

Please cite the Published Version

Tweeddale, Geoffrey (2008) Discovering discovery: the pleasures and perils of litigation archives. Business Archives (97). pp. 55-68. ISSN 0007-6538

Publisher: Business Archives Council

Version: Published Version

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DISCOVERING ‘DISCOVERY’: THE PLEASURES AND PERILS OF LITIGATION ARCHIVES

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In 1995, my friend and colleague David Jeremy asked me if I would like to work on the history of the asbestos industry. I knew almost nothing about asbestos and I had not heard of the company he mentioned – Turner & Newall (T&N) – even though it was based near Manchester. David had established contact with an American bank (Chase Manhattan in New York), which had launched a legal action against T&N and was priming its case by distributing relevant documents. David had used this windfall to write one of the first articles on the asbestos industry.¹ Apparently, the documents were only the tip of an iceberg. Intrigued by the possibilities, I took up the suggestion. We were successful in an application for funding from the Wellcome Trust and used some of the grant to purchase a complete set of documents from Chase Manhattan Bank. This was how I began work on the history of the asbestos industry and how I first learned about legal discovery.

The court case between Chase and T&N in 1995 provides as good an example as any of legal discovery in action.² Chase had sued T&N for damages relating to the sprayed-on asbestos fireproofing that T&N had applied to Chase’s Manhattan skyscraper in the late 1950s. T&N decided to fight the case, but because it had assets in America and because the action was in New York the British company became subject to US legal ‘discovery’. In America, discovery can be a powerful weapon. It gives plaintiffs extensive rights to depose witnesses and to demand and examine records – even to visit factories and archives and see the records in situ. Severe penalties can be imposed for hiding or destroying documents. Moreover, once those records are placed before the court, unless there is a protective order in place (rare in US litigation), the records are in the public domain. They can be disseminated and used freely. The documents produced are usually voluminous. Attorneys will often spend whatever it takes to copy records, depose witnesses, and prime a case. Chase was reputed to have spent \$1 million on its document search.

American legal discovery is not perfect. Sometimes defendant companies offer generous settlements in return for secrecy and documents are ‘sealed’.³

But generally, discovery has released millions of documents into the public domain. The situation is far different in other countries, especially the UK. Although court cases are based on the disclosure of relevant documents to the court, this can be a protracted process, in which plaintiffs are often denied complete access and can only obtain specific documents by request. For example, in UK asbestos litigation T&N had often denied that any of its archives had survived or claimed that they belonged to old subsidiary companies over which T&N had no control and could accept no liability. Even when documents are disclosed to the English courts, no one has access to them unless they are read into the court record or are disclosed by the judge. The rule even applies to criminal proceedings. Many other countries, it should be noted, are equally secretive. In Canada, for example, the Quebec Records Concerns Acts bars the transfer of certain documents out of the Province, even as photocopies. Most European countries rarely disclose court records.

In America, asbestos litigation began in earnest in the 1970s, when the law shifted the emphasis from the dysfunctional workman's compensation system towards the law of strict product liability. This allowed many more companies to be sued, if they had failed to warn workers and consumers of a dangerous product. The defence of the asbestos companies that they had been mostly ignorant of the hazards of asbestos until the 1960s soon fell apart as legal discovery began to prise open the doors of dozens of corporate archives. A key breakthrough was the discovery of the Sumner Simpson papers in 1979. Simpson was the president of Raybestos-Manhattan, a major US manufacturer of asbestos brake linings, which had operated from 1929. Often described as the Pentagon Papers of the asbestos industry, Simpson's documents – lying forgotten in a carton in a vault in the company headquarters – demonstrated a knowledge of the dangers of asbestos as far back as the early 1930s (alongside a policy of concealment).

It was the beginning of the largest wave of litigation in history, as the asbestos companies proved a relatively easy target for the growing army of personal-injury lawyers. Gradually, all the asbestos manufacturers were drawn into the net. These included Johns-Manville, the largest asbestos company in the world, and many of its competitors: Owens-Illinois, Armstrong Cork, Owens Corning, US Gypsum, Philip Carey, W. R. Grace, and Unarco. Product liability law – which allows distantly related entities to be sued – meant that some of America's biggest companies were pulled into court. These included MetLife, Ford, Dow Chemicals, Union Carbide, GE, Shell, and Texaco. By 2002, over 8,000 defendants had been named in court

proceedings. To give an idea of the scale of the litigation, Halliburton – the oil-services company once run by US Vice-President Dick Cheney – was hit by 300,000 claims due to Cheney's unfortunate decision to acquire a pipeline subsidiary that had used asbestos.

The documents disgorged by legal actions ranged from the papers of key individuals (such as company physicians), to the minutes of industry trade associations (such as the Asbestos Textile Institute and the Quebec Asbestos Mining Association), to the memoranda of the industry's public relations advisers (Hill & Knowlton), to secret experiments of industry-financed research groups (such as the Saranac Laboratory in upstate New York). This was aside from the reams of directors' minutes, letters, and commercial information associated with the running of any large company. So large were some of the document caches that Johns-Manville eventually set up a dedicated litigation archive in Denver. But most of these archives were not held by public depositories, but by attorneys and their firms – though they were disseminated by the media and amongst a circle of interested parties. The latter included journalists, activists, expert witnesses and a few academics.⁴ Soon the first major accounts of the asbestos industry began to appear, written by Paul Brodeur, Barry Castleman, and David Ozonoff.⁵

I knew nothing of these developments when the Chase documents arrived in my office in 1996. They were contained in two nondescript cardboard boxes: one containing microfiche, the other microfilms. I was sceptical of how useful they would be. It was evident that the fiche and reels contained a vast number of records and that it would probably be the largest group of documents on which I had ever worked, but I found it difficult to believe that the bulk of the records could relate to occupational health issues. I was wrong. The collection proved to be the largest group of records relating to a health hazard that had ever reached the public domain in the UK.⁶

In this article, I will attempt to describe some of the pros and cons of working on these and other legally discovered records. The key aspect of such documents is that they tend to be the kind of records that the industry (and individuals) did not plan for anyone to read, apart from the recipient. Often they contain thoughts, policies, and asides that these companies would not have wanted to reveal in public. As an example, would the Bendix Corporation director of this missive sent to Johns-Manville in 1966 have wanted its contents to be repeated?: 'My answer to the [asbestos] problem is: if you have enjoyed a good life while working with asbestos products why not die from it. There's got to be some cause.'⁷ Or how about this example from Johns-Manville employee Kenneth Smith? In 1963, the latter suggested

to one colleague that they should ‘purchase a small and inexpensive shredding machine’ to destroy medical records that might be used against Johns-Manville in compensation cases.⁸ Smith was the company’s chief physician. Years later, when such documents were reviewed by an attorney for the bankrupt Johns-Manville company, it was noted: ‘there are so many embarrassing documents that people disagree as to which group of any ten documents is the worst’.⁹

Such documents are sometimes marked ‘confidential’ or ‘strictly confidential’ by the company when they are generated or are stamped later ‘plaintiff’s exhibit’, denoting that the records reached the courtroom. If one is accustomed to reading only dry-as-dust business records – minute books, patents, and financial and accounting papers that are often so laborious to read and often tell so little – then discovered documents can be a revelation. There is the added thrill of knowing that the documents have sometimes provided the ‘smoking guns’ in the courtroom.

Perhaps the most important feature of such documents is that they are in the public domain. If one is fortunate to obtain copies of discovered documents, then one is immediately liberated from the constraints of official repositories. There is no more traipsing to a distant archive, no form-filling, and no more waiting for document requests to be delivered (and then to be told that one can only look at one or two documents at a time). The researcher can also forget about the frustrations of dealing with records that are ‘closed’ for one reason or another (in my experience, it is often not a very convincing reason). Even if one is still technically subject to the Data Protection Act, at least one is freed from its over-zealous implementation by archivists.

Crucially, one is freed from other types of censorship that operate with official archives. Most business historians still generate the bulk of their data from such repositories, but the terms of access are something which usually evoke little comment from historians. As regards records in the National Archives, until recently these were closed for thirty years. The Freedom of Information Act (FOI) may liberate some records, but the FOI has so far been little utilised by historians and its implementation has often been problematic. It is likely that some public records – especially those relating to controversial issues such as the environment, or strategic industries such as arms manufacture and nuclear power – may remain closed indefinitely. Certainly, FOI as it operates currently in the UK is a pale reflection of its counterpart in the US and is no substitute for legal discovery. The situation is sometimes not much better with company records. It must be remembered

that these, too, are usually private property and made available (or kept confidential) only with the consent of the owners. Although there are plenty of guides to corporate archives, no one apparently has yet examined the terms of access among company archives. Nevertheless, it is clear that some conditions of use (such as those imposed by Boots) are highly restrictive. The BP archive at Warwick University imposes a 40-year closure rule. Whatever the terms, no one is in any doubt that permissions are needed for publication and that this depends on building a satisfactory relationship with the company and its archivist. In an increasingly legalistic world, it is now almost unknown to be able to examine public records without having to sign at least one piece of paper promising 'best behaviour' on the part of the researcher. Controlled terms of access extend into official occupational health archives. According to one researcher: 'Wellcome [Trust] has a policy document that has to be signed by readers which states that nothing should be written that might damage the reputation of anyone drawing on material used in their library.'¹⁰

Compounding this problem is the fact that some business histories are also financed by corporations. The commissioned history genre still flourishes – indeed many past Wadsworth prize winners have been judged on the basis of a commissioned history. It is symptomatic of the close and sometimes ambiguous relationship that the discipline of business history has with the subject of its study. As a consequence, some areas of corporate life are still poorly illuminated by business historians and many contemporary concerns are simply not addressed in business history. There is no tradition among business historians of writing and debating about the environment, corporate ethics, and the political and social problems of multinationals in the developing world. Little scholarly work has been done on corporate crime. In 2003, I conducted a business-history literature search of corporate crime and found only four titles written by academics!¹¹ John Garrard on an obscure utilities scandal; George Robb on white-collar crime in England; Markham Lester on Victorian insolvency; and John Harris on Anglo-French industrial espionage.¹² None of these books would count as mainstream business history. In 1992, George Robb had been moved to write that the 'best work in business history is increasingly sensitive to the criminal aspects of its subject matter'.¹³ Clearly, that trend, if it did exist, did not continue. The pages of the business history journals are no better and show a similar bias. The bulk of their coverage relates to globalism, foreign direct investment, and the structural and management aspects of big business. *Business History Review*, published by Harvard Business School, contains few articles that discuss the

more contentious aspects of big (or small) business. A search of about 150 *Business History Review* articles between 1990 and 2000 produced only a few that are remotely connected with corporate misconduct. Given the role that antitrust, illegal marketing practices, fraud, corporate malpractice, and labour problems have played in US history this is an extraordinary omission. It is in these areas where discovered documents can make their greatest contribution, especially when investigating controversial industries and products. Besides bypassing many of the access and censorship problems noted above, such documents can offer a completely different vantage point on business enterprise. Asbestos is not the only industry that has been touched by legal discovery. In America, the wave of asbestos industry documents has been overtaken by a tsunami of tobacco industry archives. It took time for the records of the tobacco companies to be disclosed. For years, the industry was able to repel plaintiffs by arguing that its knowledge of the addictive and carcinogenic nature of tobacco was imperfect and that smokers had voluntarily accepted the risk by buying and inhaling the industry's products. The industry was also enormously wealthy and politically very powerful. However, Big Tobacco's defences were breached during the 1990s, when 'Mr Butts' (a.k.a. Merrell Williams, a paralegal working for Brown & Williamson) copied thousands of tobacco industry documents and then sent an unsolicited boxful to medical professor Stanton Glantz at the University of California at San Francisco (UCSF).¹⁴ In 1995, Glantz and his collaborators wrote a series of articles and then a book, *The cigarette papers*, that gave the first glimpse of the inside story of the tobacco industry and paved the way for further legal discovery.¹⁵ Attorneys, state public health bodies, and even the President of the USA became involved, as a settlement over the costs of medical treatment was brokered between the industry and various state attorneys (notably those in Minnesota).¹⁶ Some 33 million pages of tobacco industry documents became available, first in hard copy at a warehouse in Minnesota, then in electronic form through company-sponsored sites on the internet.¹⁷ Dedicated websites were also established at UCSF (containing over 50 million pages in its Legacy Tobacco Documents Library), and through the websites of activist groups such as ASH.¹⁸

Asbestos and tobacco are probably the industries that have featured most in legal discovery in the USA. But a wide range of industries have found themselves subject to discovery. Chemical manufacturers, whose raw materials and products are often highly toxic, have not surprisingly regularly been the target of personal-injury suits. In a recent study, *Doubt is their product*, Michael Williams – an epidemiologist and government health

official – provides an excellent overview of the many chemicals and minerals that have proved hazardous: aromatic amines, lead, polyvinyl chloride (PVC), benzene, chromium, beryllium, uranium, and various pharmaceutical products (such as Merck's Vioxx).¹⁹ Williams often draws on key historical studies. One such study was *Deceit and denial* by two leading American historians of occupational health, Gerald Markowitz and David Rosner. In the introduction to their book, the authors – after noting that legal discovery is an 'incredible tool for historical research' – relate how they had been asked by one Louisiana attorney to evaluate a warehouse of documents relating to the manufacture of PVC.²⁰ The documents were so voluminous that they became the launch pad for their book. The authors noted:

These legal records gave us a window into a world historians (and certainly the general public) are rarely allowed to enter: the world of corporate meetings, where corporate officials shape our ideas about their products and make decisions about the production and marketing of products that may pose a danger for workers and the consuming public.²¹

Markowitz and Rosner included in their book a consideration of the adverse environmental impact of lead. The history of the lead hazard has also been the subject of other studies, notably Christian Warren's *Brush with death* and Peter English's *Old paint*. Both authors benefited from archives generated by litigation.²² Documents for the chemical industry are less easily found than those for tobacco. However, an activists' Environmental Working Group (EWG) in Washington established the Chemical Industry Archives (CIA) in 2001. The site contains some 37,000 pages of internal chemical industry documents from the last fifty years.²³ Less slick than the tobacco document sites, it is nevertheless well designed and easy to use through search words. Documents from Monsanto, ICI, and chemical producers' associations are reproduced in facsimile.

These areas relate to my own field of interest. In a completely different area, financial litigation has also generated huge amounts of publicly-available documentation, especially following the explosive growth of digital information. The Enron trial, for example, revealed not simply a few smoking guns but a veritable arsenal. Traditional paper records were discovered, but so too were vast numbers of e-mails and also taped phone conversations between Enron managers. In the subsequent Enron trials, e-mails proved a treasure trove of information on corporate wrongdoing. The legal proceedings were a pointer to the future, when legal discovery will involve computer hard drives, databases, backup tapes, CDs, and DVDs.

Such documentary caches, inevitably, have their drawbacks. One immediate problem is finding the time and the resources to read the documentation. Even with Wellcome funding and working full-time, it took three years or more to wade through the T&N archive. When attorneys began reviewing the records that had been deposited by Johns-Manville at its Asbestos Claims Research Facility in Denver, they calculated that it would take one person twenty years to read the archive's 40,000 box files and 7,000 rolls of microfilm. It would also be an expensive exercise: when Jock McCulloch and I approached the Facility when we were writing a book on asbestos, we were told that even a day's visit could cost several hundred dollars in fees.²⁴ Reading even a selection of tobacco industry documents would be a similarly impossible undertaking, even with electronic retrieval aids.

More subtle are the problems relating to the fact that the documents and the issues that they highlight are shaped by a kind of legal determinism. Obviously, the historian can only read what the lawyers have selected and copied when building their case or have decided to put into the public domain. Historians themselves cannot usually explore the archive holdings and see what has been missed or not deemed relevant to the legal case. In the Chase case, for example, many of T&N's early minute books before the 1920s were not copied (though they were listed by the Chase attorneys, so one can see that they were extant). In practice, I did not find this too much of a problem when writing about T&N. Chase's copying exercise was awesomely comprehensive and few documents were not copied. In any case, almost every archive in official repositories is subject to the same filtering. A greater hindrance than any selectivity by Chase was a problem that cut in the opposite direction. The documents were produced by T&N and as I became familiar with them it was obvious that there were 'holes', notably (and surprisingly in such a vast archive) the lack of any significant archives relating to the company chairmen and also T&N's overseas subsidiaries.

A bigger problem is that obviously only those industries that have been involved in litigation are subject to legal discovery. As the foregoing discussion has shown, the subject-matter is inevitably slanted towards corporate malfeasance – which means that hazardous industries and financial chicanery feature largely. The legal context can spill over in other directions, sometimes in surprising ways. Such documents bring their own legal problems that are sometimes difficult to escape. Some of the documents released by legal discovery can be so damaging to individuals and companies that quoting from them in the UK needs care, especially if the individuals are

still alive. This is because English libel laws are so swingeing. The draft of *Magic mineral* soon attracted the attention of university and publisher's lawyers and insurers, mainly because T&N was still trading. A number of cuts (or rephrasing of words) was deemed advisable. For example, it was thought risky to draw attention to the conflicts of interest inherent in the relationship of epidemiologist Sir Richard Doll with T&N. Doll had been recruited to analyse asbestos-related disease at T&N and supported the company against its critics. That was well known: less well publicised was a £50,000 T&N donation to Doll's Oxford college. Any suggestion of a financial link between Doll and T&N was cut. Ironically, after Doll's death in 2005 it was revealed on the front page of *The Guardian* that for many years Doll had held an undisclosed and lucrative consultancy from Monsanto, another company whose products he had defended.²⁵

The fact that many of the issues discussed by historians using discovered documents are still 'live' can lead to some fascinating complications for those who believe in the objectivity of historical writing. Often the contest for control between companies in the courtroom can be mimicked by a contest in the historical literature, with one book attempting to debunk another. After the appearance of my study of T&N, another history of the asbestos health hazard at the company appeared. This was *The way to dusty death*, written by medical historian Peter Bartrip.²⁶ The latter began work on the history of asbestos in the late 1990s, when he was recruited by Blake Perkins (T&N's New York counsel) to write the company's history. In his book, Bartrip attacked the slipshod and biased research of various historians (present company included) and argued that T&N's critics had an aversion to capitalism. In America, mirror image books have appeared on the lead industry, with Markowitz and Rosner and Warren writing accounts that are highly critical of industry, while paediatrician Peter English has argued instead that the lead industry facilitated scientific discovery and collaborated with public health authorities. All these authors draw upon access obtained as experts in litigation: English was retained by the lead industry, with Warren serving as an expert for various city and state legal agencies in New York and Massachusetts seeking compensation from industry. Markowitz and Rosner were expert witnesses retained by the state of Rhode Island in an action against the lead paint manufacturers in 2005 that became the long-running trial in Rhode Island's history.

The tobacco industry, too, has recruited historians. In 2004, the American medical historian Robert Proctor asked in *The Lancet* whether it was appropriate for historians to work for the tobacco industry.²⁷ He highlighted

that at least 29 historians had served as expert witnesses for tobacco. Besides Peter English (mentioned above), these have included Kenneth Ludmerer, president of the American Association for the History of Medicine. These historians have usually presented evidence favourable to the industry's case and according to Proctor (the first medical historian to testify against the industry in 1999), some have 'presented inaccurate accounts of tobacco and health history in their capacity as witnesses for the tobacco industry'.²⁸ Proctor noted that few of these historians had written on the history of tobacco (in some cases their reports had been drafted by lawyers); even fewer had acknowledged industry financing of their work. He warned that historians who rendered expert advice on tobacco were playing a 'dangerous game'.

After the publication of *Magic mineral*, I received several requests for documents and also invitations to serve as an expert witness in US court cases. One of those invitations was from T&N itself, which in 2001 was involved in a convoluted action when it was sued in the US by Owens-Illinois (O-I) for \$1.6 billion. O-I argued that T&N had conspired to hide the hazards of asbestos from the company. The chance to be involved in a dramatic court case, to be deposed by top attorneys, and to be flown around the world business class at \$300 an hour might seem irresistible. But a friendly American attorney warned me about the pitfalls and told me that litigation US-style is 'often not gentlemanly at all. The opposing lawyer's goal is to trip up the witness any way he can ... [and] ... every word you utter in a lawsuit, whether it be in a deposition or a trial, is to be taken down for posterity. Thus the transcript of every deposition or trial appearance, and especially the *first* ... will follow you around *ad nauseam*'.²⁹

I turned down the offers, but expert work is attractive to some. Peter Bartrip followed up his T&N study (the draft of which T&N soon found a use for in litigation) with further legal commissions. These resulted in a book on the US asbestos industry, funded by an asbestos insulation company, which argued that asbestos industrialists were largely blameless in failing to act against the environmental risks of asbestos.³⁰ This research led to invitations to serve as an expert for American companies, such as Union Carbide. In two American depositions that Bartrip gave in 2003 and 2006, he was predictably and mercilessly grilled on the patronage he had enjoyed from T&N and its New York attorneys.³¹ In 2003, under relentless questioning by plaintiff's attorney, Mark Lanier, Bartrip confirmed that the draft chapters of his books had been sent in advance to the attorneys for reading. According to Bartrip, his attorney would read over the work and 'sometimes make suggestions for

– um – you know, typographical errors that he had picked out.’³² The depositions make uncomfortable reading and it is evident that being deposed is not for the faint-hearted, though the monetary rewards are substantial. Kenneth Ludmerer’s work for tobacco since the late 1980s apparently garnered fees of \$500,000; and other tobacco experts have been paid similar amounts. Bartrip testified that his payments from recent litigation-related work exceeded £250,000 and could have topped £500,000. He was unable to remember the exact amount.

Adversarial depositions can be the least of a historian’s problems. Rosner’s and Markowitz’s book, *Deceit and denial*, was widely praised in academic reviews, but it was less warmly received elsewhere. Defendant attorneys for Dow, Monsanto, Goodrich, Goodyear, and Union Carbide decided to counter the book’s allegations by recruiting a business historian from America’s chemical state of Delaware. This was Philip Scranton, an authority on Philadelphia textiles. Scranton, in a report lodged in 2005, launched a withering attack on Rosner’s and Markowitz’s integrity by arguing that they had flagrantly violated professional historical ethics and were little more than attorneys’ advocates. Since Scranton is not an expert on occupational health history and his ethics yardstick was a set of American Historical Association guidelines hardly anyone had ever read, his report was never likely to damage the book seriously. Moreover, some of the sins for which were authors were damned – such as knowing who were the referees for their book – seemed to many to be hardly hanging offences. But Rosner and Markowitz were forced to defend their work and reputation at length, eventually launching their own website.³³ Articles also appeared in legal journals dismissing the book and deploring the involvement of historians in legal cases.³⁴ The publishers and the foundation that had supported the book were then subpoenaed for records. Even the book’s referees were not immune from attack. In an unprecedented move, the chemical attorneys subpoenaed and deposed five academics who recommended that the University of California Press publish the book. At the depositions, each historian faced attorneys representing fifteen different chemical companies. One of the key questions posed was whether those who recommended the book for publication had checked the footnotes – another attempt to undermine the integrity of the book.³⁵

Even refusing to work for lawyers and ignoring the legal process is no defence against intimidation. In 2002, I received an approach from the Manchester office of Davies Wallis Foyster (DWF), a firm of lawyers representing Royal Sun Alliance (RSA). The insurance group was being

sued by T&N (by now in administration and Chapter 11 bankruptcy) for insurance monies, while RSA itself was countersuing the rump of T&N. The RSA position was that T&N had not disclosed the true risk of asbestos to its insurers (RSA). To prove that, RSA needed T&N's documents, which hardly surprisingly the asbestos company was unwilling to provide. When I ignored RSA's requests and offers of payment for access to my own copy of the T&N archive, DWF wrote a letter of complaint to the vice-chancellor of my university and demanded 'facilities ... for immediate inspection of the documents ... failing which it seems we will be obliged to issue a subpoena requiring the production of the documents at trial or apply for an order for disclosure. Both these steps are likely to prove much more disruptive and inconvenient for the university than simple voluntary cooperation'.³⁶ DWF had no success with the university either, though it took up my time explaining the background to the university's lawyers. Later the T&N/RSA action was quietly settled.

Whether the recruiting of historians in litigation is a passing fashion remains to be seen. For certain, though, discovered documents are here to stay. Indeed, the sheer quantity of such materials is set to increase dramatically with the digitisation of documents and communications. For the business historian, as with any other type of source material, such documents have their pros and cons. For those industries that discovery has touched, however, it is difficult not to regard discovery as a great boon. Millions of documents have been rescued from oblivion and the inner workings of business have been revealed in an unprecedented manner. As one asbestos expert, Barry Castleman, has observed: 'Only corporate documents and testimony of the individuals involved could recreate events as they emerged "from the inside." This inside story was developed at enormous expense by attorneys representing plaintiffs in asbestos litigation. It could not have emerged as fully by any other means.'³⁷ This inside story is arguably a necessary counterpoint to the sanitised view of business life that remains popular with some business and medical historians, who rely heavily on government and official repositories. It is unfortunate that legal discovery remains a foreign import – a luxury not available in Britain's secretive society. But it is to be hoped that if business history is to reflect some of the controversial issues and areas outlined above then future Wadsworth prize winners will take more notice of the potential of legal discovery.

- ¹ D.J. Jeremy, 'Corporate responses to the emergent recognition of a health hazard in the UK asbestos industry: the case of Turner & Newall', *Business and Economic History*, vol. 24, Fall (1995), pp. 254-65.
- ² Chase Manhattan Bank v. T & N, (87 Civ. 4436, Judge J. G. Koeltl), US District Court, Southern District of New York, 27 Oct.- 6 Dec. 1995. Trial transcript.
- ³ D. Michaels, *Doubt is their product: how industry's assault on science threatens your health* (New York, 2008), p. 235, highlights a number of industries – automobiles, medicines, and toys – where critical evidence has been buried.
- ⁴ For example, some key documents are available via Environmental Working Group, *Asbestos: think again* (Washington D.C., 2004). <http://reports.ewg.org/reports/asbestos/>
- ⁵ P. Brodeur, *Outrageous misconduct: the asbestos industry on trial* (New York, 1985); D. Ozonoff, 'Failed warnings: asbestos-related disease and industrial medicine,' in R. Bayer (ed.), *The health and safety of workers* (New York, 1988), pp. 139-218. B. I. Castleman, *Asbestos: medical and legal aspects* (New York, 5th edition, 2005).
- ⁶ G. Tweedale, 'Sources in the history of occupational health: The Turner & Newall archive', *Social History of Medicine*, vol. 13 (2000), pp. 515-34.
- ⁷ Bendix director of purchases Ernie Martin to Noel Hendry, Canadian Johns-Manville, Quebec, 12 December 1966.
- ⁸ Dr Kenneth W. Smith to C.H. Grote, Manville plant, 26 February 1963.
- ⁹ David T. Austern Memo re. Manville Documents, 8 February 1988.
- ¹⁰ M. Walker, *Scoop! Two* (Privately published, 2007), p. 80. Posted at: www.slingshotpublications.com
- ¹¹ G. Tweedale, 'Corporate crime: a business historian's perspective', in S. Tombs and D. Whyte (eds.), *Unmasking the crimes of the powerful: scrutinizing states and corporations* (New York, 2003), pp. 69-87.
- ¹² J. Garrard, *The great Salford gas scandal of 1887* (Manchester, 1987); G. Robb, *White collar crime in modern England: financial fraud and business morality, 1845-1929* (Cambridge, 1992); V. M. Lester, *Victorian insolvency: bankruptcy, imprisonment for debt, and company winding-up in nineteenth century England* (Oxford, 1995); J.R. Harris, *Industrial espionage and technology transfer: Britain and France in the eighteenth century* (Aldershot, 1998).
- ¹³ Robb, *White Collar Crime*, p. 6.
- ¹⁴ See Special Supplement, *Tobacco Control*, vol. 11 (2002), especially K.W. Cummings and R.W. Pollay, 'Exposing Mr Butts' tricks of the trade', *Tobacco Control*, vol. 11 (2002), Suppl 1, i1-i4. Posted at: http://tobaccocontrol.bmj.com/cgi/content/full/11/suppl_1/i1
- ¹⁵ S. Glantz, J. Slade, L. A. Bero, P. Hanauer, D. E. Barnes (eds.), *The cigarette papers* (Berkeley, 1996).
- ¹⁶ See R. Kluger, *Ashes to ashes: America's hundred-year cigarette war, the public health, and the unabashed triumph of Philip Morris* (New York, 1996); P. Pringle, *Dirty business: big tobacco at the Bar of Justice* (London, 1998).
- ¹⁷ As a result of what became known as the Master Settlement Agreement between the major tobacco companies and a consortium of state attorneys-general, the documents in the Minnesota Depository became available via: <http://www.tobaccoresolution.com> or <http://www.tobaccodocuments.com>
- ¹⁸ <http://legacy.library.ucsf.edu> and <http://www.ash.org.uk/>
- ¹⁹ Williams, *Doubt is their product*.
- ²⁰ G. Markowitz and D. Rosner, *Deceit and denial: the deadly politics of industrial pollution* (New York, 2002), p. xiv.
- ²¹ Markowitz and Rosner, *Deceit and denial*, p. xv.
- ²² C. Warren, *Brush with death: a social history of lead poisoning* (Baltimore: Johns Hopkins University Press, 2000); P. English, *Old paint: a medical history of childhood lead-paint poisoning in the United States to 1980* (New Brunswick, N.J., 2001).

- ²³ I was unable to access this site when writing this article, but it is posted at: www.chemicalindustryarchives.org
- ²⁴ G. Tweedale and J. McCulloch, *Defending the indefensible: the global asbestos industry and its fight for survival* (Oxford, 2008). We eventually reviewed a large selection of documents from the Facility that we were able to obtain from other sources.
- ²⁵ S. Boseley, 'Renowned cancer scientist was paid by chemical firm for 20 years', *Guardian*, 8 December 2006.
- ²⁶ P. Bartrip, *The way from dusty death: Turner & Newall and the regulation of occupational health in the British asbestos industry, 1890-1970* (London, 2001).
- ²⁷ R. N. Proctor, 'Should historians be working for the tobacco industry?', *Lancet*, vol. 363 (10 April 2004), pp. 1174-5. See also P. Cohen, 'History for hire in industry lawsuits', *New York Times*, 14 June 2003.
- ²⁸ Proctor, 'Should historians ...?', p. 1174.
- ²⁹ Personal communication from Shep Hoffman to G. Tweedale, 5 July 2000.
- ³⁰ P. Bartrip, *Beyond the factory gates: asbestos and health in twentieth century America* (London, 2006).
- ³¹ Deposition of P. Bartrip, New York, 22 September 2003, in Kelly-Moore Paint Company, Inc. (Plaintiff), vs. Dow Chemical Company, et al. (Defendants). No. 19785-BH02. District Court of Brazoria County, Texas, 23rd Judicial District; Deposition of P. Bartrip, In Re. Asbestos-Unfair Trade: Civil Action Practices Insurance Cases: No.: 02-C-7000, New York, 9 December 2006.
- ³² Bartrip deposition, Kelly-Moore Paint, p. 67.
- ³³ <http://www.deceitanddenial.org>. The Scranton report and the Markowitz/Rosner response can be found on this site, alongside other materials.
- ³⁴ N. Schachtman, 'On deadly dust and histrionic historians: preliminary thoughts on history and historians as expert witnesses in product liability cases', *Mealey's Litigation Report: Silica* (November 2003). p.6.
- ³⁵ J. Wiener, 'Cancer, chemicals and history', *The Nation*, 7 February 2005. Posted at: <http://www.thenation.com/doc/20050207/wiener>
- ³⁶ DWF to Manchester Metropolitan University Vice-Chancellor, 13 January 2003.
- ³⁷ Castleman, Asbestos, p. 699.