

Some Considerations when Preparing to Try a Property Damage Subrogation Case in the Age of CSI

Recent criminal trials turned national media events, such as the Trayvon Martin and Casey Anthony trials, have highlighted modern jurors' expectations for forensic evidence. Commentators have termed jurors' expectations for forensic evidence the "CSI Effect." See, e.g., Katie L. Dysart, *Managing the CSI Effect in Jurors*, ABA, Section of Litigation, Trial Evidence Committee, May 28, 2012.

The CSI effect has been characterized as jurors' sometimes unrealistic expectations for forensic evidence as a result of jurors' exposure to television dramas such as CSI and Cold Case. See, e.g., Jeffrey Heinrich, *Everyone's an Expert: The CSI Effect's Negative Impact on Juries*, *The Triple Helix* at Arizona State University, Fall 2006.

The CSI effect can have an impact on the trial of a property damage subrogation case because a property damage subrogation case typically involves forensics in the form of origin and cause, failure analysis and engineering.

The lawyer preparing a subrogation case for trial, while meeting with witnesses, drafting motions, and otherwise gearing up for trial, should take the time to consider the jurors expectations. As a generalization, jurors want to do the right thing. Jurors want to be convinced. Jurors are not easily persuaded to make a finding merely because the scales of justice tip ever so slightly. When asked in a criminal case to send a person to prison jurors want something closer to 100-percent certainty; beyond a reasonable doubt is often not enough. When asked in a civil case to award significant monetary damages to a plaintiff, which means imposing a significant monetary penalty on a defendant, jurors want something more akin to the criminal standard of beyond reasonable doubt; jurors are often not willing to find against a civil defendant merely because the scales tip ever so slightly.

To the subrogation practitioner, the CSI effect means that jurors want to know what happened. Jurors are reluctant to accept concepts of circumstantial evidence. Jurors are resistant to making permissible inferences. Further, jurors expect forensics to be part of the trial presentation and may be unduly swayed to give more weight to the forensics than is otherwise warranted as well as unduly swayed in the opposite direction by the absence of forensics. Jurors may be looking for CSI type proof, often at the expense of witness testimony, even though a significant amount of what is portrayed as "forensic science" on CSI is fictional and does not exist in real life.

The lawyer preparing to try a subrogation case should consider addressing the CSI effect head on. Consider inquiring about television viewing habits as part of voir dire. Strategize on how to present the forensics utilized in a case. Just as importantly, strategize on how to explain where there may be an absence of forensics in an effort to give jurors some real world perspective relative to their popular culture expectations. Showcase the forensic basis for your case at trial. As much as practical, utilize the courtroom technology jurors expect to see to present your case.

Consider structuring the trial of a case along the lines of a CSI episode. For example, start with the fire. Where the fire was witnessed, lead with the person who discovered the fire. Call the first-arriving firefighter in uniform. Employ attention-grabbing visuals as part of your direct examination. Use the photographs and video of the fire in progress that you may have obtained from the first-responding fire company. Call the public-sector investigator, again in uniform. Have the public-sector investigator and your origin and cause investigator use a touch screen or electronic pointer to illustrate both on the photos and on the video of the fire in progress as well as on the investigative photographs, the area of origin, the point of origin and the potential sources of ignition. Work with your forensic electrical engineering consultant to teach the jury how something



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like arc mapping can be a finger print of the fire.

Similarly, in a structural collapse case, call as your first witness someone who was in the property when the property collapsed. Collaborate with your expert to prepare visually engaging graphics to illustrate the key factors that caused the collapse such as the load on the roof at the time of the collapse, and the stress imposed upon the structural members utilizing the photographs and video from the scene investigation. Consider an interactive visual that illustrates the loads being placed on a building roof structure by the addition of roof mounted or suspended mechanical equipment, by sprinkler systems and by the accumulation of ice and snow.

When it comes to presenting damages, consider using visuals such as an interactive spreadsheet where the adjuster can input and total the numbers and the jurors can see the number increase as categories of damages are addressed during testimony.

Give jurors the visual graphics they expect. Technological advances have made it more affordable to produce graphics for trial that just a few years ago may have been considerably costly.

Today's lawyer preparing to try a property damage subrogation case must endeavor to hone their message and prepare their presentation to suit their audience. Today's jurors tend to be more sophisticated but with shorter attention spans than jurors of the past. Most jurors carry smartphones with more computing power than many trial lawyers had access to when they started practice. The length of the typical television commercial has decreased from 60 seconds in the 1950's to 15 seconds today. Jurors are 21st century people who may feel as if they've gone through a time machine when they enter a courtroom as most courtrooms are vestiges of the 19th century with the judge on the bench, the witness on the stand, the jury in the box, and the lawyers alternatively at the podium and counsel tables. The best trial lawyers have always been great story tellers. In preparing to try a property damage subrogation case, prepare to tell a great story recognizing that today most jurors do not read stories; rather they interact with stories by way of a multitude of digital media devices.

In addition to the two articles cited above, some additional pertinent reading includes, Max M Houck, *CSI: Reality*, *Scientific American*, July 2006 at 85.; Richard Matthews, *The "CSI Effect" ... in Civil Cases as Well as Criminal Ones*, *The Jury Expert*, June 2007 at 10.; N.J. Schweitzer and Michael J. Saks, *The CSI Effect: Popular Fiction About Forensic Science Affects the Public's Expectations About Real Forensic Science*, 47 *Jurimetrics J.* 357-364 (2007).; Hon. Donald E. Shelton, Gregg Barak, and Young S. Kim. *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the "CSI Effect" Exist?*, *Vanderbilt Journal of Entertainment & Technology Law* 9.2 (2006): 331-368.; Matthew J. Smith and David Petrelli, *The CSI Mystique, Using Forensic Science in Insurance Litigation*, *Litigation Management Magazine*, Fall 2013, p. 38.; Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Realty and Fiction*, 115 *Yale L.J.* 1050 (2006).; Andrew P. Thomas, *The CSI Effect: Fact or Fiction*, 115, *YALE L.J. POCKET PART* 70 (2006).

To discuss any questions you may have regarding the issues raised in this Alert and how they may apply to your particular circumstances, please contact: Steven K. Gerber in the firm's Philadelphia office at (215) 665-2088 or sgerber@cozen.com.