

HISTORIANS AS EXPERT WITNESS: QUALIFICATIONS & CREDIBILITY

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ABSTRACT

Goal of historians is to portray, whether in writing, lectures, speeches or otherwise, an ‘objective’ historical interpretation of the past events. A Historian’s methodology includes considering the conditions under which a specific source originated and giving reasonable explanation behind exercising exclusions and discretion. This research paper centrally focuses on the concept of Historians as Expert Witnesses in the Court of Law, their qualifications, methodology i.e., how the expertise is constructed and the credibility and valuations of such expert witness reports. The Author has thoroughly discussed about the criteria of ‘Contentious Historian’ in this context. The paper also has presented certain concrete suggestions in the regard of Historians who act as Expert Witnesses in the Court of Law.

I. INTRODUCTION

A witness possessing specialized knowledge, skill, experience, training or education is qualified as an expert. An Expert Witness Report equips the Court of law with a statement of opinion on a particular matter which may require expertise by witnesses. The central purpose of such a report is to set out the Expert Witness’s opinion on matters within his respective expertise on which he/ she has been instructed to report on. Experts tend to have immense influence on the jury because of the manner in which it considers a witness labelled as an “Expert” i.e., a tendency to willingly accept their opinion as correct and true by placing reliance on their designation as such.

In the historic trial court’s judgment i.e., *David Irving v. Penguin Books Limited and Deborah E. Lipstadt* (2000)¹, six expert witness reports were considered by the court before arriving at a conclusion. Considering the above notion, it becomes evident to understand and study “Who” can be referred to as an expert for the purposes of an Expert Witness Report dealing primarily with the qualifications of an Expert Witness. The purpose of this Research Paper is centrally to study the notion of qualification of historians rendering Expert Witness Reports with regard to the above-mentioned case. Such Experts play an important role in settling legal issues or disputes that pivot centrally on specific historical context and its understanding. Therefore, the moment courts attempt to decide upon the past events, thereby putting history on trial, the use of expert historians as witnesses becomes indispensable. Also, the aim of this Research Paper includes to elaborate upon the procedure of constructing such expertise and communicating it in the court of law. The methodology consists of analysing the qualification of five experts who rendered Expert Witness Report in the case mentioned above and formulating a general scheme with regard to qualifications required to act as an expert. From the judicial perspective, the paper will look into the concept of judicial acknowledgment of particular Expert Witness Reports and the reasons for validating such reports.

The primary sources for writing this Research Paper will include the Trial Court’s Judgment i.e., *David Irvings v. Penguin Books Limited and Deborah E. Lipstadt* (2000) and six expert witness reports rendered with regard to this case in order to understand the qualification of the historians involved to act as Expert Witnesses. As concluding remarks, the

¹ Trial Court’s Judgement: *David Irving v. Penguin Books Limited and Deborah E. Lipstadt* (2000). https://www.hdot.org/judge_toc/.

paper will highlight the required qualifications and also judicial methodology involved to provide validity and credibility to Expert Witness Reports.

II. “WHO” IS AN EXPERT WITNESS: CONCEPT AND QUALIFICATIONS

To begin with, considering the case of David Irving, five expert witnesses were engaged in order to advance expert witness reports related to the subject matter in this particular case. Therefore, it becomes essential to highlight and understand the background of the five experts which will eventually enable the readers to have certain background information about the qualifications of expert witness.

With regard to Richard J Evans, he has taught and researched about modern German history and acquired an excellent knowledge of German language in order to interpret accurately the texts related to this subject matter. He has also been recognized as an authority on historiography i.e., on historical theory and method. Considering the second expert witness, Hajo Funke, has also taught as a professor of politics and culture at the Political Science Institute of the Free University of Berlin. His specific areas of expertise and interest included right-wing extremism, ethno-centric nationalism and social prejudice. The third expert witness was Christopher R Browning who was a professor of History at various institutions. His scholarly career was devoted centrally to the study of National Socialist Germany and the Holocaust in specific. He has multiple publications in this relevant field which further strengthen his case of possessing exemplary knowledge over this particular subject matter. Also, he has been engaged as an expert witness in five cases involving accusations of “war crimes” under the Nazi regime. With regard to the fourth witness report, Robert Jan Van Pelt was engaged in studying the history of Auschwitz and also its historical implications with regard to the holocaust. He was also the director of the collaborative which was summoned by several Jewish organizations in order to produce a Master Plan for the future preservation and management of Auschwitz. And the last expert witness was Heinz Peter Longerich who was also a German professor of history and a German historian, regarded as one of the leading German authorities on the Holocaust. His major research interest included the history of Weimer Republic, the Third Reich, the Second World War, and the Holocaust.²

From the above summary about the qualifications of expert witnesses in the David Irving case, it is evident that all of them possessed ‘expertise’ in the subject matter of Holocaust and German history. They also have command over German language which helped them further to interpret and understand evidence as well as texts related to the Holocaust. Along with this, these expert historians possess multiple peer-reviewed publications on this subject matter which enabled them to present expert witness reports in the case at hand.

Therefore, it is evident that before a person can be called upon to give their opinions on any matter under inquiry, it must be established that “he possesses the necessary qualifications to give an opinion on the matter to which his attention has been called for i.e., their knowledge of the subject must be shown. Also, it must be established beyond doubt that such a person has means to form an intelligent opinion which is derived from an adequate knowledge of nature, and a kind of issue in controversy.”³ Thus, the qualifications required for an historian to act as an expert witness in a particular case includes expertise over the subject matter and also greatly

² The background information about the Expert Witnesses has been compiled from their relevant Expert Witness Reports as cited in the bibliography of this document.

³ Joe G. Sweet, "Qualifications of an Expert Witness," *Insurance Counsel Journal* 9, no. 4 (October 1942): 7-9.

valued publications on that topic. The existence of “specialized knowledge” over the issue is of utmost importance.

Additionally, drawing on Richard Evan’s report, Justice Gray created an “Objective historian” standard i.e., “he/she must treat sources with appropriate reservations; must not be even-handed in their treatment of evidence; must clearly indicate any speculations; must not mistranslate documents or mislead by omitting parts of the documents; must weigh the authenticity of all accounts, not merely those that contradict their favoured views; and must take the motives of historical actors into consideration.”⁴

Accordingly, it must be noted that this standard need not be utilised for establishing scholarly controversies or for setting a benchmark outside which historians may fear legal liability but only as a guide for judges i.e., help judges to make fully informed viewpoints about historical evidences which are placed before them in the court of law. Also, this standard should be interpreted to have an inclusionary rather than an exclusionary consequence which will enable to admit the testimony of a historian as long as his methodology satisfies the above-mentioned criteria. Justice Gray also mentions that a better name for this standard would be ‘contentious historian’ standard as it does not require the historian to be without any own opinion or inclination but surely requires him to make a fair appraisal of the evidence.

Taking the above view into consideration, this standard would serve multiple purposes: “it would discourage dismissal of evidence based simply on the historian’s holding convictions about his/her subject matter; it would give judges a more nuanced understanding of what historians should and should not be expected to testify on a particular stand; and it would combat the tendency of historians on either side of a case to present unduly one-sided conclusions.”⁵

III. “HOW” EXPERTISE IS CONSTRUCTED: HISTORIANS’ METHODOLOGY

“The worst that can be said about an expert witness opinion is not that it is a lie... but that it is unreasonable, that no competent expert in the field would hold it.”⁶

This section evaluates the legitimacy of historians’ expertise by considering their professional methodology. Historians undertake “critically important research into the past, unearthing and interpreting primary sources, and examining those historical documents through the lens of multiple disciplines.” It is essential to note that while every historian makes use of slightly different techniques as well as procedures in order to achieve their historical conclusions, there exists certainly a set of basic/ general principles of methodology that guide them in this task. At the most general level, each historians’ goal is “to portray, whether in writing, lectures, courtroom, etc., an objective historical interpretation.” They endeavour to accomplish this goal by taking a look at daunting number of historical sources, picking and choosing only authentic sources, reading them collectively, and consolidating them together in a manner that furnishes reliable narratives about the past events.⁷ Also, historians must be context-sensitive and take note of the conditions under which a source may have originated and whether there were any intentions which motivated its production. The essential notions

⁴ Evans, Richard J. “David Irving, Hitler and Holocaust Denial.” *Expert Witness Report*, Emory University (2003)
https://www.hdot.org/evans_toc/.

⁵ Schneider, Wendie E. “Past Imperfect: Irvings v. Penguin Books Ltd” *The Yale Law Journal* (2001): 1531-1545,
<https://www.jstor.org/stable/797584>

⁶J Sanders, “Expert Witness Ethics” *Fordham LR* 76 (2007)

⁷ Martha Howell and Walter Prevenier, “From Reliable Sources: An Introduction to Historical Methods” (2001)

of ‘objectivity and clarity’ require the historians to openly reveal to their audience that in case their factual assertions are derivative of the actual sources or his/her own interpretation of that particular source. On the other hand, the impending needs of objectivity require the historians to “abandon wishful thinking, assimilate bad news, discard pleasing interpretations that cannot pass elementary tests of evidence and logic, and, most important of all, suspend or bracket one’s own perceptions long enough to enter sympathetically into the alien and possibly repugnant perspectives of rival thinkers.” Hence, because of these intimidating tasks historians are subjects of criticisms of objectivity and also reliability.

In constructing a narrative of historical events, historians tend to answer the central questions of “who, what, where, when” and a little “why”. They do so in order to deconstruct the “narrative” by exhibiting its basis and documentary evidence available on record in order to help the court to ascertain ‘facts’ of a given historical event. In any litigation process, it becomes evident for a historian “to make such analytical processes transparent in order to aid the triers of fact and other document users to make informed decisions about evidence.”⁸ Also, it is the jury and not the expert witness who constructs the final narrative that provides the undermining decision of a case, and the historians try to subscribe to this procedure by rendering tools along with contextualised information that they utilized in arriving at the conclusion and constructing the narrative in expert witness reports prepared by them. Thus, transparency of the analytical process helps the ultimate creator of the narrative i.e., the judge in his/her work, facilitates comparisons, weighing of differing historical judgments and showcasing the expertise that a skilled historian brings on board.

Historian’s expert reports should be quite different from academic work and represent a methodology that states the record up front with little paraphrasing and more description of the document or event in consideration. Historians helping in the litigation process should be well-prepared to answer the questions about ‘why’ they decided to stress on some particular passages or documents in their narrative and not the others i.e., on what basis they exercised exclusion and discretion in putting greater value to certain evidence.

Two schools exist with regard to historians’ relationship with law. One school pursues a ‘separatist approach’, which envisages refusal to testify in cases by historians as it may degrade history as a discipline meant for only judgmental purposes. The other school which is a more ‘integrationist school’ of historians represents a harmonious relationship with law. This school believes that no legal trump exists i.e., history can do what it does very well via reports and expert evidence, which may or may not point up individual responsibility and law can do what it does thereafter. Thus, considering the judgment of the trial court which is referenced here, it is clear that the historians who offered expert witness reports in that case belonged to the latter school of thought.

Therefore, historians definitely perform more than just reiteration of abstract data which comes from events, statements and isolated documents; they work under the regime of contextualism and linkages of otherwise apparently not much known events. Because of this reason, lawyers engage historians to provide written reports for judges in order to render concrete ‘facts’ which helps the court to be oriented with the information which is not readily available to it.

IV. HISTORIANS’ EXPERT WITNESS REPORTS: CREDIBILITY AND VALIDATION BY COURTS

At trial, the verification of historical facts which are material to claims and defences proceed under a system of “rules of evidence”, developed and reformed over a period of time

⁸ Gwynneth C.D. Jones “Documentary Evidence and the Construction of Narratives in Legal and Historical Contexts” *The University of California Press on behalf of the National Council on public History* (2015), <https://www.jstor.org/stable/10.1525/tph.2015.37.1.88>

and varies from one jurisdiction to another. Therefore, the inclusion of historians into the litigation process involves multiple issues. Firstly, historians may claim to have “proven” or “supported” factual assertions, which they may not be able to prove in a legal proceeding under the notions of credible and admissible evidence. Various exclusionary rules like “rule against hearsay to the best-evidence rule”, drastically put a limit on the scope and content of what historians might produce in a court. Secondly, historians may be inappropriate witnesses because they do not contribute anything beyond what trial lawyers may accomplish through competent proofs and argument to the trier of facts. Thirdly, if historians are permitted to render expert testimony, much of what they wish to produce may not pass the test of reliability or authenticity in the court of law.⁹ Fourthly, an expert witness who is hired to furnish report for only one side may lead to dilution of their objectivity i.e., “the notion of expert’s allegiance to either the plaintiff or the defendants, may result in a testimony that is overly one sided and subjective leading to unreliable testimony.”¹⁰ Lastly, it is also essential to be state that historical methodology and findings are incapable of being tested because it does not involve the testing of a particular hypotheses but rather the evaluation of multiple context-sensitive sources. Likewise, the possibility of a certain or potential “rate of error” of historical findings does not exist because the accuracy with regard to the interpretation of past events cannot be measured concretely.

On the other hand, Costas Douzinas has argued that “legal proceedings are unsuitable for clarifying the historical record.”¹¹ He also maintains that “law cannot authenticate history because of the different temporal orientations of each discipline and the role each performs in narrating the issue.” In numerous cases, judges have shown uncertainty with regard to historians possessing ‘specialised knowledge’ that enables them to render admissible expert witness reports, which reflects an unsaid assumption that the court is already equipped with the necessary skills required to interpret archival evidence.¹² Also, judges have openly expressed that historians who may be called as experts have failed to differentiate between their own opinions and the facts which form the basis of their opinions because they did not clearly state the concrete reasoning which has led to their opinions. Therefore, Judges have been reluctant of historians as expert witnesses because they may fail to fulfil the requirements for “test of admissibility”.

Considering the above criticisms levied against historians as expert witnesses, the only stand upon which their reports are acknowledged and admissible in any legal proceedings is that “the Expert Evidence is beyond the type of knowledge that people are likely to acquire in the course of ordinary, general experience of life, and therefore, potentially beyond the knowledge of the judge or members of the jury.” Therefore, expert witnesses must make the court believe that they possess “specialized knowledge” based on their training, study or experience on the basis of which their opinions and reports are formed.

Additionally, with regard to historians acting as expert witnesses “a distinction exists between the ‘facts’ of history and ‘historical analysis’ based on textual sources and delivered

⁹ Nathan A. Schachtman, Esq. and McCarter & English LLP Philadelphia, Pennsylvania, “On Deadly Dust and Histrionic Historians: Preliminary Thoughts on History and Historians as Expert Witnesses in Product Liability Cases”, *Lexis Nexis* (2003).

¹⁰ Alvaro Hasani, "Putting History on the Stand: A Closer Look at the Legitimacy of Criticisms Levied against Historians Who Testify as Expert Witnesses," *Whittier Law Review* 34, no. 3 (Spring 2013): 343-[ii].

¹¹ Costas Douzinas, “History Trials: Can Law Decide History?” *Annual Review of Law and Social Sciences* 273 (2012).

¹² *Harrington Smith v State of Western Australia* (No.7) (2003) FCA 893.

as opinions, considered as hearsay evidence.”¹³ In both the cases, much larger preference is given to former as compared to the latter in the courts of law as the former elaborates the actual ‘facts’ which helps the court to arrive at a certain decision with objectivity and the latter consists of opinions which may be biased or subjective, therefore, not much reliable. With regard to the trial judgment as mentioned above, Mr. Justice Gray also acknowledged that he does not regard himself to state any discovery of ‘facts’ as to what did/did not occur during the Nazi regime in Germany, hence, he must rely on historical data and evidence for such purposes. He openly stated in his judgment that such a task of ascertainment of ‘facts’ is for the historians and established a distinction between his judicial role which involves resolving the issue between the parties as compared to the role of historians who are required to provide an accurate narrative of the past events.¹⁴

Also, the existence of notions of bias as well as advocacy in expert reports should “require careful analysis of the evidence provided by the Experts, not exclusion”. Thus, an adversarial system of justice could be the best stage for unreliable testimony of historians as expert witness, simply because, the courtroom enables the academics to be honest i.e., if experts do not give evidence with logic, authenticity and convincing power, then cross-examination by advocates can expose their faults openly in the court of law.

It can rightly be concluded that, robust cross-examination, presentation of contradictory evidence and concrete rules of burden of proof, which strongly strikes shaky but admissible evidence, is a crucial factor which decides upon the admissibility of such reports. Thus, cross-examination acts as an excellent buffer with regard to those who may abuse historical conclusions in order to support their respective client’s interests because with the help of contradictory experts witness reports and the process of challenging cross-examination, advocates tend to put the historian’s testimony through a crucible that may uncover unknown or intentional biases, use of incorrect data, flawed interpretations and outright deceit.

V. CONCLUSION

Both legal studies and the subject of history make use of the “evidential paradigm”. Historians try to substantiate documentation in legal cases, refer to various court records in their relevant research, submit expert witness reports and also gain from the unfolding of new historical controversies during legal proceedings which tends to give way to new or ongoing historical debates. On the other hand, lawsuits sometimes give fuel to historical controversies which ultimately instigates legal proceedings to open old archives and aid the historian’s ventures. Thus, law pressures historical access to classified archives which facilitates history’s re-examination of the past events.

With regard to granting superior weightage to historians as Expert Witnesses, this Research paper concludes on certain alternative suggestions in order to achieve this particular goal. Firstly, a concrete alternative in order to amplify the credibility of historians as expert witnesses can be to opt for court appointed expert witnesses. This would definitely help to sustain the notion of neutrality as their allegiance would not lie with one of the parties, but with the court itself and reduce any self-interest of the historian engaged in such a trial. Another way out can be to allow both the parties involved in a trial to offer counter Expert Witness Reports, leading to a “battle of experts” which will enable the jury to make well-acquainted

¹³ Trish Luker, "Reading the Archive: Historians as Expert Witnesses," *Flinders Law Journal* 18, no. 2 (December 2016): 241-268.

¹⁴ Trial Court’s Judgement: David Irving v. Penguin Books Limited and Deborah E. Lipstadt (2000). https://www.hdot.org/judge_toc/.

conclusions as a result of being exposed to differing interpretations. With regard to the standards of admissibility of Expert Witness Reports, there is a genuine need for enactments dealing specifically with experts of history or as mentioned above, “historians”. Courts should develop certain rules to be followed by such experts i.e., the methodology and consideration given to contradictory evidence should be of central importance.

To conclude, courts do tend to recognize that due to historians’ academic scholarship, training, and experience, they do possess “specialized knowledge” that is essential to understand and discern the complexities of various historical events. It is essential to note that the mutual goal of courts and historians is “ascertainment of truth” which certainly requires adequate methods, skills and motives. Indeed, the controversy which exists over the admissibility and credibility of expert witnesses is certainly as vintage as the judicial system and hence, it may be safe to say that no field is immune to such debates. Historians rendering expert witness reports are undoubtedly important, authentic and indispensable to the judicial system. So, they are certainly here to stay in order to resolve such controversies.

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