The Use of Historical Evidence in Light of LL & E and Act 400

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This paper supports the presentation entitled "The Use of Historical Evidence in Light of LL & E and Act 400" scheduled for September 16, 2014 at the LOGA Industry Seminar and CLE in New Orleans, Louisiana. This material is intended as a readable yet thorough introduction to the concepts to be presented at the seminar. In this light, it seeks to provoke thought by raising more questions than it answers. The seminar presentation will assume a basic knowledge of the recent history of "legacy" litigation in Louisiana. For those without such knowledge, two scholarly articles by the author, Loulan J. Pitre, Jr., are also attached. The subject matter of this paper and the seminar presentation will be highly focused and no substitute for a general knowledge of the multitude of legal issues presented in legacy litigation.

The presentation will be led by Loulan J. Pitre, Jr. Mr. Pitre is Partner in Charge of Kelly Hart & Pitre, the New Orleans office of Kelly Hart & Hallman, LLP. Mr. Pitre's law practice centers on energy and the environment. He has written and spoken frequently on environmental law issues, with a focus in recent years on legacy litigation. He served as a member of the Louisiana House of Representatives from 2000 to 2008 with a policy focus on coastal protection and restoration and related infrastructure issues. He currently teaches Advanced Oil and Gas Law as a member of the part-time faculty of Tulane Law School. He received his bachelor's degree from Harvard College, magna cum laude *in History, in 1983, and received his J.D. from Harvard Law School in 1986.*

Also presenting will be Dr. Jason P. Theriot, an energy and policy consultant and former Energy Policy Fellow at Harvard University. He earned his doctorate in history from the University of Houston and a degree in journalism from Louisiana State University. He recently published the book, American Energy—Imperiled Coast, Oil and Gas Development in Louisiana's Wetlands *(LSU Press, 2014), and has also conducted extensive research on the historical practices and expectations related to salt water disposal in south Louisiana oil and gas exploration and production.*

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The Louisiana Supreme Court's 2003 *Corbello* opinion[1] dramatically increased the profile and extent of litigation in Louisiana by landowners claiming environmental damage arising from oil and gas exploration and production operations.[2] *Corbello* held that an express contractual provision to "reasonably restore the land to its original condition"[3] created an obligation to restore that need not be tethered to the fair market value of the property after restoration.[4] *Corbello* also held that, under the law that existed in 2003, the landowner could recover money damages based on a theoretical remediation cost while having no obligation to actually remediate the contaminated property after the award was received.[5]

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[1] *Corbello v. Iowa Production*, 2002-0826 (La. 2003), 850 So. 2d 686.
[2] Loulan Pitre, Jr., "*Legacy Litigation*" *and Act 312 of 2006*, 20 Tul. Envtl. L.J. 347 (2007); Loulan Pitre, Jr., *Six Years Later: Louisiana Legacy Lawsuits since Act 312*, 1 LSU J. of Energy Law & Resources 93 (2012).
[3] *Op. cit.* at 686.
[4] In *Corbello*, defendants were liable for an estimated $33 million of remediation expenses, when the fair market value of the property was a mere $108,000 in its decontaminated state.
[5] In so doing, the *Corbello* Court was following the 1991 Court's example of leaving the plaintiff "apparently free to use this [remediation] money for purposes other than restoring the land." *Magnolia Coal Terminal v. Phillips Oil Co*, 576 So. 2d 475, 486 (La. 1991).

Somewhat lost in the shuffle has been the fact that *Corbello* did not hold, or even say, that the property's value had no relevance in cases involving a lease ***without*** an express restoration clause. That important issue begs a completely separate line of analysis. The latest statement in this line of analysis is in the Louisiana Supreme Court's January 2013 opinion in *LL & E*, which indicates that when the lease lacks an express restoration clause, whether damages are available to a plaintiff depends on the reasonableness of the defendant's operations.[6]

The reaction to *Corbello* has been so stunning that the Louisiana legislature has visited the issue four times in 12 years.[7] The main focus of these efforts has been to ensure that when environmental damage is proven or admitted, the responsible party must remediate the property to current regulatory standards. These efforts have naturally invited a counter-reaction by the landowner plaintiffs' bar to develop legal theories to support claims for damages separate from or in excess of a remediation that is now required by law—the proverbial "money they can keep." In the face of that, a secondary focus of the legislative enactments has been to rationalize the law surrounding these claims for separate or excess damages. The most recent aspect of this is contained in Act No. 400 of 2014,[8] which (among other things) enacted La. R.S. 30:29(M), which limits the available damages in cases where no express contractual provision addresses remediation.

Both *LL & E* and La. R.S. 30:29(M) invite, even demand, inquiry into the reasonableness of certain practices. In the absence of an express restoration provision, defendants cannot be

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[6] *State v. Louisiana Land & Exploration Co*., 2012-0884 (La. 1/30/13), 110 So. 3d 1038, *reh'g denied* (Apr. 26, 2013) (holding that defendants operating under a lease without an express restoration provision could not be dismissed on summary judgment on the issue of whether they could be liable to plaintiffs to pay excess restoration damages without a finding of negligent operations by a factfinder).

[7] 2003 La. Sess. Law Serv. Act 1166 (West); 2006 La. Sess. Law Serv. Act 312; 2012 La. Sess. Law Serv. Act 779 (West); 2012 La. Sess. Law Serv. Act 754 (West); 2014 La. Sess. Law Serv. Act 400 (West).

[8] 2014 La. Sess. Law Serv. Act 400 (West).

required to remediate beyond regulatory standards or to pay damages for such remediation without proof of negligence or excessiveness in their operations. A determination of reasonableness may be made by a factfinder, of course, but can also be susceptible of resolution by summary judgment under certain circumstances. For example, the Supreme Court decided in *Castex* that dredging canals and failing to backfill them at the end of a lease constituted "normal wear and tear" and was not an unreasonable use of plaintiff's property in light of the express provision in the lease allowing the dredging of canals.[9] Now, a similarly situated case could be decided as a matter of law on summary judgment.

An early Louisiana case illustrates the distinctions between reasonable and negligent operations and their resulting impact on the plaintiff's recovery. In *Rohner v. Austral Oil Exploration Co.*,[10] the lessee expressly promised to compensate the lessor for any damage to the lessor's corn and watermelon crops, irrespective of whether the lessee's negligence caused the damage. The appellate court thus upheld the damages awarded for the lessor's lost crops. Destruction of the land's productivity, however, was not covered by any lease provision, and the court of appeal overturned the damages awarded by the trial court for harm to the land itself because the record did not include evidence of negligence or excessiveness in the lessee's operations. The cost of repairing the lessor's fence, although not covered by an express provision to restore, was charged to the lessee precisely because its negligence caused the damage. The court reasoned that the lessee had the right to cut the fence to facilitate its operations, but in making a "poor

[9] *Terrebonne Parish School Bd. v. Castex Energy, Inc.*, 893 So. 2d 789 (La. 2005) (holding that, in the absence of an express provision to the contrary, a lessee could only owe damages to a lessor if he had been negligent or excessive in his operations).
[10] 104 So. 2d 253 (La. App. 1 Cir. 1958).

man's cut," it weakened the rest of the fence unnecessarily, which triggered the lessee's liability.

Either way, when analyzing the reasonableness of an operator's conduct, it is most important to consider the question, "**Reasonableness when?**" What was reasonable in 1910 would not have been reasonable in 2010. Act 400 seeks to answer this question by referring to "rules, regulations, lease terms and implied lease obligations arising by operation of law, or standards applicable at the time of the activity complained of." The inquiry is not about what is considered reasonable today, but what was considered reasonable **at some time in the past**. And this should also have been true even without the enactment of Act 400, although the exact parameters might have been subject to debate.[11]

In *LL & E*, for example, Justice Guidry agreed with the *Marin* Court's conclusion that the plaintiffs in that case "would not have consented to the disposal and storage of oilfield wastes into pits known to be environmentally unsound."[12] Importantly, the lease in question in *Marin* was the novating 1994 lease, not the original 1941 lease.[13] Thus, the *Marin* court did not attribute modern awareness and sensibilities to earlier generations of landowners and operators. And Justice Guidry's comments on the *Marin* decision seem to be based on implicit belief in a historical consensus that by 1994 all parties were aware that this earlier practice was "environmentally unsound."

An inquiry into the historical "reasonableness" of the use of unlined pits for the disposal of waste products might include some or all of the following questions:

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[11] Robert L. Theriot, *Duty to Restore the Surface (Implied, Express, and Damages*), LA Min. L. Inst. (Spring 2005).
[12] *State v. Louisiana Land & Exploration Co*., 110 So. 3d at 1061 (Guidry, J., concurring).
[13] *Marin v. Exxon Mobil Corp*., 2009-2368 (La. 10/19/10), 48 So. 3d 234, 260.

- Were others in the industry using it at that time?
- Were alternatives to unlined pits well-known and cost-effective at that time?
- What was the generally accepted scientific knowledge at that time?
- What were the common expectations of lessees and lessors at that time?
- Was there an express or implied consensus at that time of lessors, lessees, and public policy to accept certain practices in exchange for the economic benefits of oil and gas production?

As litigators, we must then ask, how do we present evidence of what was considered reasonable in the past to a judge or jury? We do this through direct historical evidence or by expert testimony. Direct historical evidence may come from live witnesses but, given the vintage of most legacy cases, is more likely to come from historical documents, whose admissibility is determined by the rules of evidence. In many (and probably most) instances, however, the memories of live witnesses will have faded,[14] and the context of historical documents will be inscrutable to a young lay juror. There lies the potential importance of using an experienced historian as an expert witness,[15] whose testimony is subject to the gate-keeping function of the court under Evidence Rule 702 and the body of cases applying that rule.

The use of expert historians has gained popularity since the Nuremburg trials.[16] Indeed, in 2006, the United States Court of Appeal for the Fourth Circuit relied on an expert historian's

[14] *Worm v. Crowell*, , 87 N.W.2d 384 (Neb. 1958) (holding that documentary evidence over twenty years old is preferable to oral testimony on a disputed matter).
[15] Alvaro Hasani, *Putting History on the Stand: A Closer Look at the Legitimacy of Criticisms Levied Against Historians Who Testify As Expert Witnesses*, 34 Whittier L. Rev. 343, 344-45 (2013).
[16] Jonathan D. Martin, *Historians at the Gate: Accommodating Expert Historical Testimony in Federal Courts*, 78 N.Y.U. L. Rev. 1518, 1519 (2003) *See, e.g.*, *Foster v. United States*, 130 F. Supp. 2d 68, 72 & n.6 (D.D.C. 2001) (referring to historical testimony about James Creek in suit brought under Comprehensive Environmental Response, Compensation, and Liability Act). *See generally* H. Edward

opinion, while rejecting a pulmonologist's opinion, in determining what the public knew when about the dangers of smoking.[17] And historians of science are in demand because scientific knowledge does not progress in a strictly linear fashion. Rather, it is accepted in different ways at different times and places.[18] Professor Robert Proctor testified on behalf of 830 pregnant women who were fed radioactive iron from 1945 to 1947 as part of an experiment sponsored by the Rockefeller Foundation, the Atomic Energy Commission and Vanderbilt University. He concluded that the experimenters should have known about the potential hazards before they conducted the experiment. Specifically, he traced the migration of scientific ideas from Europe to Vanderbilt University via a Jewish scientist on the cutting edge of radioactive iron who emigrated from Nazi Germany to Nashville, Tennessee before the experiment's launch.[19]

The nature of historical inquiry will usually mean that *Daubert-Foret* factors are not applied mechanically, but are instead applied in a way designed to assure that "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." [20] In *Kumho Tire v. Carmichael*,[21] the United States Supreme Court confirmed that judges have discretion to determine how to apply these criteria.[22] Justice Stephen Breyer explained, "Indeed, [the Daubert] factors do not all necessarily apply even in every instance in which the reliability of scientific testimony is

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Dunkelberger III, Historians in the Courtroom, Metro. Corp. Couns., Sept. 1999, at 58 (providing advice to practitioners on hiring expert historians in toxic tort and product liability cases).

[17] *See Waterhouse v. R.J. Reynolds Tobacco Co.*, 162 Fed. App'x. 231, 234 (4th Cir. 2006), aff'g 368 F. Supp. 2d 432, 436 (D. Md. 2005) (granting summary judgment in favor of Defendants based on an affidavit by Dr. Norell, a historian at the University of Tennessee, concluding that between 1947 and 1969, non-scientists knew that smoking could cause life-threatening illness).

[18] Robert N. Proctor, *Expert Witnesses Take the Stand: Historians of Science Can Play an Important Role in US Public Health Litigation*, 407 Nature (7 Sept 2000): 15.

[19] Id. 15-16 (The Vanderbilt plaintiffs prevailed.).

[20] *Daubert*, 113 S. Ct. at 2795.

[21] 526 U.S. 137 (1999).

[22] Susan Haack, *Of Truth, In Science and in Law*, 73 Brook. L. Rev. 985, 991 (2008).

challenged."[23] Another relevant evidentiary inquiry is whether the expert's testimony is "helpful" to the fact finder in the sense required by LCE 702. Here there is a close "fit" between the issues of historical expectations/reasonableness and an expert historian's testimony about industry customs and contemporary knowledge, beliefs, and expectations.

Unlike the typical scientific method, the historical method does not involve the testing of hypotheses or the quantification of a potential error rate for the historian's findings.[24] Art, sociology and psychology are history's sister disciplines. Collectively, they are incapable of being tested through controlled experiments. Yet art historians are called upon routinely to differentiate original paintings from forgeries. Psychologists frequently testify in child sex abuse cases. Even psychologists relying on controversial theories like repressed memory and PTSD most often survive *Daubert* challenges.[25] For example, the theory of repressed memory is good law in the Louisiana Fourth Circuit and is often used to circumvent the black letter requirements of prescription.[26] So the fact that historians' opinions are not reached through testing and experiments should not preclude them from testifying as experts at trial.

An occasional criticism of historians in the courtroom is their supposed lack objectivity, but this criticism can generally be overcome with a properly qualified expert

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[23] *Kumho Tire*, 526 U.S. at 151.
[24] Martha Howell & Walter Prevenier, From Reliable Sources: An Introduction to Historical Methods 2, 69 (2001).
[25] See Peter E. Smith, *The Massachusetts Discovery Rule and Its Application to Non-Perpetrators in "Repressed Memory" Child Sexual Abuse Cases*, 30 New Eng. J. on Crim. & Civ. Confinement 179, 200 (2004) and Constance Dalenberg, *Recovered Memory and the* Daubert *criteria: Recovered Memory as Professionally Tested, Peer Reviewed, and Accepted in the Relevant Scientific Community*, 7 Trauma, Violence & Abuse 274, 277 (2006).
[26] *See Doe v. Archdiocese of New Orleans*, 2001-0739 (La.App. 4 Cir. 5/8/02); 823 So.2d 360 *writ denied*, 2002-1960 (La. 11/8/02); 828 So.2d 1127 (holding that in light of the plaintiff's repressed memory of child sexual abuse, defendant's exception of prescription could not be decided until after a full trial on the merits).

witness. In *Cayuga Indian Nation of New York v. Pataki*, a prominent case involving Native American rights, the sympathetic trial judge expressed concern about historians' subjectivity, writing that they are "colored by their experiences, both personally and professionally, and by the task which they [are] asked to perform."[27] The subjectivist moment in historical studies, however, appears to have been a 90s' fad. As Professor Reuel Schiller writes, "finding a genuinely 'subjectivist historian' is rather like searching for a unicorn.... I have yet to meet a historian who claimed that his scholarship was nothing more than fiction or that his 'version' of the events he studied was not an attempt to ascertain the truth."[28] A qualified and prepared expert historian, who has done proper research, should be able to meet a threshold challenge and testify as an expert.

What will be the end result of this inquiry? It is clear—arguably to the point of suppressing any controversy—that the environmental values and expectations of decades past were less protective of the environment than those of today. That said, a remediation to today's regulatory standards will in (perhaps) all cases be more rigorous than the expectations at the time the activities occurred or when the lease was executed. If that is adequately presented to the factfinder, the ability of the plaintiff landowner to recover excess remediation damages should be dramatically curtailed. Given the success expert historians have brought parties in analogous cases and the inevitability of introducing historical documents in defending legacy lawsuits, the testimony of a seasoned, expert

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[27] *Cayuga Indian Nation of N.Y. v. Pataki*, 165 F. Supp. 2d 266, 271-72, 303 (N.D.N.Y. 2001) overruled by Cayuga Indian Nation of N.Y. v. Pataki, 413 F.3d 266, 268 (2d Cir. 2005).

[28] Reuel E. Schiller, *The Strawhorsemen of the Apocalypse: Relativism and the Historian as Expert Witness*, 49 Hastings L. J. 1169, 1170 (1998) (Schiller holds a B.A. in History from Yale and a J.D. and a Ph.D. in history from the University of Virginia.).

historian should aid the factfinder in avoiding the temptation to substitute his own contemporary view of reasonableness for the historical parties' understanding.