the link to mesothelioma was not generally accepted until the Wagner study in 1960.

The Wagner study linked mesothelioma to crocidolite in South Africa. Plaintiff experts argue that the attribution of mesothelioma to crocidolite in 1960 made it known and knowable that chrysotile caused mesothelioma. Yet Wagner himself believed in the 1970s that while crocidolite caused mesothelioma, chrysotile did not.

An expert historian can testify about what was known about the exposure necessary to cause disease. Today, plaintiff experts testify that every exposure above background is a substantial contributing factor. This conveniently allows blame of exposures for which a solvent defendant can be sued while ignoring exposures for which no one can be sued.

It is important to elicit evidence from an expert historian about the threshold necessary for asbestos to cause lung cancer. Today, plaintiff experts opine that asbestos can cause lung cancer in the absence of asbestosis or even exposures necessary to cause asbestosis. Yet during the time in which the conduct occurred that is now

criticized, the consensus was that asbestosis was a prerequisite to asbestos-caused lung cancer. In the early studies, including those conducted by Irving Selikoff, asbestos lung cancer occurred only in people with asbestosis.

Alternative Exposure

Although many plaintiffs today have never heard of Johns-Manville, plaintiff historian experts cannot ignore now-bankrupt or uncollectible defendants. They have chronicled, in depth, the activities, knowledge about, and asbestos-containing products of various defendants throughout the history of asbestos litigation and fiber release studies concerning those products. Castleman will confirm asbestos content and fiber release from many products. His book lays out the documentary support, which in many instances consists of discovery responses and documents produced by the company. Rosner and Markowitz have not studied corporate documents in such depth, but they have certainly cited many of the public domain studies of fiber release from them. They can testify about the knowledge of others, including other manufacturers, the U.S. Navy, and trade organizations.

Industry Custom

A plaintiff expert will become a defense expert for industry custom. The expert will admit that under OSHA, a manufacturer was not required to place a warning on an asbestos-containing product if the asbestos fibers were locked in (encapsulated) so that reasonably foreseeable use of the product would not result in exposures exceeding the OSHA PEL. To the extent that manufacturers of certain products concluded that no warning was necessary, an expert will testify that that was a common conclusion in that industry. A plaintiff will testify that if only he or she had been warned properly, he or she would have quit his or her job to avoid exposure. To the extent that any product plaintiff worked with contained a warning, however, a historian (especially Castleman) will lay foundation for that warning, helping to show that the plaintiff did, in fact, receive warnings from others and resisted them.

A historian expert will also testify about the content of warnings. A plaintiff will criticize warnings because they did not contain the words “cancer” or “mesothelioma.”

The standard warning language was “CAUTION. Contains Asbestos Fibers. Avoid Creating Dust. Breathing Asbestos Dust May Cause Serious Bodily Harm.” A plaintiff historian will admit that this language came from OSHA and that this warning language conformed to industry custom.

Although such an expert does not have the foundation to testify to design and

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standard of care, the historian can discuss industry custom about the use of asbestos in certain products in certain time periods as summarized in literature. For example, while a historian lacks foundation to testify as to whether brakes were defective by virtue of their asbestos content, the historian does have foundation to testify that asbestos was commonly used in brakes during certain time periods.

Conclusion

A plaintiff historian expert will interpret studies from decades ago through the lens of current litigation needs. By pointing out the omissions and misstatements as well as the attempts to use what was known then as notice of what is alleged today, the historian can be exposed as an advocate. Additionally, the opposing expert historian should also admit parts of the defense case, such as alternative exposure, PELs, and warnings.

