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Avoiding Daubert Challenges... and Surviving Them When You Can't

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The Issue.



- *Daubert* challenges in the context of the origin and cause of fires are less prevalent today than they were ten years ago.
- The primary reason for the lack of *Daubert* challenges is NFPA 921, and the response of professional origin and cause investigators to NFPA 921.
- Strategic Approach – Avoid *Daubert* Challenges. A *Daubert* challenge is an impediment in the form of an ancillary dispute and as such should be proactively and strategically avoided, but when a *Daubert* challenge cannot be avoided, then to be survived.



The Rules.



1. **The Federal Rules of Evidence.**
2. **Daubert v. Merrell Dow Pharmaceuticals, Inc.,**
509 U.S. 579 (1993).
3. **NFPA 921 Guide for Fire and Explosion**
Investigations.



The Federal Rules of Evidence.



- The admissibility of expert testimony is governed by Federal Rule of Evidence 702.
- Rule 702. Testimony by Experts.
- 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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.



Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).



- In *Daubert* the Supreme Court of the United States addressed and determined the standard for admitting expert scientific testimony in a federal trial.
- *Daubert* involved a suit by two infants and their parents against Merrell Dow Pharmaceuticals claiming that the children's serious "limb reduction" birth defects resulted from their mothers' prenatal ingestion of the prescription anti-nausea drug Bendectin.



Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).



- (1) Whether the theory being offered can or has been tested;
- (2) Whether the theory has been subjected to peer review and publication;
- (3) The known or potential rate of error associated with the particular scientific technique underlying the theory;
- (4) The existence and maintenance of standards controlling the technique's operation; and
- (5) The general acceptance of the theory in the relevant scientific community.

Daubert, 509 U.S. at 593-94



NFPA 921 Guide for Fire and Explosion Investigations.



NFPA 921's purpose is "to establish guidelines and recommendations for the safe and systematic investigation or analysis of fire and explosion incidents." §1.2.1. NFPA 921 was "designed to produce a systematic, working framework or outline by which effective fire investigation of origin and cause analysis can be accomplished." § 1.3. NFPA 921 was developed as a model for the advancement of fire investigation technology.



NFPA 921 Guide for Fire and Explosion Investigations.



NFPA 921 has been recognized by federal courts as a reliable methodology for evaluating admissibility of expert testimony under Rule 702. Royal Ins. Co. v. Joseph Daniel Const., Inc., 208 F.Supp. 2d 423, 426 (S.D.N.Y. 2002) (finding NFPA 921 is a peer reviewed and generally accepted standard in the fire investigation community); Travelers Property & Cas. Corp. v. General Electric Co., 150 F.Supp. 2d 360, 366 (D. Conn. 2001). In light of *Daubert* and *Kumho Tire*, NFPA 921 has become the standard for fire investigations.



I. INVESTIGATION



The Scientific Method § 4.3



1. Recognize need – there's a fire;
2. Define problem;
3. Collect data;
4. Analyze the data – data is examined;
5. Develop a hypothesis;
6. Test the hypothesis;
7. Select final hypothesis.



Basic Method of Fire Investigation. (§ 4.4)



1. Receive assignment
2. Prepare for investigation
3. Conduct investigation



Scene Investigation



- Document scene through photos and diagrams;
- Evidence recognition, documentation, and presentation;
- Witness interviews;
- Review and analysis of investigation by others;
- Identification and collection of data or info from other appropriate sources;
- Collecting and preserving evidence.



Analysis



- Analyzing the incident. (§ 4.4.5)
 - a. Analyze all data using the scientific method – develop hypothesis and test it.
 - b. An incident scenario or failure analysis should be described, explaining the origin, cause, fire spread, and responsibility for the incident.



Specialized Personnel/Technical Consultants, § 14.5



- Electrical engineers.
- Mechanical engineers.
- Fire safety engineers.
- Metallurgists.
- Others.



Origin Determination § 17



1. Involves:
 - a. Physical marks (fire patterns) left by fire.
 - b. Observation of witnesses to the fire, and pre-fire scene condition.
 - c. Analysis of the physics and chemistry of fire initiation, development and growth.
 - d. Noting the location where electrical arcing has caused damage and the electrical circuit involved.
2. Area of origin determined by moving from least damage to greatest damage.
3. Once area of origin is determined by heat, smoke and flame patterns, then you must determine point of origin. This is where the heat ignited the first fuel.



Origin Determination § 17



4. Recommended procedure for examination of the fire scene:
 - a. Examine the fire scene;
 - b. Develop a preliminary fire spread scenario;
 - c. In-depth examination of the fire scene;
 - d. Fire scene reconstruction;
 - e. Development of a final fire spread scenario;
 - f. Identification of the fire origin.
5. Notes, photos, diagrams.
6. If an area of origin is identified, then all potential ignition sources should be located and identified for a further reduction of the area of origin to a point of origin.



Cause Determination. (§ 18).



1. Consideration of the circumstances, conditions and agencies that bring together a fuel, ignition source and oxidizer, resulting in a fire.
2. Identify:
 - a. Device or equipment involved in the ignition.
 - b. The presence of a competent ignition source.
 - c. Type and form of first material ignited.
 - d. The circumstances or human actions that allowed the factors to come together to allow the fire to occur.
3. Source and form of heat ignition.

A competent ignition source will have sufficient temperature and energy and will be in contact with the fuel long enough to raise its ignition temperature.



Cause Determination. (§ 18).



4. First material ignited. (§18.4).
5. Ignition factor (cause). (§18.5).
6. Opinion. (§18.6).



Report Preparation



Why a written report is being generated?

1. Avoid authoring reports to support/justify bill.
 - a. “Short forms” and photographic studies.
 2. Avoid adjusters discussing subrogation and/or causation to “complete” their reporting.
- Discoverability issues.
 - Liability of the Insured.



Rule 26(a)(2)



- Assume draft reports are discoverable;
- Expert's final report should sound like the expert (not counsel);
- Final report should be consistent with drafts;
- Addressed to Counsel;
- Nature of Assignment;
- Avoid extraneous matters;
- No ethical justification for "purging" an expert's file.
- *Daubert* considerations.



Report Content



- Consider An Approach That Follows the Scientific Method:
 1. Recognize need – there's a fire;
 2. Define problem;
 3. Collect data;
 4. Analyze the data – data is examined;
 5. Develop a hypothesis;
 6. Test the hypothesis;
 7. Select Final Hypothesis.



Report Content



- Consider An Approach That Follows the Basic Method of Fire Investigation:
 1. Receive assignment;
 2. Prepare for investigation;
 3. Conduct investigation;
 4. Collecting and preserving evidence;
 5. Analyzing the incident;
 6. Origin Determination;
 7. Cause Determination.



Report Content



- Other Approaches.



PREPARING FOR AND GIVING EXPERT DEPOSITION TESTIMONY.



- Preparation.
- Be fully familiar with the critical facts of the case.
- Anticipate opposing counsel's preparation and areas of inquiry.
- Know your file.
- Meet with counsel.



Expert Deposition Check List



1. Personal/background information.
 - a. Present employment/occupation.
 - b. Educational background.
 - c. Prior experience as an expert, including
 - (1) prior deposition and trial testimony;
 - (2) area of specialty involved in case and other special areas of expertise;
 - (3) existence of any instances of a trial court rejecting your testimony;
 - (4) retention by same party/law firm/insurer in other cases;
 - (5) testifying for same client repeatedly, to the exclusion of other potential clients;
 - (6) testifying only for plaintiffs or only for defendants;
 - (7) any basis for possible bias due to party affiliation, prospects for future work, financial interest



Expert Deposition Check List



2. Initial retention and assignment.

- a. Who? When? Why?
- b. Knowledge of the critical facts of the case.
- c. Review retention correspondence and instructions.
- d. Actual work performed on the case.

3. Review of expert file materials.

- a. All documents produced under Rule 26, including the expert report/statement of opinions, exhibits, information, test results, data, reference materials (codes, standards, etc.)
- b. Qualifications / publications / rate of compensation and list of cases testified in over the last four years.
- c. Correspondence, draft reports, billing records, computer documents.
- d. All other documents reviewed, considered or relied upon to form opinions or conclusions, including written discovery requests and responses, deposition transcripts (including any deposition summaries provided by opposing counsel), interviews or statements by witnesses, etc.



Expert Deposition Check List



4. Verbal communications
 - a. Discussions with counsel.
 - b. Discussions with witnesses or employees of a party.
 - c. Discussions with other experts/assistants.
5. Opinions and conclusions.
 - a. Basis for each opinion.
 - b. Documents, treatises, texts or other written materials relied upon.
 - c. Assumptions/uncertainty.
6. Critique of opposing expert's work.
 - a. Agreement or endorsement of opposing expert's qualifications, analysis, methodology, authorities, theories or opinions.
 - b. Criticisms of opposing expert's qualifications, analysis, methodologies, authorities, theories or opinions.



SURVIVING *DAUBERT* CHALLENGES



- The analysis for admissibility of expert testimony turns on two considerations:
 - (1) whether the proposed witness can qualify as an expert under Rule 702; and
 - (2) whether the methodology employed by the expert in arriving at his opinion satisfies the requisite “intellectual rigor” so as to render the opinion reliable.



SURVIVING DAUBERT CHALLENGES



- A. Possess Sufficient Experience, Knowledge, Education and Training to Qualify as a Cause and Origin Expert;
- B. Employ a Methodology that is Consistent with the “Intellectual Rigor” Required Under Daubert;
- C. State Opinions Regarding the Cause and Origin of a Fire that are Reliable and Satisfy the Intellectual Rigor Required Under Daubert and its Progeny.



Ancient Roots



If fire break out, and catch in thorns, so that the shocks of corn, or the standing corn, or the field are consumed; *he that kindled the fire shall surely make restitution.*

Exodus 22:5



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Steven K. Gerber joined Cozen O'Connor in 1992 where he devotes his practice to the prosecution of large property loss subrogation matters, including actions arising from fires, building collapses, water damage and product failures. Steve has achieved subrogation recoveries on behalf of clients in scores of actions in numerous jurisdictions.

Steve is a member of the American and Pennsylvania bar associations. Steve has been rated "AV" by Martindale-Hubbell's peer review rating system.

Steve is admitted to practice in Pennsylvania and New Jersey as well as the U.S. District Courts for the Eastern and Middle Districts of Pennsylvania and the District of New Jersey. Steve regularly serves as an arbitrator in the Philadelphia County Court of Common Pleas.

Steve earned his bachelor of arts degree from Trinity College in 1987 and his law degree from the College of William and Mary in 1992.

