

The Destruction of WTC Buildings on September 11, 2001. A Court Hearing in an Adversarial Evidentiary Proceeding. Admissibility of Expert Testimony

The Admissibility of Expert Testimony Under the Standards Developed in Daubert v. Merrell Dow Pharmaceutical, Inc.

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Under the standards established by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceutical, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed 2d 469 (1993) and its progeny, expert testimony offered to support the official theory and hypotheses concerning the cause of the destruction of World Trade Center Buildings 1, 2 and 7 (the WTC) on September 11, 2001 would probably be excluded from admission into evidence by an impartial judge in a civil or criminal proceeding. In contrast, expert testimony presenting an alternative theory and hypotheses explaining the cause(s) of the destruction of the WTC grounded in and adhering to accepted and reliable scientific principles using the scientific method would satisfy the Daubert test and would be admitted into evidence.

If a “Daubert hearing” were held to determine the admissibility of expert opinion evidence regarding the cause or causes of the destruction of the WTC, expert opinion testimony presenting the official theory would likely not satisfy the Daubert test of reliability and would be rejected by an impartial judge after a Daubert hearing as unsupported by science and the laws of physics and, thus, unreliable and inadmissible into evidence under the Federal Rules of Evidence. In that event, the official theory of the cause of the destruction of the WTC would not be presented to and considered by the trier of fact. Conversely, expert opinion testimony and related evidence presenting an alternative hypothesis explaining the cause(s) of the destruction of the WTC that are grounded in reliable scientific principles using the scientific method, or “good science”, would pass the Daubert test and would be admissible into evidence. Consequently, in a civil or criminal proceeding the ruling or verdict on the question of the cause or causes of the destruction of the WTC would be based only upon expert testimony and related evidence presenting an alternative theory or theories.

I. Introduction.

It is well known that on September 11, 2001 New York City, New York, suffered an attack that resulted in the tragic death of nearly 3,000 people and the destruction of property, most notably the destruction and collapse of World Trade Center Buildings 1 and 2 (WTC 1 and WTC 2). It is less well known that at approximately 5:21 p.m. on that same day World Trade Center Building 7 (WTC 7) also collapsed. Since that day there has been a continuing debate between two schools of thought concerning the cause or causes of the destruction of WTC 1, 2 and 7.

In November 2002 Congress appointed a bipartisan commission to investigate 9/11.

The investigation took approximately eighteen months and resulted in the release and publication on July 22, 2004 of the Final Report of the National Commission on Terrorist Attacks Upon the United States, otherwise known as the 9/11 Commission Report. However, the 911 Commission Report said very little about the cause of the destruction of WTC 1 and 2 and nothing about the cause of the destruction of WTC 7. In the years since 9/11, many people who are qualified by education, training, and experience to give an opinion on the subject of the cause(s) of the destruction of WTC 1, 2 and 7 have come forward and have presented alternative scientific hypotheses and theories concerning the cause(s) of the destruction of these buildings. The National Institute of Standards and Technology (NIST) also became involved and over time presented a series of reports presenting the official theory or explanation of the cause(s) of the destruction of WTC 1, 2 and 7. The official theory and the alternative theory or theories of the cause(s) of the destructions of these buildings are not in agreement.

Very briefly, the official theory of the destruction of WTC 1 and 2 is that aircraft impact damage combined with intense heat from the fires created by the ignition of the jet fuel on Flights 11 and 175 undermined the integrity of structural support systems in the upper floors of WTC 1 and 2. According to NIST, as a result of this process, "global collapse was inevitable." NIST has, however, been unable to provide a full explanation of the collapse of WTC 1 and 2.

The official theory of the destruction of WTC 7 is that it collapsed due to fire. The fires were caused by debris from the collapse of WTC 1 which ignited fires on at least 10 floors in WTC 7 which then burned out of control until the building collapsed naturally due to gravity alone. According to the official theory of the destruction of WTC 1, 2 and 7 there is no corroborating evidence for any alternative hypotheses suggesting that the WTC towers were destroyed by controlled demolition using explosives planted prior to September 11, 2001. However, contrary to National Fire Protection Association guidelines and the scientific method, NIST did not look for evidence of explosives.

In contrast to the official theory, the alternative theory of the cause of the destruction WTC 1, 2 and 7 is that they were destroyed as a result of explosives that had been placed in the buildings prior September 11, 2001. On that date the explosives were detonated causing WTC 1 and 2 to be pulverized from the top down by some form or forms of explosives and incendiary devices, bringing them down smoothly at near free-fall acceleration. WTC 7, on the other hand, was destroyed in a more conventional, controlled manner typical of the means and methods used to destroy similar buildings and bring them down in a controlled manner into virtually their own footprint. According to the experts who subscribe to some form of the alternative theory or hypotheses, neither damage caused by the impact of the planes, nor the resulting fires were sufficient to cause the complete and total destruction of WTC 1 and 2, nor were fires alone sufficient to cause WTC 7 to collapse in the manner it did.

While there is some disagreement among those who advocate, or agree with, the alternative theory or theories as to the exact means and methods used to destroy WTC 1, 2, and 7, many qualified experts who have studied the available data have concluded that the official theory does not hold up to scientific scrutiny and analysis using the scientific method. Likewise, there are many experts who support the official theory of a gravitational collapse, but who differ significantly as to the mechanism of the collapse (e. g., progressive

pancake versus pile driver). Thus, one can reasonably deduce that there is no general acceptance of the official theory or the alternative explosives theory in the scientific community. Attempting to determine which theory or hypothesis is reliable and which is not, or whether they may both have elements of reliability and should be considered by the judge or a jury in an evidentiary proceeding, is fertile ground for a Daubert hearing. Indeed, a Daubert hearing is often where the discipline of the scientific method meets the discipline of the law. In the courtroom a Daubert hearing is where the judge is required to not only determine whether proffered expert testimony and related evidence is legally relevant, but also whether it is scientifically reliable and, therefore, entitled to be admitted into evidence and considered by the trier of fact—whether a judge or a jury.

II. Daubert—The Federal Rules of Evidence and the Admissibility of Expert Opinion Testimony in an Adversarial Evidentiary Proceeding.

“If it is a Miracle, any sort of evidence will answer; but if it is a Fact, proof is necessary.”
(Mark Twain)

In *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed 2d 469 (1993) the United States Supreme Court rejected the long-standing test governing the admissibility into evidence of expert testimony that had been established in *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923) and followed for decades by virtually all courts. Under *Frye*, when “novel” scientific expert testimony and related evidence was at issue, a judge could defer to the proffered experts, or perhaps to his or her own judgment, on the question of whether or not the novel scientific evidence had gained “general acceptance” in the relevant field of science. If the court concluded that it had gained general acceptance the expert evidence was admissible, unless it was inadmissible and excluded for some other reason. If the scientific evidence had not gained general acceptance in the relevant field it was not to be admitted into evidence. It follows that if the *Frye* test is applied the argument over admissibility will focus on whether or not the novel scientific evidence was generally accepted in the particular field of science that is at issue.

While *Daubert* did not scrap the *Frye* test in toto, but rather retained the “general acceptance” factor, it established additional factors to be considered by courts on the question of the admissibility of scientific expert testimony under the Federal Rule of Evidence. *Daubert* was followed about six years later by *Kumho Tire Co. Ltd v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed 2d 238 (1999). In *Kumho* the United States Supreme Court made it clear that under the Federal Rules of Evidence the courts’ evidentiary gate-keeping responsibility imposed by *Daubert* applies not just to scientific expert testimony, but also to expert testimony based upon “technical or other specialized knowledge.” In other words, where the Federal Rules of Evidence apply, all expert opinion testimony is subject to the courts’ gate-keeping responsibility under the test established in *Daubert*.

Under the Federal Rules of Evidence governing expert testimony, *Daubert* and *Kumho* instruct that a court is to serve as a “gatekeeper” and must conduct what is essentially a four-part analysis of the proposed expert opinion or theory before the expert testimony is to be admitted into evidence in support of the opinion or theory. The purpose of the courts’ gatekeeper function is to allow judges to determine that the expert opinion testimony is both relevant and reliable before the jury (or the judge) is permitted to receive it into

evidence. Daubert and Khumo, *passim*.

Following Daubert and Khumo Rule 702 of the Federal Rules of Evidence was amended to take into account the Daubert factors. In addition, the admissibility of all expert testimony is governed by the principles of Rule 104 (a). Under Rule 104(a), the proponent of the expert testimony has the burden of proving by a preponderance of the evidence that the admissibility requirements have been met. Rule 702 reads as follows:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based upon sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

As a threshold matter, under Rule 702 the proposed expert witness must be qualified in the scientific or technical field under inquiry. Rule 702 (a), and to some extent Rule 702 (b), mandate that the proposed expert testimony must be "helpful to the trier of fact". The "helpful" factor is an expression of the relevancy component emphasized in Daubert and codified in FRE Rule 401. The reliability factor enunciated in Daubert is set forth in FRE 702 (b), (c) and (d). In short, under the Federal Rules of Evidence, before a putative expert can give opinion testimony: 1) the expert must be qualified, 2) the testimony must be helpful to the trier of fact (that is, it must be based upon facts and data material and relevant to the case), and 3) the testimony must be relevant and reliable. For purposes of this paper it is assumed that in any Daubert hearing the proffered experts will be qualified by knowledge, skill, experience, training, or education to give an opinion on the question of the cause(s) of the destruction of WTC 1, 2 and 7. Accordingly, only the relevancy and reliability factors are discussed below.

1. Relevancy.

In a civil or criminal action in which the purpose, or a purpose, would be to determine the cause or causes of the destruction of WTC 1, 2 and 7 on September 11, 2001, competent and material evidence offered to establish the cause of the destruction of these buildings would be relevant. Under Rule 401 of the Federal Rules of Evidence:

Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.

This rule itself, and as construed and applied by the case law, is to be used as a guide by judges to handle the wide variety of relevancy issues that will arise in any given case, which issues are bounded only by the ingenuity and savvy of lawyers as they advocate for their clients. Expert opinion relevancy, like all relevancy issues, is case specific. As a general proposition, scientific evidence ruled to be relevant in one case will not "fit" in another case and will be ruled irrelevant.

For purposes of the subject under inquiry in this paper, relevant evidence would be evidence that tends to make more probable that the alleged facts in support of the official theory of the destruction of WTC 1, 2 and 7 are true or correct, or that tend to make less probable that such facts are true or correct. Conversely, relevant evidence would also include evidence that tends to make less probable that the facts alleged in support of the official

theory of the destruction of WTC 1, 2 and 7 have been proved, or that tends to make more probable that such facts have not been proved and are false. In that connection, expert testimony and related evidence that presents facts, and that provides reliable opinions, to prove the cause(s) of the destruction of WTC 1, 2 and 7 are relevant. Ultimately, the facts to be proved by the expert opinion testimony and related evidence are facts that establish causation, i. e, the proximate cause or causes of the destruction of these buildings. Because causation is relevant, expert testimony and related evidence is admissible on the question of causation-provided it is reliable. This would include not only reliable expert testimony and related evidence in support of the official theory, but also such expert opinion and evidence that presents facts and opinions in support of the alternative explosives hypotheses.

2. Reliability.

Once it is determined that the expert testimony, whether based on scientific, technical or specialized knowledge, is relevant on the issue of causation the question then becomes whether it is reliable and should be admitted into evidence. If the court rules that the expert testimony is reliable it may be admitted into evidence at which time it is entitled to whatever evidentiary weight the jury (or judge) puts on it. If, on the other hand, it is ruled unreliable, any such evidence is not to be admitted and as a result will never be considered by the jury and should not be considered by the judge in a bench trial. In short, under the courts' evidentiary gatekeeper function, judges are required to exclude unreliable expert

evidence, including opinion testimony. Indeed, unreliable expert testimony is not to come into evidence at all, with the hope or expectation that the trier of fact, whether a judge or a jury, will put no weight on it or outright reject it. The risk that unreliable expert testimony will be accepted as true, for whatever reason, and affect the jury's verdict is too great to allow it to come into evidence in the first place. Thus, under Daubert and Kumho the judge as the evidentiary gatekeeper is required to keep unreliable expert testimony out of evidence in the first instance and admit only relevant and reliable expert testimony.

3. The Daubert factors.

Under Daubert and FRE 702, when carrying out their evidentiary gate-keeping duties under the Federal Rules of Evidence, judges must at a minimum inquire into:

1. Whether the opinion or theory is susceptible to testing and has been subjected to such testing;
2. Whether the opinion/theory has been subjected to peer-review and publication;
3. Whether there is a known or potential rate of error associated with the methodology used and whether there are standards controlling the techniques' operation; and,
4. Whether the opinion/theory has been scrutinized and generally accepted by the scientific community.

Significantly, Daubert established a non-exclusive checklist or guide for courts to use when determining the relevancy and reliability of expert testimony. Both before and after Daubert courts have found other factors important when assessing whether the proffered expert testimony is sufficiently relevant and reliable to be admitted into evidence and considered by the trier of fact. Examples of additional factors considered by courts include:

(1) Whether the experts are “proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.”

(2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.

(3) Whether the expert has adequately accounted for obvious alternative explanations.

(4) Whether the expert “is being as careful as he would be in his regular professional work outside his paid litigation consulting.”

(5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

While the four Daubert factors are applicable to all cases generally (where the Federal Rules of Evidence apply or where the state courts have adopted the Daubert or similar test), these additional factors are examples of the types of tests that have been developed

by the courts in the trenches of litigation and in the context of the facts and circumstances of real cases playing out in courtrooms every day where, as they say, “the rubber meets the road”. When determining whether the proffered expert testimony is relevant and reliable, additional factors such as these are often as informative and useful to courts, if not more so, than the Daubert factors per se standing alone.

III. Application of the Daubert Factors to the Official Theory and to the Alternative Theories of the Cause of the Destruction of WTC 1, 2 and 7.

In this paper the reader has been provided with a reasonably sufficient introduction to the question of the cause(s) of the destruction of WTC 1, 2 and 7, as well as citations to several sources and documents addressing both sides of the debate on this subject. It is beyond the scope of this paper to go into greater detail. Indeed, it is incumbent upon the readers who are so inclined to dig deeper into the available information and conduct their own research with respect to investigating the facts, proved or alleged, and the science and technology involved in connection with the question of the cause(s) of the destruction of WTC 1, 2 and 7 on September 11, 2001. I will endeavor, however so briefly here, to apply the Daubert factors to the expert opinions on this important issue.

1. Whether the opinion or theory is susceptible to testing and has been subjected to such testing?

a. The Official Theory. Answer: Yes and no.

The official theory of the destruction of WTC 1, 2 and 7 is susceptible to testing, but, for obvious reasons, the theory has not been tested on full scale replica in the field with an actual steel-structure high rise, whether similar to WTC or otherwise. The tests conducted by NIST used global impact computer simulations and analysis on WTC 1 and 2, and fire dynamics, thermal and limited tests on certain elements using building materials under controlled conditions as to all three buildings. However, the material and fire tests conducted by NIST did not support its initial findings. Moreover, NIST could not explain the

total collapse of the buildings and never conducted tests on scale models as is typically done on other structural failures to verify if indeed “global collapse was inevitable” once initiated. Based only on the computer models conducted by NIST, NIST formulated its hypotheses for the official theory discussed above. “Unofficial”, i.e., private, tests of the official theory conducted by qualified architects, engineers, physicists, and demolition and explosive experts have proved to the satisfaction of those performing the tests, as well as many of their peers and lay persons, that the official theory is not scientifically valid. Notably, actual fires in all other steel-structured high-rises that have occurred in the field under real-life situations and conditions have never caused any of them to globally collapse—including the Empire State Building, which was impacted by a B-25 Bomber on July 28, 1945 and which suffered extensive fire damage. (See, Endnote)

b. The Alternative Theory. Answer: Yes. The alternative explosives hypothesis has been tested. Conventional explosives, as well as high-tech explosives, have destroyed, and will destroy, steel-structured high rise buildings in the manner observed on September 11, 2001 in connection with WTC 1, 2 and 7. Moreover, such explosives will produce the same types of evidence observed with the destruction of the Twin Towers, including a uniform downward acceleration, pyroclastic-like flows, and temperatures high enough to melt steel—all of which are impossible with a fire-induced gravity collapse.² Whether the opinion/theory has been subjected to peer-review and publication?
a. The Official Theory. Answer: No.

While NIST had a team of individuals provide support for NIST’s investigation and the preparation and publication of NIST’s draft and final reports on the destruction of WTC 1, 2 and 7, there is little if any information available suggesting that the hypotheses advanced by NIST in support of the official theory have been subjected to formal peer review. In the private sector many architects, engineers, physicists, demolition and explosive experts, and other qualified people have poured over the NIST reports, as well as other documents and available evidence and have analyzed the official theory given the available information they were able to obtain. Such reviews of NIST’s reports has resulted in the publication of numerous scientifically valid and in some cases peer-reviewed studies, many of which call into question the validity and reliability of the NIST reports on several significant and critical points that bear on the question of causation.

b. The Alternative Theory. Answer: Yes

While NIST states that its investigation found no evidence to support the alternative explosives hypotheses (contrary to NFPA guidelines it did not look for evidence of explosives), many architects, engineers, physicists, demolition and explosive experts have investigated and analyzed the explosives hypotheses and have concluded that the only hypothesis that accounts for all the available evidence and observations regarding the cause of the collapse of WTC buildings 1, 2 and 7 using the scientific method is the “explosive demolition hypothesis.”

3. Whether there is a known or potential rate of error associated with the methodology used and whether there are standards controlling the techniques’ operation?

a. The Official Theory. Answer: Yes

The rate of error is 100%. That is, the previous rate of success in collapsing two 110-story

steel skyscrapers such as WTC 1 and 2, by a fire ignited by jet fuel (even taking into account aircraft impact damage) and one 47 story steel skyscraper such as WTC 7 (which had no aircraft impact damage) is 0%. The official explanation of the destruction of these three buildings on September 11, 2001 assumes unprecedented processes and events in all three cases. Crucial tests were ignored by NIST and, in some cases, results were achieved through unscientific and illegitimate manipulation of data. Many qualified experts conclude that the official theory is impossible because it defies the fundamental laws of physics.

b. The Alternative Theory. Yes.

The rate of error of the tests that have been conducted is 0%. That is, with the exception of demolitions that were only partially ignited or that had “gone wrong,” the rate of success of collapsing steel skyscrapers and other buildings with explosives is 100%. Moreover, samples of the WTC dust were examined by accredited researchers with relevant expertise using standard, established scientific methods and their results have been published in a peer-reviewed journal: the researchers found nanothermite in the dust. The widespread presence of nanothermite, which can function either as an incendiary or an explosive, in the WTC dust is a very strong indicator of deliberate demolition of the buildings and evidence that explosives had been planted in the WTC prior to September 11, 2001. Further, the use of Newtonian physics to determine the rate of the acceleration of WTC 7’s collapse has definitively ruled out NIST’s hypothesis of a fire-induced collapse. In sum, the alternative explosives-demolition-hypotheses accounts for all the available data and observations regarding the cause of the collapse of WTC buildings 1, 2 and 7.

4. Whether the opinion/theory has been scrutinized and generally accepted by the scientific community?

a. The Official Theory. Answer: Yes and No.

The official theory as pronounced by NIST (and FEMA) has been scrutinized by numerous architects, engineers, physicists, demolition, and explosive experts. While some members of the scientific community have chosen to accept the official theory, there is no general acceptance of the theory in the scientific community. Indeed, the official theory has been rejected by many qualified experts who have reviewed and scrutinized the NIST reports and the data that NIST has made available.

b. The Alternative Theory. Answer: Yes and No.

While there are some who accept the alternative hypotheses and some who do not, it appears that the more time members of the scientific community devote to scrutinizing the evidence, including that provided by NIST and FEMA, the more likely they are to accept the alternative explosives demolition theory.

IV. Conclusion. Daubert hearings are very well established in American jurisprudence. When scientific and other technical evidence is at issue the right to a Daubert hearing is as straightforward as legal matters can get. In any civil or criminal proceeding in this country where expert testimony is required to assist the trier of fact to reach a decision or a verdict, it is a litigant’s right (and duty) to seek to admit expert testimony in support of the litigant’s case. That right is nearly, if not entirely, absolute and is subject only to the Daubert, or similar, test of relevance and reliability. In virtually every civil lawsuit or criminal proceeding presented in the United States, whether pending in a federal court or in a state court, it is

routine, standard practice for our courts to ask the parties very early in a case whether they will need a Daubert hearing. Courts routinely set Daubert hearings and it can be reversible error for a court to fail to conduct such a hearing. Many such hearings occur every day in this country in the State courts, as well as the United States District Courts. These hearings give all parties the opportunity to establish that their expert opinion testimony is relevant and reliable and to challenge the relevancy and reliability of all proposed expert opinion testimony and related evidence. To the knowledge of this author, no court has conducted a Daubert hearing and considered the relevancy and reliability of any expert evidence on either side of the question of causation in connection with the destruction of WTC 1, 2 and 7. Cases that may have required such a Daubert hearing have been dismissed on one ground or another, or in a few instances settled, long before a Daubert hearing would have been held in due course. Given the magnitude of 9/11 and all that has followed in its wake, it is not unreasonable to inquire whether we, the people of the United States of America, indeed the people of the World, are entitled to a Daubert hearing on the question of the cause(s) of the destruction of WTC 1, 2 and 7 on September 11, 2001. *Stevan Douglas Looney is a 1980 graduate of the University of San Francisco, School of Law. Mr. Looney is a trial lawyer and practices primarily in the courts of New Mexico and the United States District Court for the District of New Mexico. Mr. Looney is also admitted to the United States Supreme Court and the United States Tax Court.*

Note:

As an interesting and relevant historical side note, unknown to most people alive today, long before 9/11 a New York City skyscraper was hit by a large aircraft. On July 28, 1945 the Empire State Building was struck by a B-25 bomber. The plane lost its bearings in dense fog and struck the 79th floor of the building and burst into flames. According to an article entitled The Plane That Crashed Into The Empire State Building:

At 9:49 a.m. the ten-ton B-25 bomber smashed into the north side of the Empire State Building. The majority of the plane hit the 79th floor, creating a hole in the building eighteen feet wide and twenty feet high. The plane's high-octane fuel exploded, hurtling flames down the side of the building and inside through hallways and stairwells all the way down to the 75th floor. []

One of the engines and part of the landing gear hurtled across the 79th floor, through wall partitions and two fire walls, and out the south wall's windows to fall onto a twelve-story building across 33rd Street. The other engine flew into an elevator shaft and landed on an elevator car. []

Some debris from the crash fell to the streets below, sending pedestrians scurrying for cover, but most fell onto the building setbacks at the fifth floor. After the flames were extinguished and the remains of the victims removed, the rest of the wreckage was removed through the building.

The plane crash killed 14 people (11 office workers and the three crewmen) plus injured 26 others. Though the integrity of the Empire State Building was not affected, the cost of the damage done by the crash was \$1 million.

<http://history1900s.about.com/library/misc/blempirecrash.htm>;
http://en.m.wikipedia.org/wiki/B-25_Empire_State_Building_crash

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