

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

COLLEEN KING,

Plaintiff,

-vs-

94-CV-411C(M)

BRANDTJEN & KLUGE, INC.,

Defendant and
Third-Party Plaintiff,

-vs-

AAKRON RULE CORP.,

Third-Party Defendant.

APPEARANCES: DAVID W. COVINO, ESQ., Buffalo, New York, for Plaintiff.

DAMON & MOREY LLP (THOMAS J. DRURY, ESQ., of Counsel),
Buffalo, New York, for Defendant Brandtjen & Kluge, Inc.

GROSS, SHUMAN, BRIZDLE & GILFILLAN (HUGH C. CARLIN,
ESQ., of Counsel), Buffalo, New York, for Third-Party Defendant
Aakron Rule Corp.

INTRODUCTION

In the present products liability action, the court dismissed plaintiff Colleen King's failure to warn and punitive damages claims in September 2000. See Item 106. As a result, plaintiff's remaining claims against defendant Brandtjen & Kluge, Inc. ("Kluge"), are based on theories of negligence and strict liability. On January 3, 2001, Kluge filed the present *Daubert* motion in an effort to exclude testimony from three of plaintiff's proffered experts: Gerald Rennell, Donald Schutt, and Dr. Dale Wheeler. Item 110. Then, on

March 23, 2001, plaintiff directed her own *Daubert* motion at David Toler, who is one of Kluge's proffered experts. Item 121. Both motions have been fully briefed. The court heard oral argument on May 14, 2001.

BACKGROUND

Plaintiff claims to have suffered injuries while operating a Kluge B Series platen press in May 1993 ("the press" or "the subject press").¹ Kluge initially sold the press to Reveille, Inc., but in 1967 Aakron Rule Co. acquired it from Reiveille. Plaintiff was hired by third-party defendant Aakron Rule in April 1993. On May 18, 1993, plaintiff who had been trained to operate the press on the previous day was assigned to work on it. Plaintiff alleges that a stack of boxes fell into the press as she was operating it, and her hand was crushed by the press when she reached into it to retrieve the boxes.

DISCUSSION

Kluge's present motion concerns the testimony of three of plaintiff's proffered experts: Gerald Rennell, Donald Schutt, and Dr. Dale Wheeler. Plaintiff's motion is directed at David Toler. The Federal Rules of Evidence set forth the standard for admissibility of expert testimony:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise

¹ "Platen" is commonly defined as "a flat plate; especially one that exerts or receives pressure (as in a printing press)" or "the roller of a typewriter or printer." MERRIAM WEBSTER COLLEGIATE DICTIONARY (obtained at <http://www.merriam-webster.com/cgi-bin/dictionary>).

Fed. R. Evid. 702. The trial judge is to act as a “gatekeeper” with respect to expert testimony to ensure that such testimony is both relevant and reliable. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589-91 (1993). The *Daubert* rule applies not only to scientific knowledge, but also to technical or other specialized knowledge. See *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999). The determination as to the relevance and reliability of such evidence is committed to the sound discretion of the trial court. See *id.* at 158.

The court will only admit specialized expert testimony if the witness is “qualified as an expert by knowledge, skill, experience, training or education” Fed. R. Evid. 702. As with relevance and reliability, “[t]he exclusion of expert testimony for failing to *qualify* under Rule 702 of the Federal Rules of Evidence lies within the district court’s broad discretion” *Morse/Diesel, Inc. v. Trinity Indust., Inc.*, 67 F.3d 435, 444 (2d Cir. 1995) (emphasis added).

In terms of reliability, *Daubert* set forth specific factors, such as testing, peer review, error rates, and ‘acceptability’ in the relevant scientific community, which the trial court may consider in determining this question. 509 U.S. at 595. However, the *Daubert* test is flexible and its “list of specific factors neither necessarily nor exclusively applies to all experts or in every case.” *Kumho*, 526 U.S. at 151. Expert testimony is deemed reliable where it has “a traceable, analytical basis in objective fact.” *Bragdon v. Abbott*, 524 U.S. 624, 653 (1998) (citing *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997)); see also *Kumho*, 526 U.S. at 158.

I. Kluge’s *Daubert* Motion

A. Qualifications of Schutt and Rennell

“The Second Circuit . . . construe[s] expert qualification requirements liberally.” *Zwillinger v. Garfield Slope Housing Corp.*, 1998 WL 623589, at *9 (E.D.N.Y. Aug. 17, 1998). “Liberality and flexibility in evaluating qualifications should be the rule . . . the expert should not be required to satisfy an overly narrow test of his own qualifications.” *Bunt v. Altec Indus., Inc.*, 962 F. Supp. 313, 317 (N.D.N.Y.1997) (quoting *Lappe v. American Honda Motor Co.*, 857 F. Supp. 222, 226, *aff'd*, 101 F.3d 682 (2d Cir.1996)). Assuming that the proffered expert has the requisite minimal education or experience in a relevant field, courts have not barred an expert from testifying merely because he or she lacks a degree or training narrowly matching the point of dispute in the lawsuit. See *Zwillinger*, 1998 WL 623589, at *8 (citing *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717, 741 (3d Cir.1994)). In other words, a person knowledgeable about a particular subject need not be precisely informed about all the details of the issue raised in order to offer an opinion. See *Thomas J. Kline, Inc. v. Lorillard, Inc.*, 878 F.2d 791, 799 (4th Cir.1989).

1. Donald Schutt

Donald Schutt is prepared to offer an opinion on the relevant custom and practice of the printing industry at the time the subject Kluge press was designed and manufactured in and around 1950. More precisely, Schutt intends to testify as to Kluge’s likely expectations and intentions at the time that the subject press was designed, *i.e.*, whether Kluge expected and intended that the press could be easily modified from an automatically fed press to a manually fed press.

Kluge points out that Schutt never received his high school diploma, let alone a GED. See Item 112, Exh. F, pp. 13-14. Kluge further observes that Schutt is not a professional engineer and has no formal training in engineering. *Id.* at 20-21. In addition, Kluge states that Schutt has never actually made or designed a platen press himself and therefore cannot claim to be an expert in the safe design of platen presses. *Id.* at 22. Further, Schutt has no publications regarding printing press design, he has never been involved in a patent application regarding printing press technology, and he holds no professional certifications. See Item 110, ¶ 22.

Moreover, Kluge claims that Schutt has only “minimal” hands-on experience with Kluge presses. See Item 112, Exh. F, p. 108. Schutt indicated at his deposition that he operated a Kluge press just once, in 1953. See Item 112, Exh. F, pp. 108-10, 113, 121. Although Schutt has more than 20 years of experience as a supervisor in printing shops where Kluge presses were used regularly, Kluge maintains that Schutt never personally operated those Kluge presses during his time as a supervisor. See Item 112, Exh. E, pp. 210-16, 218, 237-41, 246,-47, 251-52, 260-62, 264. After his brief experience with operating a Kluge press in 1953, Kluge claims that Schutt did not deal with a Kluge press until 1997 when he happened to receive two Kluge presses as part of a larger purchase he had made of used machinery. *Id.* at 111, 128, 273.

To the contrary, Schutt maintains that he has been personally familiar with a Kluge “N” Series press since at least 1997, since he currently owns and operates one at his printing business in Orchard Park, New York. Schutt states that he is aware of how easily

his Kluge N Series press can be converted from an automatically fed press to a manually fed press. See Item 115, Exh. A, ¶ 19.

Plaintiff also responds by highlighting Schutt's extensive experience in the printing and graphic arts industry—55 years in all. Item 115, Exh. A, ¶ 3. Schutt says that he knew how to set printer's type by the time he was 13 years old and became a journeyman printer by 1952. *Id.* ¶¶ 4-5. Prior to earning his journeyman's card, he operated platen presses regularly while working for the Erie Press Corporation. See Item 115, Exh. A, ¶ 5. From 1952 to 1958, Schutt operated many printing presses—including a Kluge platen press—for a local printing company. *Id.* ¶ 9. From 1958 to 1962, Schutt owned and operated the *South Buffalo News*, and his pressmen there operated a platen press as well as many other types of printing presses. *Id.* ¶ 10. Then from 1963 to 1975, Schutt worked as a supervisor for two different local printing companies. As a print shop supervisor, Schutt trained workers how to operate many kinds of presses, including Kluge platen presses, and advised his workers on how to operate many printing presses in a safe and efficient manner. See Item 115, Exh. A, ¶¶ 11-12. Since 1975 Schutt has owned and operated his own printing business. In running this business, Schutt has bought, serviced, and used many presses—including Kluge N and D series platen presses. *Id.* ¶ 18.

2. *Gerald Rennell*

Gerald Rennell was retained by plaintiff in his capacity as an industrial safety consultant. Rennell states that he is an expert in machine guarding and machine safety and intends to offer his opinion on whether the subject press was designed to be fed manually and whether the subject press was adequately guarded at its “point of operation.” Item 115, Exh. B, ¶¶ 9-11.

Rennell describes himself as a “safety consultant,” but Kluge points out that he is not a formally trained engineer. See Item 110, ¶ 28. Furthermore, Kluge observes that Rennell’s two published articles on machine safety did not appear in peer reviewed journals and, in any event, had little to do with the safe design and operation of printing presses. See Item 113, Exh. H, pp. 51-54.

Plaintiff, on the other hand, insists that Rennell is eminently qualified as an expert in machine guarding and has reviewed more than enough information to provide reliable testimony in this trial. See Item 115, Exh. B, ¶¶ 3-24. Rennell is the current president of Technical Safety Associates, which is a consulting firm concerned with the safety of industrial manufacturing machinery. Item 115, Exh. B, ¶ 3. In his 31-year career in the machine guarding and safety industry, Rennell estimates that he has performed thousands of machine safety analyses. *Id.* ¶ 5.

In terms of formal training, Rennell completed a 30-credit-hour training at the Detroit Institute of Technology in 1974. As part of that training, he wrote a course paper entitled “The History of Machine Guarding,” in which he paid special attention to platen printing presses. *Id.*

From 1969 to 1971, Rennell was a safety engineer with General Motors (“GM”) and worked to make machines—including presses—safer for General Motors workers to operate. Item 115, Exh. B, ¶ 6. Rennell then worked for an insurance carrier as an industrial safety and loss control consultant from 1972 to 1977 and reviewed the adequacy of safeguards in many industrial machines—including Kluge platen presses. *Id.* ¶ 7.

Rennell himself has designed and developed point-of-operation guards for printing presses and has also taught industrial safety at the college level as well as to high school industrial shop teachers. Item 115, Exh. B, ¶¶ 7-8. Rennell is a member of the American Society of Safety Engineers, a recognized industry group. *Id.* ¶ 6. Finally, Rennell has testified in similar product liability trials before federal courts in the Northern District of New York, the Eastern District of Pennsylvania, the Southern District of Ohio, and the Northern District of Indiana. Item 115, Exh B, ¶ 9.

3. Conclusion as to Schutt’s and Rennell’s Qualifications

In opposing Schutt’s and Rennell’s testimony, Kluge invokes *Daubert*’s four classic factors (testing, peer review, error rates, and general acceptability) and argues that these witnesses cannot satisfy any of *these elements*. However, courts have recognized that the four factors set forth in *Daubert* are not exhaustive and, in many cases, are simply unhelpful to the analysis. For example, in *United States v. Brumley*, 217 F.3d 905 (7th Cir. 2000), the court allowed a law enforcement officer with extensive experience in drug trafficking to offer his opinion as to whether the defendant had been found carrying a “user or dealer” amount of heroin at the time of his arrest. *Id.* at 911-12. Certainly, that expert’s opinions did not meet any of *Daubert*’s four factors, but the court found that the witness’s

unique experience in and knowledge of drug trafficking made his testimony sufficiently reliable for the purposes of Rule 702.

Kluge attempts to liken Schutt to excluded experts from cases like *Ancho v. Pentek Corp.*, 157 F.3d 512 (7th Cir. 1998), and *Shah v. Pan American World Services, Inc.*, 148 F.3d 84 (2d Cir. 1998). Kluge’s argument on this point is unpersuasive. In *Ancho*, plaintiff sought to rely on the opinions of Ronald Lobodzinski, who had been retained to offer an opinion on the design of the defendant’s conveyor belt and a related system of “automatic transfer cars” that ran on the conveyor belt. 157 F.3d at 514. The circuit court upheld the trial court’s decision to exclude Mr. Lobodzinski from testifying at trial and noted that:

Lobodzinski had no expertise in [manufacturing] plant design and . . . he had failed to observe the transfer car in operation, much less even take[n] the time to visit the accident site.

. . . .

“He appear[ed] to know nothing about these types of [conveyor] systems. He hasn’t designed them. He hasn’t even repaired them. He hasn’t utilized them.”

. . . .

Lobodzinski was . . . without any experience in the field of architectural design relating to plants of this nature, nor was he familiar with the operation of this type of conveyor system.

Id. at 516-17 (quoting lower court Judge from transcript of trial court’s *Daubert* hearing).

In *Shah*, the court of appeals affirmed the trial court’s decision to bar plaintiff’s proffered airport security expert from testifying at trial. 148 F.3d at 101. The court observed that the trial court had not abused its discretion in light of the fact that the proffered expert “had never been a security officer with an American commercial airport or American airline, had

never performed a threat assessment of an airport, had performed no recent consulting work, and had received no training with respect to airport or airline security.” *Id.*

Unlike the barred experts from *Ancho* and *Shah*, Schutt has had decades of experience in a relevant industry (*i.e.*, the printing industry) and has dealt extensively with platen presses made by both Kluge and its competitors. Kluge makes much of the fact that Schutt has not spent a great deal of time personally operating Kluge platen presses. However, Schutt need not be experienced with the *precise* issue for which his opinion is proffered. See *Thomas J. Kline, Inc. v. Lorillard, Inc.*, 878 F.2d 791, 799 (4th Cir.1989) (“One [who is] knowledgeable about a particular subject need not be precisely informed about all details of the issues raised in order to offer an opinion.”); see also *Sullivan v. Ford Motor Co.*, 2000 WL 343777, at * 4-5 (S.D.N.Y. Mar. 31, 2000). Moreover, Schutt’s experience supervising workers who operated platen presses must be credited in his favor. As part of that work, Schutt regularly advised workers on safety issues associated with the operation of platen presses. Finally, Schutt indicates that since 1997 he *has*, in fact, operated a Kluge platen press at his printing shop. While Schutt admittedly lacks formal education, his considerable experience in the printing industry and his corresponding experience with platen presses—*both made by Kluge and others*—is sufficient to qualify him as an expert on the custom and practice of printing press manufacturers in and around 1950.

As for Rennell, Kluge likens his qualifications to the excluded expert in *Ancho*, 157 F.3d 512, as well as an excluded expert in *Redman v. John D. Brush and Co.*, 111 F.3d 1174 (4th Cir. 1997). In *Redman*, the court of appeals reversed the trial court’s decision

to allow one of plaintiff's experts to offer an opinion on whether a safe had been designed to be sufficiently "burglar deterrent." *Id.* at 1179. Plaintiff's expert, who was trained as a metallurgic engineer, "opined that, although the safe was fire resistant, it was not burglar deterrent." *Id.* The court of appeals found that it had been improper to allow plaintiff's expert to testify since he "was not qualified to testify about [relevant] industry standards" *Id.* The court went on to detail the purported expert's insufficient qualifications: "He had never before analyzed a safe, engaged in the manufacture or design of safes, or received any training regarding safes. Even more importantly, he was not personally familiar with the standards and rating systems for fire protection capacity and burglary protection capacity used in the safe industry." *Id.* at 179.

Similarly, the plaintiff's proffered expert in *Ancho* was barred from testifying because he "had failed to observe the [subject] transfer car in operation"; "appear[ed] to know nothing about these types of [conveyor] systems;" "was . . . without any experience in the field of architectural design relating to plants of this nature, nor was he familiar with the operation of this type of conveyor system." 157 F.3d at 516-17 (internal citation and quotation omitted).

As with Schutt, Kluge's attempt to liken Rennell to the excluded experts in *Ancho* and *Redman* is unpersuasive. Unlike those excluded experts, Rennell has spent 31 years in the relevant industry of machine guarding and safety and is a member of the American Society of Safety Engineers. During his career, Rennell has analyzed thousands of machines with safety concerns in mind. Rennell is accredited in machine safety by the Detroit Institute of Technology and has taught machine safety to college students and high

school instructors. In addition, Rennell worked as an industrial safety consultant for many years and, as part of that work, has reviewed the adequacy of safeguards in many industrial machines—including Kluge platen presses. While Rennell is not an academically trained engineer and has not published articles on machine guarding in peer reviewed journals, these classic *Daubert* factors are not the *sine qua non* of admissibility under Rule 702. It suffices to say that Rennell’s considerable training and experience qualifies him under Rule 702 to offer an opinion on the adequacy of the subject press’s safety and guarding.

B. Reliability of Schutt’s and Rennell’s Proffered Testimony

1. Donald Schutt

Kluge insists that Schutt’s understanding of the subject press is marginal and flawed and, as a result, that his testimony is unreliable. While Schutt did inspect the subject press, Kluge argues that Schutt could not testify to many critical details regarding the press’s condition. For example, Schutt could not say which parts of the press had been broken or removed or whether the subject press could have been automatically fed if it were used in its present condition. See Item 112, Exh. F, pp. 324-25.

Plaintiff responds by providing a detailed description of how Schutt formed his proffered opinions on the custom and practice of press manufacturers in the 1940s and 1950s. See Item 115, Exh. A, ¶¶ 13-21. First, Schutt inspected the subject press and several other Kluge presses “of the same vintage.” Item 115, Exh. A, ¶¶ 13-15. Schutt also took time to discuss these Kluge presses with operators of the presses and confirmed that hand-feeding of a platen press remains a prevalent practice even today. *Id.* Schutt

then reviewed operator's manuals, past advertisements, and parts catalogs for the subject press (and other presses like it) in a further effort to determine whether Kluge had designed the subject press so that it could easily be converted to a hand-fed press. *Id.* ¶¶ 16-17. Finally, Schutt states that he reviewed *The Practice of Printing*, which is a well known and widely used instruction manual that printers used during the time frame in which the subject press was designed and manufactured. Item 115, Exh. A, ¶ 21.

2. *Gerald Rennell*

Kluge's argument on the insufficient reliability of Rennell's testimony basically rests on one fact: Rennell did not inspect the subject press before forming his opinions. In fact, Kluge adds, Rennell has not inspected any comparable Kluge B Series press in order to form his opinions about the subject press. See Item 113, Exh. H, pp. 107-08.

Plaintiff insists that Kluge makes too much of the fact that Rennell has not inspected the subject Kluge press. By way of background, it appears that the subject press was disposed of before Rennell was retained. In any event, Rennell states that while he was not able to inspect the press itself, he has been able to view a videotape and inspect photographs of the subject press. Item 115, Exh. B, ¶¶ 11, 13. Based on this videotape and these photographs, Rennell has concluded that the subject press lacked adequate point-of-operation guards at the time it was designed and manufactured.

Rennell also offers a detailed explanation of his methodology. See Item 115, ¶¶ 11-24. In sum, Rennell has: (1) reviewed the operator's manual and various parts catalogs for the subject press, see *id.* ¶¶ 13, 14, 17; (2) reviewed depositions of the key witnesses in this case and also of key witnesses in similar product liability actions, *id.* ¶ 14;

(3) reviewed the injuries attributed to other Kluge presses of the same series as the subject press, *id.*; (4) reviewed advertisements from the appropriate time periods, *id.* ¶¶ 16, 20; (5) reviewed a videotape of a Kluge press being converted from automatic-feed to hand-feed, *id.* ¶ 15; (6) reviewed relevant safety and standards literature from the industry, *id.* ¶ 22; (7) reviewed relevant patents from the printing press industry, *id.* ¶ 23; and (8) reviewed texts that were used to train operators at the time the subject press was made, *id.* ¶ 24.

3. Conclusion as to Reliability of Schutt's and Rennell's Testimony

With respect to Schutt, Kluge highlights the fact that he was unable to specify which parts of the subject press had been removed or damaged over time and that he could not say whether the subject press could have been automatically fed given its condition at the time of his inspection. However, Schutt did not examine the subject press with an eye towards whether it could have been automatically fed, since “the plaintiff could have hand fed [the press] whether it was capable of automatic operation or not.” Item 116, p. 19. Similarly, “[i]t is the *defendant's* contention that the removal of parts from the press had something to do with the plaintiff's injury [T]he plaintiff's expert should not be disqualified because his inspection of the press was not tailored” to the defendant's theory of the case. Item 116, p. 19.

Moreover, Schutt has formulated his opinions on the relevant custom and practice of the printing press industry by inspecting the subject press and several similar Kluge presses; discussing these various platen presses with different press operators; reviewing operator manuals, past advertisements, and relevant parts catalogs; referring to *The Practice of Printing* (an instruction manual from the relevant time period); and relying on

his own experiences in the printing industry over the last fifty years or more. While this kind of testimony does not bear the classic indicators of reliability, it is hardly the kind of “junk science” that *Daubert* and *Kumho* are aimed at excluding. Schutt’s opinions regarding industry custom and practice from the relevant time period are based in objective facts and have traceable analytical bases in those facts. If Kluge does not agree with Schutt’s conclusions, it is free to cross-examine him vigorously regarding the limitations of his experience in the industry and his interpretations of the sources he used.

With respect to Rennell, Kluge’s reliability objection is premised on the fact that he did not actually inspect the subject press before forming his opinions. Yet, Rennell has stated that he was able to view a videotape of the subject press’s being operated and was also able to inspect photographs of the subject press. In any event, Rennell’s inability to inspect the subject press would not have rendered his testimony unreliable, since courts recognize that an expert need not be familiar with the particular product at issue, *see Bunt*, 962 F. Supp. at 318, so long as the witness’s “education or background [will] permit[] him to analyze a given set of circumstances” and reach an informed and reasoned opinion, *Lappe v. American Honda Motor Co.*, 857 F. Supp. 222, 226-27, *aff’d*, 101 F.3d 682 (2d Cir.1996). Moreover, Rennell’s testimony appears sufficiently reliable in light of his detailed explanation of the analytical approach he routinely undertakes in assessing machine safety and guarding.

C. Testimony of Dr. Dale Wheeler

Dr. Wheeler is an orthopedic surgeon who has been plaintiff's treating physician since she injured her hand. Kluge has no objection to Dr. Wheeler's offering testimony regarding the nature and extent of plaintiff's injury. See Item 111, p. 16. However, Kluge objects to Dr. Wheeler's offering testimony on the *cause* of plaintiff's injury. First, Kluge points out that Wheeler has no personal knowledge of plaintiff's injury, *i.e.*, he did not witness the incident. See Item 113, Exh. I, pp. 28, 30; see *also* Item 116, p.12. In addition, Wheeler admits that he does not know exactly how plaintiff's hand was caught in the subject press, *i.e.*, whether it was crushed by a "compression" force from the press or caught in a "shearing" force of two converging parts. See Item 110, ¶ 34 (citing Item 113, Exh. I, pp. 19-23, 34). Indeed, Wheeler admits that he has never even seen a printing press and has no way of knowing precisely how a platen press might catch the operator's hand. *Id.* at 31, 34.

Kluge's objection to Wheeler's testimony regarding causation is curious. In the course of treating plaintiff, Dr. Wheeler took a history from plaintiff and learned that she had injured her hand in a printing press at work. See Item 113, Exh. I, p. 15. The practice of taking a patient's subjective history and relying on it in order to form a diagnosis and a course of treatment is standard practice among physicians. Moreover, courts routinely allow treating physicians to offer opinions that are based on, among other things, the plaintiff's subjective history. See, *e.g.*, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 452-53 (2d ed. 2000). Based on plaintiff's subjective history and his clinical examination of her hand, Dr. Wheeler fairly concluded that plaintiff had suffered a "compression injury" to her

hand as a result of her hand being caught in a press at work. See Item 113, Exh. I, pp. 22-24, 28, 37-38, 42.

Kluge insists that Dr. Wheeler has never even seen a platen press and therefore is completely unqualified to explain *precisely* how the subject press might have caused plaintiff's injuries. In other words, Kluge maintains that Dr. Wheeler does not understand how the various components of a platen press move and work and therefore cannot speak to how those parts might have come into contact with a press operator's hand. Yet, if Kluge's argument were taken to its logical extent, it could bar Dr. Wheeler from testifying that a plaintiff's broken leg was the result of an automobile accident—even when that plaintiff had come into the emergency room and related as much to the doctor himself. Under Kluge's argument, the treating physician would not be able to speak to "causation" because he would have no expertise in principles of physics and the interior layout of an automobile, and would therefore be unqualified to explain exactly how an automobile's dash board, windshield or steering wheel might have come into violent contact with a person during a motor vehicle accident. The foregoing would obviously be an absurd result and serves to demonstrate the fallacy of Kluge's argument regarding Dr. Wheeler. In testifying, Dr. Wheeler may rely on the history he took from plaintiff while treating her as well as his own clinical observations and experience. Thus, Dr. Wheeler may generally testify to what he understands to be the cause of plaintiff's injuries. While plaintiff's statement to Dr. Wheeler regarding how she was injured is hearsay, it is admissible hearsay since it was a statement made for the purpose of securing medical diagnosis or treatment. See Fed. R. Evid. 803(4). Counsel for Kluge is free to establish through cross-examination that Dr. Wheeler has no personal knowledge of the alleged incident and that

his testimony regarding the cause of plaintiff's injury is based partly on plaintiff's own representations to him regarding how her injury occurred.

II. Plaintiff's *Daubert* Motion

Plaintiff Colleen King directs her *Daubert* motion at David Toler, who is Kluge's proffered expert on machine design, guarding, and safety. Plaintiff argues that Toler's proffered testimony is inadmissible for two reasons. First, plaintiff insists that Toler is not qualified to testify on the issues of guarding and safety for a platen printing press that was designed and built in and around 1950. Second, plaintiff argues that Toler's opinions are not based in objective fact and, as a result, are insufficiently reliable for the purposes of Rule 702.

A. Toler's Qualifications

David Toler is a Professional Engineer who holds a bachelor of science in aerospace engineering and a masters of science in mechanical engineering. Item 126, ¶ 3. For the past fourteen years, Toler has worked as an engineering consultant in the areas of product evaluation, equipment failure analysis, accident reconstruction, and machine design and safety. Item 126, ¶ 4. Prior to becoming a full-time consultant, Toler spent ten years working as a design engineer in various industrial settings. *Id.* ¶ 5. As a consultant, Toler has provided services to eighteen printing press manufacturers. *Id.* Toler has also taught mechanical engineering in a college setting and in the context of continuing professional education. While teaching these classes, Toler regularly deals with the subjects of machine guarding and safety. Item 126, ¶ 6. In addition, Toler has testified as

an expert in machine design and safety in several courts, both federal and state. Item 126, ¶ 7. Finally, Toler states that his work as a consultant has enabled him to learn about relevant equipment, standards, and practices of the printing industry. *Id.* ¶ 9.

Plaintiff states that Toler is unqualified to testify in this case because he has no specific education or training regarding the printing industry or platen presses. See Item 122, p. 3. Further, plaintiff points out that Toler is not trained in the operation of platen presses and has never published a scholarly article on platen press design. Item 122, p. 3 (citing Item 121, Exh. X, pp. 18-20). Moreover, plaintiff observes that Toler never examined the subject press,² nor did he examine a similar Kluge B Series platen press in order to form his opinions in this case. While Toler did interview an acquaintance of his who was a printer and had operated platen presses, and also read pertinent deposition transcripts from other lawsuits, plaintiff argues that it is unclear whether Toler's acquaintance or the witnesses in the depositions ever operated a Kluge platen press. See Item 122, p. 4.

Plaintiff cites to two cases to support this aspect of his motion: *Stagl v. Delta Air Lines, Inc.*, 117 F.3d 76 (2d Cir. 1997); and *Oglesby v. General Motors Corp.*, 190 F.3d 244 (4th Cir. 1999). For the reasons discussed *infra*, plaintiff's reliance on these two cases is unavailing. In *Stagl*, the court of appeals acknowledged that courts "may properly conclude that witnesses are insufficiently qualified . . . because their expertise is too general or too deficient." 117 F.3d at 81. However, the court there found that the disputed

²It must be noted that not only did Toler not inspect the subject press, but Gerald Rennell—one of plaintiff's experts—was unable to do so as well. See *supra*.

expert was sufficiently qualified to testify. Therefore, the facts in *Stagl* do not support plaintiff's position here. See *id.*

In *Oglesby*, 190 F.3d 244, plaintiff had sought to proffer Douglas Bradbury, a mechanical engineer, as an expert on the defective design of a plastic connector used in the GM radiator hose that injured plaintiff when it unexpectedly detached. In affirming the district court, the circuit court reasoned that while "Bradbury was . . . a qualified mechanical engineer who attempted to apply general engineering principles" to GM's plastic connector, "[h]is testimony was not sufficiently reliable . . . [because it] did not properly draw on specialized knowledge. Rather, it depended on . . . unsupported suppositions." *Id.* at 250. Thus, the court in *Oglesby* was troubled by Bradbury's failure to draw on his specialized knowledge and by his unsupported interpretation of crucial evidence, *not* by his lack of specialized expertise in the design of plastic connectors used in GM radiator hoses. In other words, *Oglesby* does not support barring an expert from testifying simply because he lacks sufficient specialization with the precise product at issue.

For the reasons discussed herein, the court finds that Toler is sufficiently qualified to offer expert testimony on the design of the subject press. Again, in construing an expert's qualifications under Rules 702 and 703, "[l]iberality and flexibility . . . should be the rule . . . the expert should not be required to satisfy an overly narrow test of his own qualifications." *Bunt*, 962 F. Supp. at 317 (quoting and citing *Lappe*, 857 F. Supp. at 226) (internal formatting omitted). Thus, when a proffered expert has the requisite minimal education and experience in a relevant field, courts have not barred the expert from testifying merely because he or she lacks a degree or training narrowly tailored to the issue

in dispute. See *Zwillinger*, 1998 WL 623589, at *7-9 (citing *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717, 741 (3d Cir.1994)); see also *Canino v. HRP, Inc.*, 105 F. Supp.2d 21, 27 (N.D.N.Y. 2000).

Even more to the point, courts have permitted professional mechanical engineers to testify regarding the design of a particular machine, even where the expert did not have extensive experience with the machine at issue. In *Stagl*, 117 F.3d 76, the court of appeals addressed the qualifications of Grahme Fischer, who was a mechanical engineer.

The focus of the defendant's voir dire examination of Fischer . . . concerned whether Fischer had expertise in airline terminal or baggage claim area design. Fischer admitted that he did not, but testified credibly that his field of expert knowledge is the interaction between machines and people.

. . . .

It is hard to imagine an expert in airport terminal design or baggage claim systems who developed that expertise in any way other than by working for the airline industry. Accordingly, to require the degree of specificity the [district] court imposed came close to letting that industry indirectly set its own standards. At times this cannot be avoided. But where, as here, well-trained people with somewhat more general qualifications are available, it is error to exclude them.

Id. at 81-82; see also *Belofsky v. General Elec. Co.*, 980 F. Supp. 818 (D. Virgin Islands 1997) (finding that while proffered expert on refrigeration machines “may not have been employed with GE or any other refrigerator manufacturing company, such specific expertise is not required by Rule 702”).

An educated, trained, experienced mechanical engineer such as Mr. Toler is qualified to proffer an expert opinion on the design of a machine with which he may not

have been especially familiar prior to being retained as an expert.³ For these reasons, the court finds that Mr. Toler is qualified to offer an opinion on whether the subject press was defectively designed.

B. Reliability of Toler's Proffered Testimony

1. Toler's Representations Regarding Principles and Methodology

In an affidavit opposing plaintiff's motion, Mr. Toler has detailed the general principles and methodology that underlie his analysis of a machine's design, guarding, and safety. Item 126, ¶¶ 10-13. Toler states that he has used a widely accepted methodology to determine if the subject press was defectively designed at the time it was manufactured in 1950. Item 126, ¶ 10. Specifically, Toler indicates that he has:

- disregarded information and reports that arose *after* 1950, when the press was made and delivered;
- reviewed the industry's safety and guarding philosophies prior to 1950;
- reviewed relevant laws and regulations as well as industry standards and practices to determine if the absence of a certain feature in 1950 would have been considered "defective";
- reviewed the development of various machines through 1950—especially the development of platen presses and the evolving use of automatic feeders with the platen press;

³See *In Re Paoli R.R. Yard PCB Litigation ("Paoli II")*, 35 F.3d 717, 741 (3d Cir.1994); *Hammond v. International Harvester Co.*, 691 F.2d 646, 652-53 (3d Cir.1982) (holding that an engineer, whose qualifications were sales experience in field of automotive and agricultural equipment and teaching automobile repair, nevertheless could testify in products liability action involving tractors); *Knight v. Otis Elevator Co.*, 596 F.2d 84, 87-88 (3d Cir.1979) (holding expert could testify that unguarded elevator buttons constituted design defect despite expert's lack of specific background in design and manufacture of elevators).

- evaluated the expectations of print shop owners and other consumers of platen presses as of 1950;
- evaluated the utility of the platen press as of 1950;
- evaluated any alternative designs that were available as of 1950; and
- considered work place training and procedures within the printing industry.

See Item 126, ¶ 10. In addition to the foregoing methodology, which is general in nature, Toler has taken the following specific steps in this case:

- identified the nature of any design defect and possible solutions for any such defect;
- determined the root cause of plaintiff's claimed injury;
- considered the roles that modification to and misuse of the subject press played in plaintiff's injury; and
- considered the consumer's (*i.e.*, Aakron Rule) responsibility to maintain sufficient guarding of the press and the consumer's knowledge of risk to the operator.

See Item 126, ¶ 11. Toler insists that he has not relied on novel theories in forming his opinions and that his testimony will help the jury resolve material issues of fact. See Item 126, ¶ 12. Toler's opinions are detailed *infra* in part II, B, 2 of this discussion.

2. Plaintiff's Opposition

All of plaintiff's arguments against Toler converge on the same premise: there is a significant "gap" between the proof that Toler cites and his proffered opinions. Put another way, plaintiff argues that Toler links his opinions to objective facts *ipse dixit* and does not ground them in a traceable analysis in the facts. See Item 133, pp. 2-3; *Joiner*,

522 U.S. 136; see also *Bragdon v. Abbott*, 524 U.S. 624, 653 (1998). Indeed, “[a]n expert’s opinion should be excluded when it is based on assumptions which are speculative and are not supported by the record.” *Tyger Const. Co. Inc. v. Pensacola Const. Co.*, 29 F.3d 137, 142 (4th Cir. 1994).

Plaintiff challenges five specific areas of Toler’s proffered testimony and urges one general challenge to the overall reliability of Toler’s report. The five particular areas that plaintiff challenges are as follows: (a) Toler’s opinions on modifications made to the subject press; (b) Toler’s opinion that the extensive modifications to the press make it impossible to say with an engineer’s certainty that a guard installed on the press in 1950 would have still been in place in 1993 when plaintiff suffered her injury; (c) Toler’s opinion that certain hand-fed platen presses can be operated safely without a point-of-operation guard; (d) Toler’s opinion that it was unforeseeable in 1950 that the subject press might be used as a hand-fed or open press; and (e) Toler’s opinion that the subject press was designed and manufactured in compliance with all government and industry standards of the time.

As to the broad challenge, plaintiff argues that Toler’s opinion is not based on “good grounds” or the type of facts normally relied on by experts in this field since Toler’s report blindly endorses a series of facts set forth in the 1996 affidavit of Henry Brandtjen. See Item 122, p.7 (citing Item 121, Exh. B (Brandtjen affidavit)). It is conceded that just over two pages of Toler’s single-spaced report were lifted directly from the Brandtjen affidavit. Compare Item 121, Exh. A, pp. 4-6, with Item 121, Exh. B, pp. 5-9. Toler himself admitted during his deposition that a substantial portion of his expert’s report was taken

directly from the Brandtjen affidavit. See Item 121, Exh. X, pp. 161-62, 67, 191, 206. Toler specifically confirmed that he relied almost exclusively on the Brandtjen affidavit and deposition in order to learn about the custom and practice of the printing press industry at the time that the Kluge B series press was made. For example:

Q: . . . How much of [the first paragraph on page four of your report] did you take from [the Brandtjen] affidavit?

A: Effectively all of it.

Q: . . . So you did not get that information from another place . . . other than Mr. Brandtjen's affidavit.

. . . .

Q: . . . You didn't independently research this stuff is what I'm asking you. . . .

A: To some extent, I've discussed some of these issues . . . with my friend who runs the printing shop. But I . . . was looking for basically confirmation that this information [from Brandtjen] was . . . right

Item 121, Exh. X, p. 163.

While plaintiff then goes on to assail the reliability of the Brandtjen affidavit, see Item 122, pp. 7-8, it is more fundamentally problematic that Toler has relied so extensively on Brandtjen's representations and has done little—outside of conferring with a friend of his in the printing industry—to investigate Brandtjen's many representations. Part of being an expert in the design of platen presses in this case will require an understanding of what the customs and practices of the printing industry were in and around 1950. Toler has developed his understanding of those critical issues by endorsing—without careful scrutiny—the factual representations of a man who was an upper-level employee of third-party defendant Kluge.

In this way, the reliability of Toler's proffered testimony is made generally suspect. Extensive reliance on an interested party's statements of historical fact do not strike this court as the "good grounds" that the Supreme Court envisioned in *Daubert*, 509 U.S. at 590. In any event, Toler's reliance on the Brandtjen affidavit only serves as relevant background to the court's determination of whether his proffered testimony is sufficiently reliable. *See infra*.

a. Toler's opinion on modifications.

Plaintiff argues that Toler's testimony regarding alleged modifications to the subject press is unreliable for two reasons. First, plaintiff claims that although Toler has only been able to see the subject press through videotapes and photographs, he has offered testimony regarding parts of the press that were not even visible in the tape and photographs. *See* Item 122, p. 9. Plaintiff also points out that Toler misidentified certain parts of the press when reviewing the photographs, stating that the press's foot brake had been removed when it is clearly visible in all of the available photographs. *See id.*⁴

Plaintiff's argument on this point is not persuasive. Plaintiff cites no proof to support the contention that Toler both invented certain observations about the subject press and misidentified other parts of it. Plaintiff simply directs the court's attention to an exhibit attached to the Brandtjen affidavit, *see* Item 121, Exh. B (attached photo image), and urges

⁴Plaintiff also contends that Toler's opinion on modifications is patently unreliable because he states that the "ruler boxes" that plaintiff was stamping at the time of her injury could not have been fed through the subject press—as the press was originally designed. *See* Item 122, p. 9. While plaintiff accurately cites a string of proof in support of this argument, a careful reading of Toler's report reveals that he never stated that the press—as designed—could not have accommodated the ruler boxes with which plaintiff was working.

the court to conclude for itself that Toler has misidentified many of the press's parts. See Item 122, p. 9. Yet, the court cannot reach such conclusions on its own since it is neither a fact finder in this setting nor is it an expert in platen press design. For these reasons, Toler's opinion on modifications must be deemed admissible. Plaintiff's challenge to Toler's opinion on modifications is best left to cross-examination.

b. Opinion on whether a guard would have remained in place on the modified press.

Toler expresses the opinion that "no basis exists on which to conclude with any reasonable degree of engineering certainty that if a guard were present on the subject machine in 1950, it would have been present at the time of the plaintiff's injury and functioned to prevent her injury." Item 126, ¶ 11. Interestingly, Toler did not proffer this particular opinion in his expert's report.⁵ It is only in his affidavit opposing plaintiff's motion that Toler indicates that there is no basis to say with any certainty that a guard would have stayed in place for forty or more years, given the extensive modifications that were made to the press.

Plaintiff argues that Toler's opinion on this point is patently unreliable because it flies in the face of fundamental principles of machine guarding. Citing the code of ethics for professional engineers, plaintiff argues that "Toler's . . . reasoning that an engineer should not bother to guard because he can't be sure that someone won't try to remove the guard really sets him apart from others in his profession." Item 133, p. 3. The court agrees with plaintiff, to a point. Toler will be barred from expressing this opinion to the extent that he

⁵Rather, Toler's report indicates that there was no certainty that an *interlocked feeder* would have remained in place in light of the many modifications that the subject press underwent over time. See Item 121, Exh. A, pp. 3, 6.

intends to suggest that it might be unnecessary or even useless to design machines with guards because of the possibility that a subsequent owner could remove them. Not only would such an opinion be contrary to the engineer's professional code of ethics, it would be repugnant to good and common sense.

However, it is not entirely clear that this is what Toler means to suggest. While this issue is not addressed by the motion papers, Toler's opinion may prove relevant to "determin[ing] the root cause of the injury" Item 126, ¶ 11. That is, if a jury accepted Toler's opinion on this point (that a point-of-operation guard installed in 1950 would not have survived the subsequent modifications made to the press), then the jury could be entitled to determine that a failure to design the press with a point-of-operation guard was not the proximate cause of the accident, but that, in either event, the modifications made to the press were the true cause of the accident and would have been the true cause even if the press had been designed so that a guard could be put in place for hand-feeding operations.⁶

As to reliability, the court finds that Toler may offer the opinion that it is unreasonable to say that a guard—or an interlocked feeder for that matter—would have still been in place forty years later, given the extensive modifications made to the press after it left Kluge's manufacturing plant in and around 1950. Toler's conclusion on this point flows logically from his opinions regarding modifications. *See supra*. It is not mere speculation for Toler, as a mechanical engineer, to take stock of modifications to a

⁶Of course, the court's rulings on evidence and charge to the jury will play a significant role in determining whether Toler's opinion on this issue can be seen as relevant to the issue of causation.

machine and conclude that a guard or some other part of the press would not have survived those modifications.

For these reasons, it appears that Toler's opinion on whether a guard would have remained in place is both relevant and sufficiently reliable to be admitted as evidence under Rule 702 is deemed admissible. However, without the benefit of first hearing what other witnesses will say and what the other proof will indicate, the court cannot decide the extent to which Toler's opinion on this point will be relevant to the facts of the case. The court will permit Kluge to proffer this particular evidence; and the court will determine, either during trial or after the close of proof, the extent to which it is relevant.

c. Opinion on need for point-of-operation guard.

Toler indicated at his deposition that "a Kluge hand-fed open press would not require a point-of-operation guard to be safe to operate." Item 121, Exh. X, p. 250. Toler offered this particular opinion during an exchange on how certain designs might affect the safety of an open platen press. See Item 121, Exh. X, pp. 248-57. This is a novel and perhaps even startling opinion. Certainly, the relevant government and industry standards support the contrary position: a hand press should always be equipped with a point-of-operation guard in order to protect the operator from injury. See Item 121, Exhs. D, P, Q, R, S, and T. In addition, the experts retained in this case—including Toler at certain points—agree that point-of-operation guards are a needed safety feature on hand-fed presses. See, *e.g.*, Item 121, Exh. A, p. 4 (Toler Report).

Toler offered this opinion during an exchange which began when Mr. Covino asked whether "an open press sold during the late '40s and 1950s, was defective if it did not have

point-of-operation guarding on it?” Item 121, Exh. X, p. 248. Toler responded by saying that it would “depend[] on the configuration of the press,” *id.*, and went on to explain that *certain* open presses have platens that “rotate[] to a horizontal position, [and] offer[] a very good opportunity to hand-feed without really exposing yourself to the point of operation. A guard in those circumstances, in my opinion, was not an absolute necessity to make the press safe to operate.” *Id.* Since many Kluge presses have a platen that rotates horizontally back towards the operator, Toler surmised that an open Kluge press would not have been defectively designed *per se* if it had been designed without a point-of-operation guard. See Item 121, Exh. X, pp. 250-54.

One can imagine defending Toler’s opinion on this issue by arguing that this particular statement had a reasoned basis in fact and was made only in the context of a hypothetical discussion on platen press design. Of course, the court cannot know for sure how Kluge would defend Toler here, since Kluge offered no specific argument on this issue in its opposing papers.

Toler’s opinion here is more than just unpersuasive; it is directly and inexplicably contrary to established tenets of machine guarding. Indeed, Toler himself acknowledged in other parts of his deposition and report that point-of-operation guards are widely recognized as a necessary safety feature on open presses. For these reasons, the court finds Toler’s opinion on the need for a point-of-operation guard on open presses to be unsupported by objective fact and, as a result, insufficiently reliable to be admitted as evidence under Rule 702.

d. Opinion on whether press was intended to be used manually.

Plaintiff contends that Toler's opinion that the subject press was not designed to be converted to hand-fed presses is patently unreliable because there are no good grounds to support it. See Item 122, pp. 10-14. Here, plaintiff calls special attention to the way in which Toler has extensively borrowed from the Brandtjen affidavit's representations of fact on this crucial issue. See *supra*. Moreover, plaintiff argues that the evidence in the record overwhelmingly demonstrates that the press was meant to be used as a hand-fed press.

Indeed, various operators' manuals, parts catalogs, advertisements, patents, and training textbooks all point towards the fact that Kluge platen presses of this vintage were built so that they could be easily converted to a hand-fed press. See Item 122, pp. 11-14 (citing Item 121, Exhs. G, H, J, K, M, N, and O). The operator's manual for the Kluge B series, which plaintiff contends was the series of the subject press, indicates at "step 4" of the assembly instructions:

After the feeding arm is locked in position, the next operation is to raise the feeding arm. This is done by releasing the feeding arm lock level "B" . . . then with the hand . . . raise the feeding arm with an upward movement following through until it has gone as far back as it will go. *The press may now be operated in the same manner as an open press.*

Item 121, Exh. G, p. 6 (emphasis added). Toler attempted to explain step 4 by placing it in the context of a larger set-up process:

Q: . . . Have you ever seen [those four steps] performed? . . .

A: I've done those four steps.

. . .

Q: Okay. . . . when you do those four steps, do you agree that that exposes the operator to the point of operation?

A: No. That's a *setup* process, and if your setup operator is the same as the printing operator, then during the setup operation, they would be exposed to the whole point of operation. That's the whole objective [of the setup process].

Item 121, Exh. X, p. 81 (emphasis added).⁷ Toler's interpretation of step 4 is an attempt to put a gloss on language that is unequivocal. That is, the operator's manual for the Kluge B series clearly contemplated that the press might be operated as a hand-fed press (*i.e.*, an open press).

Next, plaintiff calls the court's attention to a Kluge advertisement for its automatic platen press.⁸ This advertisement indicates that the automatic

feeder is sturdy in construction and very simple in operation. Two cams, located at the base of the press and operating through double-row ball bearings, operate the entire feeding mechanism, and two more cams the delivery. These cams are never out of time with the press *and any change from mechanical feeding to handfeeding is accomplished by merely raising the arm off the cams and locking it in that location in the same manner as for makeready.*

Item 121, Exh. H (emphasis added). At his deposition, Toler again sought to explain the meaning of apparently clear language by placing it into a particular context.

⁷ At oral argument, Kluge's counsel suggested that Kluge never anticipated that someone would stop the assembly process at step 4, and that the next twenty or more steps for assembly reveal that the Kluge B series was exclusively intended to operate as an automatic press. These subsequent steps alluded to by counsel are not present in the record on the present motion.

⁸It is not clear from the record when this advertisement was published and to which Kluge series it applied. On this score, plaintiff's expert Mr. Rennell infers that this advertisement speaks to *all* Kluge presses that were built through 1960, since the operator's manual for the Kluge press was essentially unchanged from the mid-1940s (when the Kluge series A was built) until 1960. See Item 115, Exh. B, ¶ 16.

Q: . . . [T]he language where it says any change from mechanical feeding to handfeeding, what does that mean to you as an engineer?

A: Well, this -- the press has to be made ready, and the steps in doing that involve adjusting [various parts of the press], all of which you need access to the platen. And moving the feeder out of the way gives you that access.

Q: Mr. Toler, what does it mean by mechanical feeding?

A: Automatic feeding.

. . . .

Q: Okay. Handfeeding means running the job by hand, does it not?

A: No.

Q: Handfeeding does not mean running a job by hand?

. . . .

A: It can on a hand-fed press.

. . . .

Q: Let me see if I got your testimony right here. Handfeeding to you in that reference does not mean printing the job by hand.

A: Right.

Q: When it says that any change from mechanical feeding to handfeeding, that means to you you're going from mechanical feeding to make ready?

A: [Yes . . . such as where] . . . you were either doing the initial setup or correcting some type of problem.

Item 121, Exh. X, pp. 130-32.

Toler's interpretation of the advertisement's plain terms is strained, at best. As with the operator's manual, the court finds that the advertisement is a clear indication that it was foreseeable to Kluge—if not actually foreseen—that its automatic platen press would, at times, be used as a hand-fed press.

In further support of her opposition to Toler's testimony on foreseeability, plaintiff cites to an operator's manual for the Kluge automatic feeder, an operator's manual for the Kluge D series press, a parts catalog for a Kluge automatic platen press, textbooks from the industry, as well as patents from the relevant time period. See Item 121, Exhs. K, L, M, N, and O. A detailed discussion of these documents is not necessary. It suffices to say that these remaining exhibits only lend further support to what the foregoing discussion makes clear: it was foreseeable to Kluge that its automatic B series press might be used at times as a hand-fed press. For all of the foregoing reasons, Toler's testimony to the contrary is insufficiently reliable because it completely lacks support in the record's objective facts. See *Tyger Const.*, 29 F.3d at 142.

e. Opinion on compliance with industry customs and standards of 1950.

Given the court's finding on foreseeability, there is little question regarding Toler's opinion that Kluge designed the subject press in compliance with industry standards and practices of the era. For substantially the same reasons that the court found Toler's opinion on foreseeability inadmissible, the court grants the motion as to Toler's opinion on conformity with government and industry standards.

As an initial matter, it is conceded that the subject press was not designed with a point-of-operation guard for hand-feeding jobs. Toler himself acknowledges that “[t]he

need to have a point of operation guard on hand-fed presses was well known in the industry” at the time that the subject press was manufactured. Item 121, Exh. A, p. 4. Furthermore, the record contains a series of documents which demonstrate that hand-fed presses were required to be equipped with point-of-operation guards. For example, the National Safety Council’s 1946 manual on accident prevention in industrial settings states that “hand-fed presses should have a mechanically operated barrier fastened to the platen. The barrier rises 4 to 6 inches as the press closes and lifts the operator’s hand out of the danger zone.” Item 121, Exh. P; *see also id.* Exhs. Q-V (providing further evidence that point-of-operation guards were universally required on hand-fed presses).

In light of the foregoing findings—first that use of the subject press as a hand-fed press was clearly foreseeable and second that all relevant standards of that time required point-of-operation guards on hand-fed presses—the court finds that Toler’s opinion on this particular issue is not substantiated by objective fact and is therefore insufficiently reliable to be admitted as evidence. That is, Toler’s testimony on the subject press’s substantial conformity with government and industry standards of the era is inadmissible.

CONCLUSION

Mr. Schutt and Mr. Rennell are qualified to offer expert testimony. Further, their testimony is sufficiently reliable to be admitted as evidence under Rule 702 of the Federal Rules of Evidence. As to Dr. Wheeler, he may offer testimony regarding the cause of plaintiff’s claimed injuries. For these reasons, defendant Kluge’s motion *in limine* is denied (Item 110).

Mr. Toler is also qualified to offer expert testimony. Furthermore, Mr. Toler's opinion regarding modifications is sufficiently reliable to be admitted and his opinion as to whether a hand-feed guard would have remained in place may prove admissible. However, Toler's testimony is insufficiently reliable as to his opinions regarding the need for a point-of-operation guard on a hand-fed press, the foreseeability of use as a hand-fed press, and compliance with relevant government and industry standards. For these reasons, plaintiff's motion *in limine* is granted in part and denied in part (Item 121).

So ordered.

JOHN T. CURTIN
United States District Judge

Dated: June 20, 2001
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