

Litigation Management

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The CSI Mystique

Using Forensic Science In Insurance Litigation

By Matthew J. Smith and David Petrelli



Long before the CSI debuted in the fall 2000 television season, those involved in insurance litigation had known and used forensic evidence in claims and trials for decades. Much has been written about the “CSI effect” on jury verdicts, especially in criminal trials. The reality of juries reaching inexplicable decisions has been around as long as jury trials have existed. Regardless of these sensationalized verdicts, forensic science and evidence is an important part of many cases we in the insurance industry present and, if used effectively, can help lead to a successful outcome. Instead of fearing the “CSI effect,” the real question to ask is how can we maximize the benefit of the continuing forensic science “craze” which CSI created?

CSI, in its various versions, remains among the top three television shows in America and reaches more than 40 million U.S. viewers every week. Combined with “copycat” shows, they reach more than 2 billion viewers worldwide every week, forming the largest block of television viewers with the sole exception in the U.S. of the current reality show craze. Chances are, with literally tens of millions of American viewers a week watching television shows based upon forensic evidence analysis, many of those individuals will be selected to be seated on juries deciding insurance-related civil lawsuits.

CSI is not the first exposure most television viewers have had to forensic science. The roots of CSI itself date back to *Quincy M.E.*, which ran from 1976 until 1983. Jack Klugman portrayed the combination coroner/detective who solved crimes as much from the laboratory as the courtroom. The unique combination of law, law enforcement and medical forensics in *Quincy* was a Hollywood first combining many of the same elements of today’s CSI genre of shows. The majority of jurors today are from America’s “baby boomer” generation, who grew up on television series ranging from *Dragnet* to *Hawaii 5-0* and even shows such as *Medical Center*. All of these shows heavily incorporated the use of forensic analysis. In the late 1960s and early 1970s, many popular TV shows, such as *Mannix*, *Cannon* and *Ironside*, were focusing on private investigation, all of which involved the use of forensic evidence and analysis to solve cases.

Capitalize on the Curiosity

The reality of more than a half-century of these types of media entertainment exposures is most jurors come into a courtroom with a pre-conceived notion of what forensic evidence should be and how it is used in investigations and litigation. It is our role and duty

to capitalize on the positives and minimize the negatives associated with these pre-conceived notions.

Jurors today are more fascinated and intrigued by forensic evidence than at any point in the history of jury trials. This provides the opportunity to use forensic evidence more strategically. The intersection of pop culture and juries through television shows should not be something to shy away from, but instead embrace fully and use to maximum advantage. In 2002, the American Bar Foundation published “What We Do When We Do Law and Popular Culture.” This article correctly observed:

Jurors will consider lawyers poor advocates when their presentations in court are not as compelling as what jurors have come to expect from feature films, TV or even popular novels...

While this statement relates to lawyers, the same is true for any type of forensic services provided by experts who testify in court — ranging from origin and cause investigations, accident reconstructions, laboratory analysis, independent medical examinations, medical reviews and even forensic accounting.

What we and our experts do, how we do it and why we do it are all issues that we tend to take for granted, but which have an extreme appeal if explained properly to the jury. When presented in a direct and engaging way, the background story and role of forensic evidence in a case will also add credence, credibility and a certain mystique to what we may view as mundane. Jurors are ready and willing to hear and thoughtfully consider forensic evidence — especially when the advocate or witness presenting the evidence in court presents it in a manner that intrigues the jury and demonstrates to them the extent of analysis and preparation that went into building the case being presented.

Those in the industry have a tendency to overlook both the appeal of explaining forensics and also how it forms a foundation for credibility and reliability through well-tested, time-proven methods and practices. Too often, we focus on the irrational jury verdicts associated with CSI and forensic science gone wrong and lose track of the success we can gain if we use this popularity to our strategic advantage.

The Reality

Those acquainted with forensic analysis know that what is presented on the television screen is far from reality. Most laboratory analysis is done in a basement with old tile floors and fluorescent lighting, not in the space age, blue-lit laboratories on



- Q.** What was the one U.S. television series where the “star” was an insurance claim investigator?
- A.** *Banacek*, which ran on NBC from 1972–1974 starring George Peppard.

the screen. Also, lab results and testing are far more complicated and time-consuming than solving the entirety of the case in a one-hour episode. It is our role and duty to explain the differences between forensic reality and Hollywood reality. We can do a better job of explaining the reliability and credence given to scientific analysis by carefully explaining and even demonstrating to jurors how and why we use this type of evidence, and the extensive steps taken from the loss scene through testing and analysis necessary to reach a sound and reliable decision. Jurors may find this the most interesting and compelling portion of the evidence presented at trial.

In a major study of the “CSI effect,” *U.S. News and World Report* issued a cover story in April 2005 that candidly found:

Stoked by the technical wizardry they see on the tube, many Americans find themselves disappointed when they encounter the real world of law and order. Jurors increasingly expect forensic evidence in every case, and they expect it to be conclusive.

This was followed in 2006 by a major expose’ in the *Saint Louis Post-Dispatch* titled “CSI and Law & Order Lead Jurors to Great Expectations.” In her article, Linda Deutsch noted, “The justice system is now facing what legal experts call, ‘the CSI effect,’ a TV-bred demand by jurors for high-tech, indisputable forensic evidence...” Findings such as these should lead us to understand and appreciate we may lose cases not because we do not have good or sound evidence, but because we do not present an effective case that meets, or hopefully exceeds, the expectations of jurors who are ready to be wowed in the courtroom with the who, what, when, where and why of our forensic analysis and evidence.

CSI and the related plethora of forensic sciences depicted on television has affected the American education system as well. The *Elmira, New York Star-Gazette* published an article in 2006 entitled “CSI Effect Found in Classrooms and Courtrooms” that contained a very interesting observation:

Forensic science programs report exploding enrollment and are inundated with inquiries about careers in forensic science. Some recent news articles cite a ‘reverse’ CSI effect where students are dropping out

of forensic programs, because they are disappointed by the degree of science involved and the tedious and unglamorous nature of the profession, compared to its television depiction.

The Experts

We walk a fine line in taking advantage of the juror interest in forensic evidence and explaining to juries why forensic evidence is important, but may not always be entirely conclusive or in keeping with the perception they have seen on television. This is where highly skilled and effective expert witness testimony is crucial in trying the insurance case in today’s CSI-infused environment. It is more important than ever that the experts retained during the investigation and evaluation phases are highly qualified and unbiased. To truly be of value, they will need to have the skills to present their processes, scientific methods and conclusions to a jury of media-educated non-experts.

The most effective experts, as well as attorneys, are the ones who communicate to juries the evidence we routinely rely on in insurance-related litigation in an energized and intriguing manner. Simply presenting the evidence to the jury may not be sufficient. To be on the winning side in the courtroom today requires a clear understanding of what jurors expectations, right and wrong, are and presenting forensic evidence in a manner that will draw the jurors into a better understanding of the strength of the evidence and why it supports a verdict. Those who cannot connect with jurors on this level in the era of electronic communications and pop culture are destined to lose cases and walk out of the courtroom still perplexed as to why.

So what is the real “CSI effect?” If we truly want to win cases, this should be viewed as a great opportunity and a wake up call to look anew at the role and presentation of forensic evidence in the cases brought to trial. It should also cause each of us to reassess how we present ourselves, our evidence and our cases in the courtroom of the new millennium. Jurors are ready and eager to hear forensic evidence, but they are more demanding for us to explain and clarify why the evidence is reliable. It up to us to differentiate for them the line between reality and television fantasy. We will still not win every case, but we need to embrace a new and invigorated way to utilize forensics in the courtroom. The next time a jury issues what we believe is a wrong decision in a forensic-based lawsuit, perhaps we need to ask not how the jury got it wrong, but what we ourselves should have done better. Doing so will not only win more cases, but improve our professions as well. **LM**

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