

FISC Bulletin Board

Jerry Rudden, Chair
Terry-Dawn Hewitt, Co-chair
IAAI Fire Investigation Standards Committee (FISC)

Foreword

The IAAI Fire Investigation Standards Committee (FISC) usually uses this column to publish information about various standards relating to fire investigation. Many of our columns have related to *NFPA 921 Guide for Fire and Explosion Investigations*. One of our FISC members, Angelo Pisani, was involved in a court case involving NFPA 921 and prepared an article to describe his experience and his position on the never-ending controversy of whether NFPA 921 is a “standard” or a “guide.” This article also has an interesting lesson on the importance of attorneys with little or no fire litigation experience obtaining assistance early in a case from a well-qualified fire expert. After reading this article, it was the decision of FISC that this would be a worthwhile piece to publish in our Bulletin Board as it contains many important lessons concerning the use of NFPA 921 in court. To the extent that this article contains opinions, they are the opinions of the author and does not necessarily reflect the position of FISC or the IAAI.

NFPA 921: A Standard, or “Just a Guide”?

By Angelo Pisani Jr., Ph. D.

Unfortunately, even today, it appears that, some fire investigators still do not take the recommendations in NFPA 921 seriously because “it is *not a standard*, it is *just a guide*.” Below is a case that illustrates how such thinking can have devastating effect on the outcome of a case and one’s career as a fire investigator.

On May 20, 1997, Nadzira Ficic’s automobile caught fire as her brother was driving it on a crowded expressway on Staten Island, New York. The NYC Fire Department extinguished the fire and the vehicle was considered a total loss. Mrs. Ficic filed a claim for \$34,000 and two weeks after the fire, State Farm Fire and Casualty’s expert inspected the vehicle and concluded the fire was “suspicious.”

State Farm denied the claim believing that the fire was intentionally set at the direction of the owner Mrs. Ficic who then sued State Farm to recover the loss. State Farm’s expert testified that based on the fire patterns he observed, the fire originated on the floor behind the driver’s seat. In addition, he advised the jury that he examined the vehicle’s electrical

wiring and fuel system and found that they did not initiate this fire. Plaintiff’s attorney did not call an expert witness.

The sole question for the jury was: Did the plaintiff have the fire set to collect on her insurance policy? On February 4, 2004, the jury returned a verdict for the defendant when five out of six jurors answered “yes.” Shortly thereafter, plaintiff’s attorney filed a motion to set aside the verdict on the grounds that the verdict was contrary to the weight of the evidence and contrary to the law. On January 10, 2005, the trial judge wrote a letter to both attorney expressing his concerns that the court was troubled with the opinion rendered by State Farm’s expert that the fire was ‘suspicious,’ since one would believe that ‘suspicion’ would be the beginning of an arson investigation, not the conclusion. Since the expert’s resume indicated that he had a professional affiliation with the International Association of Arson Investigators (IAAI), the Court looked to the IAAI website and found the organization utilizes the User’s Manual for NFPA 921 Guide for Fire and Explosion Investigations. The Court’s review of NFPA 921 revealed the “Classification of Cause” which states that use of the term *suspicious* is not an accurate description of a fire cause. It also reviewed the sections on “Methodology” and “Opinions” and found the following: “Use of the scientific method dictates that any hypothesis formed from an analysis of the data collected in the investigation must stand the challenge of reasonable examination (see *Daubert v. Merrill Dow Pharmaceuticals, Inc.*)”; and that if the confidence level of the opinion is only “possible” or “suspected,” the cause should be listed as “Undetermined.” As a result of this review, the Court forwarded chapters 2 (Basic Methodology), and 16 (Cause Determination) from NFPA 921 (2001 ed.) to both attorneys and asked that they or their experts comment in a supplemental affidavit/affirmation on the post trial motion.

The *plaintiff* submitted an affidavit (from the author of this article) that stated he too is a member of the IAAI and agreed with the Court’s concerns. The *defense* argued that the material was not considered by the jury and therefore should not be considered by the Court and chose not to have its expert opine.

1. The Court wrote, “This court is troubled with the opinion rendered by State Farm’s expert that the fire was ‘suspicious.’ That opinion, which was testified to, was

reiterated in his written report, which was marked as a court exhibit, but not submitted to the jury. One would believe that “suspicion” would be the start of the arson investigation, not its conclusion.”

Plaintiff’s expert responded, “The Court’s concern is justified. The term “suspicious” is generally used by the fire chief to indicate that he/she is suspicious as to the cause of the fire and is requesting a *fire investigation* be conducted. The goal of the fire investigation is to determine the cause of the fire. If the cause is determined to be incendiary (arson) by the *fire investigator*, a criminal arson investigation (by a *criminal investigator*) usually ensues. The purpose of this investigation is to identify and arrest the person who started the fire. Without an incendiary cause, there is no crime and no arson investigation.”

2. The Court wrote, “Hence, State Farm expert’s conclusion that the fire was “suspicious” is not a recognized classification of a cause of fire by his peer group, the International Association of Arson Investigators, of which he is a member.”

The Plaintiff’s expert responded, “I agree with the Court on this issue. As the Court points out, NFPA 921: Guide for Fire and Explosion Investigations does not recognize “suspicious” as a classification of a fire cause. It is important to note that the three major fire/arson investigation professional organizations in the nation, International Association of Arson Investigators (IAAI), National Association of Fire Investigators (NAFI), and the National Fire Protection Association (NFPA) which publishes “NFPA 921” each endorses and teaches this guide to its members, nationally and internationally. The national fire community, the U.S. Alcohol, Tobacco and Firearms Bureau, and courts around the nation have recognized this document as the authoritative guide in the field of fire and explosion investigations.”

On April 1, 2005, the Supreme Court of the State of New York, County of Richmond, issued a Decision and Order whereby it: set aside a jury verdict for the defendant State Farm Fire & Casualty; struck the expert’s opinion as invalid and unreliable; and entered a judgment in favor of the plaintiff precluding any chance of a retrial. In its decision the Court observed that it was membership in the IAAI that gave State Farm’s expert some of the necessary training to hold himself out as an expert and that he should have complied with their training and the NFPA 921 Guide which is utilized by its members. This case, a descendant of *Daubert v. Merrill Dow Pharmaceutical Inc.*,¹ illustrates the perils of ignoring NFPA 921.

Lessons We Can Derive From This Case

Considering NFPA 921 As “Just A Guide” Fails To Recognize Its Significance In Litigation.

This is just one more case in a growing list where the courts have recognized NFPA 921 as a “standard of care” and *more than just a guide*. In its decision the Court wrote, “the opinion

of the fire investigator . . . must be stricken and disregarded as being invalid and not reliable because that opinion is not based upon the generally accepted classifications for the causation of fire within the fire investigation community”² Investigators who contend that NFPA 921 is “only a guide” must recognize that while that is true as it relates to NFPA’s definition of it, the courts are increasingly viewing it as a “standard,” and it is the courts’ definition, not the NFPA’s, that will ultimately decide the outcome of your case, and your future as an expert witness.

Expect The Court To Hold You Accountable For The Teachings Of Organizations You Are A Member Of

In seeking answers to questions and concerns the Court had about this case it looked to the professional organizations listed in the expert’s CV. The Court wrote that, “It was [his] membership in an organization such as the IAAI that gave him some of the necessary training to even hold himself out as an expert in the field of arson investigation. Therefore he should comply with their training and their generally accepted published standards or he should have explained, when given the opportunity, why they are not relevant.”³ The IAAI listing prompted the Court to visit its website. There, the Court found that the IAAI “utilizes the User’s Manual for NFPA 921 Guide for Fire and Explosion Investigations.” Further, in reading NFPA 921, the Court determined that the term “suspicious” was not a recognized classification of a cause of fire by the expert’s peer group (the IAAI, of which he claimed to be a member). Therefore, investigators holding membership in professional organizations should expect the court to hold them to the teachings of the organization unless they can demonstrate that they are not relevant.

Ignore NFPA 921 At You’re Peril

While it is not known whether the defense expert did not agree with NFPA 921 on this issue, or was unfamiliar with it, it is clear that the Court found fault with the expert’s failure to use its “classification of cause” in his opinion. As a result, the record (the Court’s Decision and Order) now shows that his opinion was considered invalid and not reliable by the Court. The Court also wrote, “Such an invalid and clearly erroneous expert opinion, not recognized by the expert’s peers, mislead the jury into making an irrational decision that a suspicious fire is proof of an intentionally set fire.”⁴

Endnotes

¹ 509 U.S. 579 (1993)

² Id. at 804

³ *Ficic v. State Farm Fire & Cas. Co.*, 9 Misc. 3d 793 (Sup Ct, Richmond County 2005) at page 802

⁴ Id. at 802