



Fire Litigation Perspectives

SUMMER 2007

Tedford & Henry, LLP · 750 Main Street, Suite 1600, Hartford, Connecticut 06103 · P (860) 293-1200 · F (860) 293-0685 · www.tedfordhenry.com

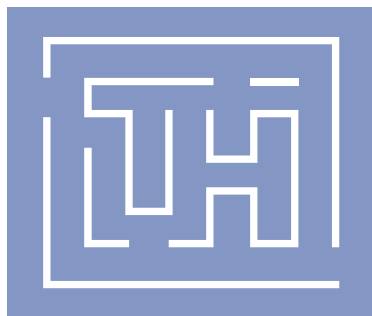
The Daubert Series: Part IV

Once the decision has been made to assert a *Daubert* challenge, consideration must be given to "the hearing" and the timing of the motion.

"The Hearing"

The moving party often wants a *Daubert* hearing. Such live evidentiary hearings may work to the movant's tactical advantage.

- Presuming there is an assigned trial judge at the time of the hearing, the hearing is an opportunity to educate the court as to the complex scientific issues involved in advance of the trial
- It tends to drain the financial resources and other resources of the non-moving party
- It serves to establish a more thorough record for appellate review



On the other hand,

- It tips the movant's hand to its opponent
- It allows the opponent's expert to have a "dry run" at cross-examination
- It uses valuable resources and is a financial cost to the client

Is a Live Hearing Required?

Most federal courts addressing the issue have held that an *in limine* hearing is not required when a *Daubert* challenge is raised.

Whether to hold an evidentiary hearing is generally a decision left to the sound discretion of the district court. A district court may properly limit the scope of a *Daubert* hearing where the

challenge is not a novel one or where no new or specific facts are relied upon in objecting to the proffered expert's testimony. On the other hand, a *Daubert* hearing may be appropri-

ate in "complicated cases involving multiple expert witnesses."

If you are seeking an evidentiary hearing, it is imperative that the request for hearing set forth argument as to why such a hearing is appropriate under the circumstances of the case.

article continues inside...

Welcome to FIRE LITIGATION PERSPECTIVES

This quarterly publication is brought to you by Tedford and Henry, LLP, a law firm with a national practice devoted to fire science litigation. Our business colleagues find *Perspectives* a resource for fire science issues, as well as for interesting developments in the law.

To subscribe:
www.tedfordhenry.com/newsletter

FREE SEMINARS

To all of our colleagues — Tedford & Henry would be glad to present our **Fire Science 101, and Exculpating Your Product At The Fire Scene** courses at your location. Contact us for more details.

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By: Jeff D. Colwell, Ph.D., P.E.
- News & Facts

Editorial:

Deep Pocket Blues

Are you tired of being the company put on notice of "every fire" west of the Atlantic? Are you tired of having to pay "defense costs" to end frivolous product litigation? Is your product's label the only one that is legible after the fire? If so, then you've got the "deep pocket blues."

Fire litigation is not product liability in a different wrapper. Fire litigation is product litigation with more issues, more hurdles, and more available defenses. To take advantage of the additional defenses, you and your attorney must understand fire science. You must understand the culture of the fire investigators who are identifying the area of origin to include your company's product at the fire scene, as well as the mindset of the attorneys who are promoting the litigation.

In what other product liability action does the area of origin become relevant? In what other product liability action do the concepts of competent ignition source, first fuel, or arc mapping provide a defense?

If your company is tired of suffering from the deep pocket blues, then stop treating your fire litigation like just another products case. You have to empower yourself and effectively fight back. To do that you must become educated in the field of fire science and



insist that your investigators and attorneys be experts in that science as well.

Only then will you be able to cure the deep pocket blues by exculpating your product at the fire scene and dissuade opposing fire investigators and attorneys from associating your

company's product with being a potential deep pocket for recovery. Fire science training is available through the National Association of Fire Investigators, The International Association of Arson Investigators, The University of Wisconsin Engineering Department (Professor Richard Moll), the U.S. Department of Alcohol, Tobacco, and Firearms, the free website www.cfitrainer.net, and Fire Findings (www.firefindings.com). Our firm provides training to companies at no charge and at your facility. Cure those blues!

— BY: FREDERICK B. TEDFORD

The Daubert Series: Part IV (continued)

Because there can be no guarantee that an evidentiary hearing will ensue, it is critical that the parties' legal memoranda provide detailed explanations of the experts' anticipated testimony, as well as supporting documentation such as affidavits, deposition transcript, or reports.

The full article can be found on the Tedford & Henry website at: www.tedfordhenry.com/articles.

Tell Us What You Think

Just as we welcome all readers to submit articles for publication in our newsletter, we welcome all readers to submit their thoughts and opinions in response to articles we print. We will be glad to publish any comments or contrary opinions in either a future newsletter or on our website.

You may submit any comments directly to: info@tedfordhenry.com.

TOPLIFF v. WAL-MART STORES EAST LP, 2007 WL 911891 (N.D.N.Y.) (March 22, 2007)

In Topliff v. Wal-Mart Stores East LP, the court meticulously examined the reliability of the plaintiff's expert's methodology relating to his fire investigation. The underlying product liability action concerned a young girl, age five, who was severely burned and permanently scarred at the home of her parents. The plaintiff alleges that the accident occurred when the 100% polyester jogging suit that the five year-old was wearing ignited and melted upon contact with hot air and debris from a backdraft of a wood stove.

The defendants filed a motion to preclude the plaintiff's expert on several grounds. First, pursuant to Rule 702 of the Federal Rules of Evidence, the defendant argued that the expert was not "qualified" to testify as an expert in the subjects at issue: fire investigation, the flammability of apparel, the use of flame retardants in or on apparel, and the use, placement or composition of warnings for apparel. According to the defendant, the expert did not possess the necessary "knowledge, skill, experience, training, or education" in those subjects. Second, pursuant to Rules 702 and 703 of the Federal Rules of Evidence, the defendant argued that the expert's methods were not "reliable" because he altered standard testing protocols to achieve the results he desired, and he relied on insufficient facts to reconstruct the alleged incident that injured the child. Third, pursuant to Rules 703 and 403 of the Federal Rules of Evidence, the defendant argued that the expert's proposed testimony should be excluded since the probative value of that testimony was substantially outweighed by its prejudicial effect upon the defendant.

Although the court found that the expert possessed the minimum amount of experience or training necessary to render him "qualified" to testify as an expert in fire investigation, the court precluded his testimony on the basis that it was both unreliable and unfairly prejudicial. With respect to qualifications, the court found that the expert's only education regarding fire investigation was his attendance at

three seminars: (1) the National Fire, Arson, and Explosion Investigation Training Program, (2) the National Seminar on Fire Analysis Litigation; and (3) the National Advanced Fire, Arson, and Explosion Investigating Science and Technology Program. Additionally, the expert was a Certified Fire and Explosion Investigator, providing a further basis for the court to find him qualified to testify on fire investigation.

Interestingly, before turning to the reliability of the proposed testimony regarding fire investigation, the court precluded the expert's opinions concerning the use of flame retardants on consumer apparel as well as the proposed testimony regarding warnings on consumer apparel. The court held that the expert, a chemist and chemical engineer, was only qualified to testify on the limited subject of the chemical properties of polyester in general and how such properties change due to the application of heat or flame. The court summarized the expert's fire investigation opinion as follows: (1) that a "blast of hot air" of "about 400°F" emanated from the plaintiff's wood stove as a result of a "downdraft" of air; (2) that the blast of hot air was accompanied by "flaming and glowing materials including [] newspaper and kindling embers" of "about 1800°F"; and (3) that "some of these flaming embers or burning newspaper landed on [the child's] 100% polyester garment and ignited it in a variety of spots."

The court stated that the technique or theory used by the expert to arrive at his

fire investigation opinions was so devoid of any scientific method that it was unreliable under a Daubert analysis. The court focused on the expert's failure in his report to adequately account for all of the record evidence at issue, determining that the expert's report espoused opinions which did not take into consideration testimony from key witnesses and physical evidence remaining after the fire. The court further found that the expert had engaged in "circular reasoning," evidenced by his repeated use of the terms "typically" and "[i]t is well known." The court also noted that no tests or studies were cited to back up the expert's factual assertion that a "downdraft" through the type of stove in question caused newspaper and embers of this temperature to travel such a distance in such a quantity and at such an angle to melt the jogging suit in question, and that the expert failed to consider alternate hypotheses.

Finally, the court stated that, even if the offered testimony were found to have a modicum of probative value, the probative value would be substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury under Rules 403 and 703 of the Federal Rules of Evidence. The court went on not only to exclude the expert's proposed testimony about fire investigation on the ground that it was unreliable and/or unfairly prejudicial, but the court also granted the defendant's summary judgment.

Guest Article

The practice of fire science litigation is dependent on the expertise and strong thinking of associates in this exacting field. These knowledgeable individuals have authored fire-related articles which we have posted in their entirety on the Tedford & Henry website. We appreciate the submission of these articles, and note that the opinions expressed therein are those of the authors. If any reader wishes to comment on the submissions, please send us your thoughts and we will be glad to include them in a future issue. Read excerpts of those informative articles here in *Perspectives*, and then get the full story at www.tedfordhenry.com/articles.

Hot Surface Ignition: Unraveling the Myths

While ignition of automotive fluids on hot surfaces is often alleged in litigation involving motor vehicles, this ignition mechanism is very complex and expert opinions in this area can be incorrect. Dr. Colwell's paper explores and unravels some of the common myths and misconceptions about hot surface ignition. Guidelines and strategies to evaluate potential hot surface ignition scenarios and how to best test an expert's opinion are also discussed.

Jeff Colwell, Ph.D., P.E. is a Senior Managing Engineer at Exponent in Phoenix, Arizona. He specializes in the engineering analysis of thermal and combustion processes, especially the cause, origin, and propagation of fires and explosions. Dr. Colwell has particular expertise investigating fires associated with automobiles, recreation vehicles, motorcycles, and heavy trucks where typical fire scenarios include post-collision fires, structure fires involving vehicles, and fires that occur while the vehicle is being operated. He analyzes how these fire scenarios, along with vehicle design, operation, maintenance, repair and aftermarket equipment, are related to mechanisms of fire causation, growth rate, and spread. He has specialized expertise in designing and conducting both component and full-scale tests to evaluate these complex relationships.



Jeff Colwell, Ph.D., P.E.
Exponent Failure Analysis Associates
23445 North 19th Avenue
Phoenix, Arizona

Dr. Colwell's paper can be read in its entirety on our website at: www.tedfordhenry.com/articles.

Submit Your Articles

Tedford and Henry encourages readers of *Perspectives* to submit topical guest articles for inclusion in this Quarterly Newsletter and on our website.

Contact Brian Henry at 860.293.1200 or via e-mail at bhenry@tedfordhenry.com.

The Eyewitness—Not To Be Unnoticed

It would seem that any fire investigator or fire science attorney worth his or her salt would know the value of the eyewitness. Still, time and time again, eyewitnesses are overlooked because of time constraints, mismanagement of the fire scene, or simply because a fire investigation was prematurely closed. While eyewitness statements may have their limitations, they may be a powerful tool in fire litigation that should not be underestimated.

A fundamental element of fire origin determination as set forth by *NFPA 921* is the gathering of “observations reported by persons who witnessed the fire or were aware of conditions present at the time of the fire” – eyewitnesses. *NFPA 921: Guide for Fire and Explosion Investigations*, Ch. 17, 17.1.1 (2), (2004 Edition). Indeed, *NFPA 921* states that “[i]n some instances, a single item, such as... a dependable eyewitness to initiation, can be the basis for a conclusive determination of origin...” 17.1.2.

In addition to shedding light on the *origin* of a particular fire, witness statements may also provide information on whether flashover has occurred or the location and extent of fire at a particular time. The description of certain “benchmark events,” such as a roof collapsing, a window breaking out, or an explosion, can provide critical assistance to a fire modeling expert in developing a timeline and examining fire spread and causation issues as well. *NFPA 921* at §20.2.4.

Of course, the [eye witness] statements are not infallible. “[A]ny information solicited or received by the fire investigator during a fire investigation is only as reliable as the source of that information.” *NFPA 921* at §13.1.2.1. Eyewitness information, perhaps even more so than other verifiable information gathered by the investigator such as photographic evidence, is susceptible to being called into question. Multifarious factors affect the reliability of the eyewitness statement:

- whether the witness is a trained observer—for example: [fire fighter], law enforcement, emergency personnel, etc., as opposed to a lay person
- the length of time from the event to the statement
- the stress, if any, to which the witness was subjected at the time of the observation
- corroboration of statements by others, facts and evidence
- duration of event
- complexity of event





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Tedford & Henry, LLP

750 Main Street, Suite 1600, Hartford, CT 06103

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Perspectives from the **Hotseat**

Tedford & Henry **News & Facts**

T&H is pleased to announce the relocation of its office to Suite 1600 of 750 Main Street in Hartford. While our telephone number, fax number, and website will remain the same, our suite number change will take effect on July 30th.

Brian Henry has been invited to speak as a guest lecturer at the National Seminar of Fire Analysis Litigation in Sarasota, Florida, on August 9, 2007. He will be presenting on the topic of "Selecting and Utilizing Fire and Explosion Experts — A Litigation Partnership." Please contact us for details on attending.

Ted Tedford has been invited to speak at the DRI Fire and Casualty Seminar in Chicago, Illinois, on November 1, 2007. He will be presenting on the topic of "Confronting Myths in Electrical Product Fire Claims — The Triumvirate of Temperature, Energy and Time." Please contact us for details on attending.

