

# OTHER SIMILAR INCIDENTS EVIDENCE IN PRODUCTS LIABILITY LITIGATION

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## I. INTRODUCTION

One of the most crucial issues in a products liability action is whether the jury will hear evidence of other incidents involving the same or a similar product. Few issues will strengthen a case for the plaintiff like evidence that the defendant was on notice of injuries caused by their product. Therefore, a good defense attorney will make every effort to prevent the admission of other similar incident evidence.<sup>1</sup> In every products liability case where other similar incident, accident or injury evidence arises, the ruling of the court on this issue has the potential to significantly impact the outcome of the case.<sup>2</sup>

Other acts evidence in this article discusses similar acts, happenings, transactions or claims that are related to the facts involved in the present dispute.<sup>3</sup> The need for logically relevant similar incident evidence is especially great in product liability litigation.<sup>4</sup> Similar act evidence in products liability litigation includes relevant proof of other incidents, accidents or injuries caused by the same defect.<sup>5</sup>

## II. RELEVANCE

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<sup>1</sup> See *Guy v. Ford Motor Co.*, Civ A. No. 92-2075, 1995 WL 92353 (E.D. La. March 3, 1995) (moving to exclude evidence of another similar incident of the same product defect demonstrating the same defective characteristics at another time offered to show the existence of a defect at the time of the incident in question); see also *Boudlouche v. Chrysler Corporation*, Civ A. No. 95-3496, 1996 WL 514977 (E.D. La. Sept. 6, 1996) (moving to exclude evidence of unrelated incidents of failure of the vehicle assembly and procedure process that resulted in the similar defect offered to refute the defendant's claim that the assembly and procedure process were infallible).

<sup>2</sup> Robert A. Sachs, "Other Accident" Evidence in Products Liability Actions: Highly Probative or an Accident Waiting to Happen?, 49 Okla. L. Rev. 257, 258 (1996) [hereinafter *Other Accident*]

<sup>3</sup> Gail A. Randall, *Products Liability Litigation: Impact of the Federal Rule of Evidence 404(b) Upon Admissibility Standards of Prior Accident Evidence*, 61 Wash. L. Q. 799 (1983) [hereinafter *Products Litigation*].

<sup>4</sup> *Products Litigation* at 800.

All relevant evidence is admissible.<sup>6</sup> Relevant evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”<sup>7</sup> If there is a dispute concerning a fact or issue, other incident evidence is relevant if probative as proof of that fact or issue. Other similar incidents, accidents or injuries that have any tendency to make the existence of a fact, either more probable or less probable, than it would be in the absence of the evidence are relevant.<sup>8</sup> Therefore, if the other similar incident evidence is relevant, it should be admissible.

Proof of another incident is at most, circumstantial evidence of the proposition to be proven. Circumstantial evidence can be offered to help prove a material fact, yet be so unrevealing as to be irrelevant to that fact.<sup>9</sup> In few instances does the dissimilar nature of other incidents or other accident evidence place such evidence in the unrevealing category.<sup>10</sup> However, as the circumstances and conditions of the other incidents become less similar to the incident under consideration, the probative force of such evidence decreases.<sup>11</sup>

#### **A. Substantial Similarity**

Similarity is closely related to relevance.<sup>12</sup> Unless the circumstances surrounding another incident is similar to the one in question, it cannot be relevant to it.<sup>13</sup> The issue of what constitutes

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<sup>5</sup> *Products Litigation* at 800.

<sup>6</sup> Fed. R. Evid. 402 & parallel state rules, including Ala. R. Evid. 402.

<sup>7</sup> Fed. R. Evid. 401 & parallel state rules, including Ala. R. Evid. 401.

<sup>8</sup> *Other Accident*, 49 Okla. L. Rev. at 258.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Other accidents*, 49 Okla. L. Rev. at 259.

<sup>12</sup> *Id.* at 259.

<sup>13</sup> *Other accident*, 49 Okla. L. Rev. at 262.

similarity involves two questions. First, is the same or a substantially similar product involved and second, are there similar circumstances surrounding the other accident?<sup>14</sup>

Many courts, to minimize the dangers such evidence creates, have imposed “similarity” requirements on prior accident evidence in product liability litigation.<sup>15</sup> There is authority to support the proposition that perfect similarity of circumstances is not required for the evidence of prior accidents or injuries to be admissible.<sup>16</sup> Theoretically, if the prior incident occurred under substantially similar circumstances as the incident at issue with nearly identical products, the probative value of the prior incident evidence justifies this admission.<sup>17</sup> The various similarity tests found in products liability litigation, however, leads to inconsistent decisions regarding the admissibility of prior incident evidence.<sup>18</sup> The most serious consequence of this inconsistency is that courts often improperly exclude logically relevant evidence.<sup>19</sup>

Generally, if the proponent proves sufficient similarity to satisfy the court and gain admission of prior incident evidence any differences should go to weight and not admissibility. This principle was illustrated in *Jones & Laughlin Steel Corp. v. Matherne*<sup>20</sup>, the defendants challenged the trial court’s

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<sup>14</sup> *Other accident*, 49 Okla L. Rev. at 262.

<sup>15</sup> *Products Litigation*, 61 Wash. Univ. L. Q. at 801.

<sup>16</sup> *See Four Corners v. Turbomecca*, 979 F. 2d 1434 ( 10 th Cir. 1992).

<sup>17</sup> *Products Litigation*, 61 Wash. Univ. L. Q. at 801

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Jones & Laughlin Steel Corporation v. Matherne*, 348 F. 2d 394 (5th Cir. 1965). This is a products liability action against the manufacturer seeking recovery for damage caused by a falling crane boom. The boom’s fall was caused by the failure of a fitting on one of the pendant lines supporting the boom. One of the witnesses, Mr. Hodges, owned a truck, crane and rigging company in Oklahoma City. After examining the pendant line and Jal Klamp involved in the *Matherne* case, testified that the pendant lines were made alike, just like the ones involved in his case. Hodges stated that the only difference was that his were larger. Over Jones & Laughlin’s objection, Mr. Hodges was permitted to testify that as his crane was attempting to lift a concrete slab when it reached the height of a foot, the pendant line broke. He testified that one Jal Klamp split about three-quarters the way down and there were six or seven small cracks in the other Jal Klamps. Jones & Laughlin’s counsel declined to cross examine Mr. Hodges.

decision to admit oral testimony tending to prove the harmful tendency of Jal Klamps<sup>21</sup> to fail. This evidence consisted of information concerning prior failures. The defendants argued that the trial court admitted this evidence without a showing of substantial similarity of condition or reasonable proximity in time. The appellate court expounded that while it is true that some of the conditions are dissimilar,<sup>22</sup> the defendants had ample opportunity to explore these differences during cross examination or bring out this information through examination of its own witnesses who investigated the accident, but chose not to do so. The court stated that the differences between the circumstances of the accidents could have been developed to go to the weight to be given to the evidence<sup>23</sup> and that this evidence cannot be held under either a federal or state rule to be inadmissible.<sup>24</sup>

## **B. The Degree of Similarity Required**

Admissibility standards vary in the degree of similarity required between the collateral incident and the incident that is the subject of the present litigation.<sup>25</sup> The majority view requires the court to analyze the purpose for which the proponent offers the evidence and then define an admissibility standard appropriate for that purpose. Similarity requirements act as limitations to admissibility and ultimately function as “similarity tests” for admissibility.<sup>26</sup>

Similarity tests fall along a sliding scale of admissibility. The most lenient standard merely requires the defendant to have knowledge of the prior incident.<sup>27</sup> The strictest standard demands

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<sup>21</sup> A Jal Klamp is a fitting, which is manufactured by Jones & Laughlin Steel Corporation used on the pendant line to help support the boom on a crane.

<sup>22</sup> For example, Hodge’s crane was the larger of the two, the prior user conditions of Hodge’s pendant line and Jal Klamp was not proved. The weight of the concrete slab was not proved, nor was their testimony on whether the boom was in motion or at rest.

<sup>23</sup> *Matherne*, 348 F.2d at 400.

<sup>24</sup> *Products Litigation*, 61 Wash. Univ. L.Q. at 803-804.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Products Litigation*, 61 Wash. Univ. L. Q. at 804.

identity of conditions between the two incidents. Similarity controls admissibility; but, the degree of similarity required may vary at the court's discretion. Thus, the trial judge confines his analysis to categorizing the evidence by those purposes for offering the evidence provided by the proponent.<sup>28</sup> The judge then excludes the evidence if it is not sufficiently similar to the conditions surrounding the accident.

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Arbitrary exclusion of logically relevant evidence stifles thorough product liability litigation.<sup>30</sup> Courts frequently state, without qualification, that relevancy of such accidents depends upon "whether the conditions that operated to produce the prior failures were substantially similar to the occurrence in question and whether they are in close proximity in time of the incidents to each other."<sup>31</sup> A greater degree of similarity and proximity will usually enhance the probative value of the evidence.<sup>32</sup> Although substantial similarity is the applicable standard, courts should err on the side of inclusion.<sup>33</sup>

The foundational prerequisite, requiring the proponent of similar incident evidence to establish substantial similarity before the evidence is admissible, is more stringent in cases where the other incident evidence is proffered to show the existence of a dangerous condition or causation as compared to notice or knowledge of a defect.<sup>34</sup> Admission generally requires a showing that the same defect that caused plaintiff's injury caused the injury in the offered incident. This stricter standard is illustrated in

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<sup>28</sup> *Id.* at 804.

<sup>29</sup> *Id.*

<sup>30</sup> *Products Litigation*, 61 Wash. Univ. L. Q. at 816.

<sup>31</sup> Weinstein's Evidence Manual, §6.01 [6][b]

<sup>32</sup> *Id.*

<sup>33</sup> *See Koehn v. R. D. Werner Co., Inc.*, 809 P. 2d 1045, 1048 (Colo. App. 1990).

<sup>34</sup> *Nachtsheim v. Beach Aircraft Corp.*, 847 F. 2d 1261 (7th Cir. 1988).

*Nachtsheim v. Beech Aircraft Corp.*<sup>35</sup> The court’s rationale for the more stringent standard is that “in such cases the jury is invited to infer from the existence of another accident, the presence of a dangerous condition which caused the subject accident.”<sup>36</sup> As the circumstances and conditions become less similar to the accident under consideration, the probative force of such evidence decreases.<sup>37</sup> At the same time, the danger that the evidence will be unfairly prejudicial remains.<sup>38</sup> The jury might infer from the evidence of the prior accident alone that ultra-hazardous conditions existed and caused the subject incident without those issues ever having been proved.<sup>39</sup>

In *Four Corners Helicopter, Inc. v. Turbomecca*<sup>40</sup> the Defendants argued that the trial court erred in admitting evidence of other incidents of labyrinth screw backouts.<sup>41</sup> The district court concluded that plaintiffs demonstrated substantial similarity between the offered incidents and the engine failure in the case in question. The incidents offered in *Four Corners* consisted of sixteen reports that involved the same product and the circumstances were similar enough to allow the court to admit the

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<sup>35</sup> *Nachtsheim*, 847 F. 2d at 1268. A pilot’s estate and the owner of an airplane brought a products liability action against the airplane manufacturer alleging that the design of the Baron 58P rendered it unsafe for flight in icing conditions. This theory centered on an elevator, a flight control mechanism, located on the rear of the plane. Plaintiffs attempted to admit evidence of another crash in St. Anne, Illinois, which involved a model 58 T.C. Barron. Plaintiffs argued that the planes were substantially similar, both pilots were instrument rated pilots, both flights occurred in instrument conditions, specifically icing environment, and each case involved a report of ice accumulation on the air frame, and both planes were in icing conditions for a short period of time prior to the fatal crash.

<sup>36</sup> *Id.* at 1269.

<sup>37</sup> *Id.* at 1269.

<sup>38</sup> *Id.* at 1269.

<sup>39</sup> *Id.* at 1269 (citing *Gardner v. Southern Railway System*, 675 F. 2d 949, 952 (7th Cir. 1982)).

<sup>40</sup> 979 F. 2d 1434 (10th Cir. 1992). The helicopter owner and the pilot’s surviving spouse brought an action against the helicopter and engine manufacturers based on theories of strict liability and negligence. Plaintiff alleged that a loose labyrinth screw had backed out of position and contacted the compressor impeller causing the helicopter engine to overheat. The offered other similar incidents were embodied in a computer printout listing those reports.<sup>40</sup> Plaintiffs offered this evidence as probative to the existence of a design defect, notice of design defect, duty to warn, negligence, causation and to refute the Defendant’s claim that the accident was caused by a maintenance problem due to excessive vibration.

<sup>41</sup> 979 F. 2d at 1439

proffered evidence.<sup>42</sup> The appellate court opined that two cases are never identical.<sup>43</sup> Slightly different factors do not render any of the proffered incidents not substantially similar for the purposes for which they are offered.<sup>44</sup> These sixteen incidents, though not identical, were relevant for all purposes and any differences between these other instances of engine failure and the case in question affected the weight of the evidence and not its admissibility.<sup>45</sup> The sixteen reports were admissible for all offered purposes. The court noted that substantial similarity requires the existence of a high degree of similarity when the evidence is offered to prove the existence of a dangerous condition or a defect in the product as opposed to notice of a defect.<sup>46</sup>

A showing of substantial similarity becomes problematic if the evidence is consumed or destroyed. Under these circumstances, circumstantial evidence may be used to establish the existence of a manufacturing defect at the time that the product left the manufacturer.<sup>47</sup> At least one court has recognized a more relaxed standard of substantial similarity when the offered evidence is proposed to demonstrate the defendants' awareness of a defect.<sup>48</sup> In *Johnson v. Ford Motor Co.*,<sup>49</sup> the Court noted that on the issue of notice, the proponent of the evidence must show a "reasonable similarity".<sup>50</sup>

### **III. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION OR WASTE OF TIME**

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<sup>42</sup> *Id.*

<sup>43</sup> 979 F. 2d at 1439.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1440.

<sup>47</sup> *Rose v. Figgie International, Inc.*, 495 S.E. 2d 77, 81 (Ga. App. 1997).

<sup>48</sup> *Rose*, 495 S.E. 2d at 81.

<sup>49</sup> *Johnson v. Ford Motor Co.*, 988 F.2d 573 (5th Cir. 1993).

<sup>50</sup> *Johnson*, 988 F. 2d at 580 (recognizing a more relaxed admissibility standard for other similar incident evidence used to show manufacturer's notice of injury causing defect).

Even relevant evidence of other similar incidents, accident or injuries may be excluded if its probative value is substantially out-weighed by danger of unfair prejudice, confusion of the issues, misleading the jury, or if the court is convinced that admission is likely to cause undue delay, waste of time, or needless presentation of cumulative evidence.<sup>51</sup> Evidence of other incidents is not easily admitted into evidence if the court perceives a danger of unfair prejudice, consumption of time and distraction of the jury to collateral matters, especially in a products liability lawsuit.<sup>52</sup>

#### **A. Degree of Prejudice**

Potential for prejudice is not an absolute justification for the exclusion of a proponent's relevant other incident evidence. Mere prejudice is not the standard which allows exclusion of the offered evidence, it must be substantially more prejudicial than probative.<sup>53</sup> Since all effective evidence is prejudicial in the sense that it is damaging to the party against whom it is being offered, prejudice requiring exclusion is given a specialized meaning.<sup>54</sup> For evidence to be sufficiently prejudicial to justify exclusion, evidence must have a tendency to suggest that a decision will be made on an improper basis, commonly an emotional ones, such as bias, sympathy, hatred, contempt, retribution or horror.<sup>55</sup>

There are measures that the opponent of other similar incident evidence may employ to minimize the danger associated with admission of other similar incident evidence. A limiting instruction can mitigate potential prejudice the court perceives as a reason to justify exclusion of other similar incident evidence. Additionally, cross examination can be used to develop weaknesses resulting from

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<sup>51</sup> Fed. R. Evid. 403 and parallel state rules.

<sup>52</sup> *Uitts v. General Motors Corporation*, 411 F. Supp. 1380, 1383 (E. D. Penn. 1974) (citing McCormick on Evidence, §200 (2d ed. 1972)).

<sup>53</sup> *See Koehn*, 809 P. 2d at 1048; Fed. R. Evid. 403 and parallel state rules.

<sup>54</sup> *Id.*

dissimilarities. In *Four Corners Helicopter, Inc. v. Turbomecca*<sup>56</sup> the defendants argued that the trial court erred in admitting evidence of sixteen other incidents of labyrinth screw backouts.<sup>57</sup> The district court concluded that plaintiffs demonstrated sufficient similarity between the offered incidents and the engine failure in the case in question to allow this evidence to be admitted. The court in *Four Corners* stated that the defendant was free to cross examine plaintiff's witness to develop distinctions and was also free to request a limiting instruction as a curative step to mitigate possible prejudice.<sup>58</sup> The appellate court noted that in product liability actions, the occurrence of similar incidents or failures involving the same product has "great impact on a jury", as it tends to make the existence of a defect more probable than it would be without the evidence.<sup>59</sup> The proponent of this evidence can also argue that the limiting instruction and the cross examination can be used as a means of mitigating the perceptions of prejudice that accompany the admission of this highly probative evidence.

## **B. Confusion of the Issues**

Even relevant evidence may be excluded if the court decides that confusion of the issues will likely burden the litigation and work unfairness to its opponent. In *Nachtsheim*<sup>60</sup> the court stated that even when substantial identity of circumstances is proven, the admissibility of such evidence lies within

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<sup>55</sup> *Id.*

<sup>56</sup> 979 F. 2d 1434 (10th Cir. 1992). The helicopter owner and the pilot's surviving spouse brought an action against the helicopter and engine manufacturers on theories of strict liability and negligence. Plaintiff alleged that the loose labyrinth screw had backed out of position and contacted the compressor impeller causing the helicopter engine to overheat. A computer printout listing those reports. Plaintiffs offered this evidence as probative to design defect, notice of design, duty to warn, negligence, causation and to refute the Defendant's claim that the accident was caused by a maintenance problem due to excessive vibration.

<sup>57</sup> 979 F. 2d at 1439.

<sup>58</sup> *Id.* at 1439.

<sup>59</sup> *Id.*

the discretion of the trial judge who must weigh the dangers of unfairness, confusion, and undue expenditure of time in the trial on collateral issues against the factors favoring admissibility.<sup>61</sup> The court considered the fact that the other aircraft was manufactured by the same defendant. The court stated that the defendant would have to defend as a practical matter not only against the present suit, but also against the other accident offered into evidence.<sup>62</sup> The court was concerned that the jury would be confronted with additional technical evidence on a collateral issue that would unnecessarily prolong the trial and create a risk of confusion of the issues. The court excluded the evidence stating that there were too few established facts about the offered incident to allow a viable comparison to the incident that was the subject of the litigation.<sup>63</sup> The court noted that its primary concern was that the plaintiffs failed to present any evidence that the alleged dangerous condition, a frozen elevator, was in any way involved in the offered incident.<sup>64</sup> The court perceived that there would be a danger of undue delay and that the jury could become confused and exercised its discretion to exclude the evidence.

### **C. Undue Delay - Mini-trials**

Undue delay and waste of time is a consideration, that allows courts to exclude even relevant evidence. Courts often propose that under some circumstances fairness requires “mini-trials” to diminish the prejudicial impacts of this evidence. Plaintiffs in *Uitts v. General Motors Corp.* offered

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<sup>60</sup> 847 F. 2d at 1269.

<sup>61</sup> *Nachtsheim v. Beechcraft Corporation*, 847, F. 2d 1261, 1269 (7th Cir. 1988) (quoting *McKinnon v. Skil Corp.*, 638 F. 2d 270, 277 (1st Cir. 1981)).

<sup>62</sup> *Nachtsheim*, 847 F. 2d at 1269.

<sup>63</sup> *Nachtsheim*, 847 F. 2d at 1269.

<sup>64</sup> 847 F. 2d 1261. The Court examined cases cited by Plaintiffs to support their position seeking admission of this evidence; pursuant to that review the court stated that those cases involved circumstances where the proponent of the evidence was able to establish certain facts about the other accident that permitted a useful comparison to be made. In *Nachsteim*, plaintiffs only similarities presented evidence that the other accident and the accident under litigation were in an icing environment and that both planes crashed. There was no evidence that an elevator failure occurred in the other crash that would provide a link between that accident and the Plaintiffs’ theory about their case.

into evidence thirty-five reports concerning incidents which involved identical or substantially similar vehicles which they claim were involved in substantially similar incidents.<sup>65</sup> Plaintiffs proffered the evidence on the issue of causation.<sup>66</sup> The court stated that to minimize the prejudicial affect of these reports, the defendants would be required to review each report individually with the jury. The result would be a “mini-trial” on each of the thirty-five reports offered by plaintiffs. This would lengthen the trial considerably and the minds of the jurors would be diverted from the claims of the plaintiff to the claims contained in the reports.<sup>67</sup> Since the court was convinced the plaintiff introduced these reports to corroborate the testimony of the plaintiff in the *Uitts* case the court believed that the prejudicial nature of these thirty-five reports far outweighed any probative value the evidence had, and accordingly, the court found no error in excluding the evidence.<sup>68</sup> The defendants were successful in focusing the Court’s attention on dissimilarities.<sup>69</sup> The defendants convinced the court that the probative value in this comparison was outweighed by the unfair prejudice to the defendant and could, judging from the

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The Court noted that this would create an element of a trial on collateral issues which introduces a real possibility of confusing the issues.

<sup>65</sup> *Uitts v. General Motors Corporation*, 411 F. Supp. 1380, 1381-2 (E.D. Penn. 1974) (allowing Plaintiff to prove causation without proving a specific malfunction or defect of the vehicle, but rather , relying on the MacDougall theory to establish liability. The effect of MacDougall is to lessen plaintiffs’ burden of proof by allowing Plaintiffs to establish a prima facie case, merely by showing the occurrence of a malfunction in the absence of abnormal use and reasonable secondary causes.)

<sup>66</sup> *Uitts*, 411 F. Supp. at 1383.

<sup>67</sup> *Uitts*, 411 F. Supp. at 1383.

<sup>68</sup> *Uitts*, 411 F. Supp. at 1383.

<sup>69</sup> *Nachtsheim*, 847 F. 2d at 1267. These facts included information that the St. Anne pilot broke altitude clearance at 13,000 and was detected at 13,800 feet while the plane in *Nachtsheim* crashed prior to reaching its assigned altitude of 11,000 feet, the St. Anne pilot had a record of prior problems, the St. Anne pilot indicated that he was experiencing problems with auto pilot; it is difficult to determine the amount of time that lapsed prior to the plane actually picking up ice and the pilots’ later report of icing conditions, and the St. Anne crash was a near vertical crash with an eighty-degree nose down altitude whereas in the plane *Nachtsheim* appeared flyable in that the plane landed in the trees at a three degree down altitude.

arguments, add to the confusion”.<sup>70</sup> The appellate court’s review was based on the abuse of discretion standard and it upheld the trial court’s decision to exclude the evidence of the other crash.

#### **D. Rebuttal**

Evidence initially offered for one purpose and excluded because of its potential to work unfair prejudice can be admitted when the opponent opens the door to its admission as rebuttal evidence during the trial. This was the case in *Koehn v. R. D. Werner Company, Inc.*, where the Colorado Court of Appeals reversed the trial court’s exclusion of relevant post-incident evidence.<sup>71</sup> The appellate court stated that plaintiffs proffered testimony was submitted for the legitimate purpose of rebutting testimony of the defendants’ expert.<sup>72</sup> Thus, the appellate court held, it could not be characterized as unfairly prejudicial to defendant.

The court in *Koehn* indicated that the probability of admitting other similar incident evidence is heightened when the defendant contends that the challenged incident could not have possibly caused the plaintiff’s injury.<sup>73</sup> In other words, this evidence was admissible, even if the evidence was initially excluded pursuant to defendants’ pre-trial motion, despite the fact that it was potentially probative to the existence of a defect. After the defendants’ expert testified that the ladder was without defect and that plaintiff’s misuse of the ladder caused the accident and subsequent injury, this evidence should have been admitted for the purpose of rebutting this expert’s testimony.<sup>74</sup>

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<sup>70</sup> *Id.* at 1267

<sup>71</sup> *Koehn v. R. D. Werner Company, Inc.*, 809 P. 2d 1045 (Colo. App. 1990). This was a products liability action that alleged plaintiffs injuries were caused by Defendant’s defective manufacture of a stepladder. Plaintiff offered evidence that eleven months after her accident, that her supervisor fell while using an identical ladder that collapsed under circumstances similar to those that caused her injury. The ladders were two of three purchased at the same time by plaintiff’s employer.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* (citing *Ringelheim v. Fidelity Trust Co.*, 330 Pa. 69, 198 A. 628 (1938))

<sup>74</sup> *Id.* at 1047-8.

## **IV. OTHER PURPOSES**

### **A. Impermissible Purposes**

Rule 404(b) is a specialized, but important, application of the general exclusionary rule of character.<sup>75</sup> Character evidence is generally inadmissible to prove that the accused acted in conformity with that character on the occasion that is presently the subject of the litigation. Consistent with this rule, evidence of other wrongs or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion is consistent with prior conduct.<sup>76</sup> Other similar incidents are character evidence. This special application of the general exclusion of character evidence and the latent prejudice associated with “other similar incidents” are most often the basis of an opponent’s objection. This is especially true for product liability litigation.

If another similar incident is includes a statement made outside of the present proceeding offered for its truth; it is objectionable hearsay.<sup>77</sup> Evidence in the form of reports and complaints and lawsuits is subject to challenge by defendants that the proffered evidence is hearsay. Hearsay objections are defeated if the other incident, accident or injury is offered as probative evidence for another legitimate purpose other than the truth of the matter asserted.<sup>78</sup>

### **B. Permissible Purposes**

In product liability litigation, evidence of prior or subsequent similar incidents may generally be admitted when offered to demonstrate notice or knowledge of a defect. Prior and subsequent incidents may be offered to prove magnitude of the danger, prove the defendant’s ability to correct a known

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<sup>75</sup> Fed. R. Evid. 404(b) cmts.

<sup>76</sup> Fed. R. Evid. 404(b) cmts.

<sup>77</sup> Fed. R. Evid. 801(c).

<sup>78</sup> *See Soden v. Freightliner Corp.*, 714 F.2d 498, 507, (15th Cir. 1983); *See also, Uitts v. General Motors Corp.*, 411 F. Supp. 1380, 1383 (E.D. Penn. 1974).

defect, to show lack of safety for intended usage, to demonstrate the strength of the product; to provide the standard of care; to show causation.<sup>79</sup> The purposes for admission are limited only by the principles of materiality, relevancy, the application of the Rule 403 balancing test and the creativity of the lawyer. Several specific applications are discussed herein.

### **1. Notice of a Defect**

Prior accidents, incidents and injuries evidence in a products liability case is often admitted to show that the defendant knew or should have in the exercise of reasonable care known of a defect.<sup>80</sup> Evidence can be offered through testimony of other victims injured by the defective product involved in other incidents,<sup>81</sup> documents that embody the facts and circumstances surrounding the other incidents,<sup>82</sup> and reports generated and maintained by the defendants that provide cumulative accounts of other similar incidents. It is apparent that the defendant's notice or knowledge of an alleged defect is the most often utilized purpose for admitting other similar incident evidence. This evidence is often indispensable as proof of wantonness and the reprehensibility of the defendant's conduct sufficient to justify the imposition of punitive damages.

In products liability actions, Alabama courts have admitted evidence of other reported incidents to prove defendant's notice of the defect if the proponent shows that the same component or product

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<sup>79</sup> Ramos v. Liberty Mutual Insurance Co., 615 F. 2d 334(1980); Hessen v. Jaguar Cars, Inc., 915 F. 2d 641 (11th Cir. 1990); Jones v. Otis Elevator Co., 861 F. 2d 655 (11th Cir. 1980).

<sup>80</sup> See Taylor v. General Motors Corp., and No. 52072, 1997 WL 677042 (Ala. Oct. 31, 1997); see also General Motors Corp. v. Johnston, 592 So. 2d 1054, (Ala. 1992); General Motors Corp. v. Moseley, 447 S.E. 2d 302 (Ga. App. 1994); Drabik v. Stanley-Bostitch, Inc., 997 F. 2d 496 (8th Cir. 1993); Soden v. Freightliner Corp., 714 F. 2d 498 (5th Cir. 1983); Marios v. Paper Converting Machine Co., 539 A. 2d 621, (Me. 1988).

<sup>81</sup> See *id.*

<sup>82</sup> See *id.*

caused the similar accident. In *General Motors Corporation v. Johnston*,<sup>83</sup> the Alabama Supreme Court affirmed the trial court's decision to admit 251 internal reports of stalling problems offered by plaintiffs as circumstantial evidence of General Motor's notice of the stalling problems.<sup>84</sup> The court was persuaded by the proponents showing that the reports contained evidence of the stalling problems in vehicles with the identical engine as the one in plaintiff's pickup truck.<sup>85</sup>

Alabama courts determine the admissibility of other similar incident evidence under the substantial similarity standard on a case by case basis.<sup>86</sup> If the proponent fails to make the proper foundational showing, Alabama courts preclude such evidence. A recent Alabama Supreme Court decision upheld the trial court's exclusion of fourteen internal investigative reports produced by the defendants because the proponent failed to provide sufficient evidence of similarity of circumstances.<sup>87</sup> In *Taylor v. General Motors Corporation*, plaintiffs proffered evidence consisted of fourteen internal investigative reports of the defendants related to incidents in which other drivers lost control of their Sprint vehicles and ran off the road. The Court opined that the similarities between those incidents and

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<sup>83</sup> 592 So. 2d 1054 (Ala. 1992). Plaintiff, Mr. Ford Lewis, was seriously injured and his seven year old grandson, Barton Griffin, was killed when his 1988 model 2500 series Chevrolet pickup truck stalled in an intersection. The vehicle was struck by a tractor trailer truck. Mr. Lewis and Bart's mother sued General Motors Corporation alleging that the pickup truck was defective under the Alabama Extended Manufacturers Liability Doctrine (AEMLD). The Plaintiffs asserted that there was a defect in the fuel deliver system and that the defect caused the engine to stall. Specifically, they alleged that a programmable read-only memory chip (PROM) was defective. The PROM is located in the TBI/ECM system of this model truck. "TBI" stands for a throttle body injection. "ECM" stands for electronic control module. The TBI/ECM system controls several engine function including the fuel delivery system. When a driver depresses the accelerator, a sensor transmits a command to the ECM. The memory programmed in the PROM in turns relays the command to the engine. The PROM is installed and calibrated for each particular engine model. Plaintiffs claim that the PROM and its calibrations caused the pickup truck to stall on the date of the collision. Plaintiffs asserted that General Motors knew of the stalling problem of the model truck in question and did not alert its customers.

<sup>84</sup> *Id.* at 1057.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 1058. (citing C. Gamble, McElroys Alabama Evidence §426.01(2) (4th ed. 1991)).

<sup>87</sup> *Taylor v. General Motors Corporation*, No. 1952072, 1997 WL 677042 (Ala. Oct. 31, 1997). A motorist was injured in a single vehicle accident when he lost control of his automobile. Plaintiff sued the manufacturer under the Alabama

Taylor's accident end there. None of the fourteen reports mentioned the failure that plaintiff alleged caused the incident at issue. The fourteen reports attributed the other incidents to a variety of automotive malfunctions ranging from brake failure to the loss of power steering, but did not include the failure of a torque rod bracket or a transmission mount, the problem that Taylor alleged caused his accident.<sup>88</sup> The circuit court refused to admit the documents because plaintiff could not establish a relationship between the parts replaced and those parts that were actually defective.<sup>89</sup> Consequently, the Alabama Supreme Court found that any probative value of the evidence was speculative, and that the circuit court did not abuse its discretion by refusing to admit the documents.<sup>90</sup>

A proper foundation must be laid prior to the admission of other similar incident evidence on the issue of knowledge or notice of a defect. Although several courts have acknowledged that the substantial similarity showing is more lenient when evidence is offered on the issue of notice, the standard remains a substantial similarity.<sup>91</sup> In *General Motors Corp. v. Moseley*, Plaintiff's counsel repeatedly referred to 120 other lawsuits and an estimated 240 deaths during opening statement, direct examination and cross examination of witnesses and closing argument. Plaintiff argued that a showing of substantial similarity is only required when other similar incidents are offered to prove the existence of a defect, demonstrating a mere similarity is sufficient when the evidence is offered to establish notice of a defect.<sup>92</sup> The court rejected the plaintiffs' argument stating that it begged the

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Extended Manufacturer's Liability Doctrine (AEMLD) alleging that a defect in his 1988 Chevrolet Sprint caused the accident.

<sup>88</sup> *Taylor*, 1997 WL 677042, at \*6.

<sup>89</sup> *Id.* at \*7.

<sup>90</sup> *Id.*

<sup>91</sup> *General Motors Corp. v. Moseley*, 213 Ga. App. 875, 447 S.E. 2d 302 (1994). See *Briney v. Deere & Co.*, 150 F.R.D.(S.D. Iowa 1993); see also *Johnson v. Ford Motor Co.*, 988 F.2d 573,588(5<sup>th</sup> Cir. 1986).

<sup>92</sup> *Moseley*, S.E. 2d at 307.

question, “notice of what defect?”<sup>93</sup> Prior precedent make it clear that before such evidence is admissible for whatever appropriate use, there must be a showing of substantial similarity to the incident at issue. The court found that plaintiff’s failure to make the proper foundational showing and arguing this evidence in violation of the court’s ruling constituted reversible error.<sup>94</sup> However, as discussed earlier, at least one court has defined the proper similarity standard as a “reasonable similarity” if the existence is offered to prove notice.<sup>95</sup>

Courts in some jurisdictions hold evidence of prior lawsuits and complaints admissible and probative to the defendant’s notice or knowledge of the product's defect. At least one court has held the use of a limiting instruction in conjunction with other mitigating factors justified the trial court’s admission of evidence of other accidents involving the product. In *Soden v. Freightliner Corporation*<sup>96</sup> the trial court issued a limiting instruction designating the permissible use of the proffered evidence as well as the impermissible evidence.<sup>97</sup> In other words, the court instructed jurors that the evidence was admissible for the purpose of proving notice but was not to be used as evidence of the truth of the matters asserted in the lawsuits and complaints. The appellate court upheld the trial court’s admission of this evidence. The defendant’s notice or knowledge of the purported design defect was probative to the plaintiffs’ punitive damages claim.<sup>98</sup> The court stated that weaknesses were further mitigated by several other factors.<sup>99</sup>

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<sup>93</sup> *Id.* at 307.

<sup>94</sup> *Id.*

<sup>95</sup> See *infra* note 49.

<sup>96</sup> 714 F. 2d 498 (5th Cir. 1983). A truck driver was killed in a post collision fuel fire. The District Court admitted evidence of five lawsuits and three formal complaints as probative to Freightliner’s notice or knowledge of the defective design of its fuel system.

<sup>97</sup> *Soden*, 714 F. 2d at 507, n. 12.

<sup>98</sup> *Soden*, 714 F. 2d at 508.

<sup>99</sup> *Id.* at 508-9; The factors listed in the opinion are as follows: The defendant did not contest the alleged cause nor the occurrence of the other accidents. The defendants offered no evidence to rebut or discredit the plaintiffs’

Before prior incidents will be admissible to prove knowledge, notice or knowledge must be a disputed factual issue. The opponent of other similar incident or accident evidence may choose to stipulate to the disputed fact to preclude admission of the proponent's use of this highly probative evidence. In *Drabik v. Stanley-Bostitch*,<sup>100</sup> the defendants stipulated to its notice of four other injuries prior to the 1984 incident involving the inadvertent discharge of N 16 CT Nailer. The stipulation was subject to the defendants' objection alleging that the evidence was inadmissible because plaintiff failed to show substantial similarity.<sup>101</sup> Two of the incidents, to which the defendants earlier stipulated, were later introduced for another permissible purpose subject to the Defendants "substantial similarity" objection.<sup>102</sup>

In *Marios v. Paper Converting Machine*,<sup>103</sup> the trial court admitted evidence of seven pending lawsuits. The admission was upheld on appellate review as sufficiently similar to the suit in question to establish that the defendants knew or should have known, that the machine may have been unreasonably dangerous as designed or produced.<sup>104</sup> The court, after a thorough analysis, determined that the evidence as offered was substantially similar to the incident at issue and more probative than prejudicial to the disputed issues including the defendant's notice of the defect.<sup>105</sup> The court opined that

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affirmation of substantial similarity. The defendant arguably benefited by the decision to refrain from revealing the extent of the actual similarity to the accident which was the basis of litigation and the other offered accidents. Furthermore, the court was influenced in its decision that admission was proper because Freightliner was successful on the issue of exemplary damages at trial.

<sup>100</sup> 997 F. 2d 496 (8th. Cir. 1993).

<sup>101</sup> *Id.* at 503.

<sup>102</sup> *See id.* at 503.

<sup>103</sup> 539 A. 2d 621 (Me. 1988) Plaintiff, an injured machine operator brought a negligence and strict liability lawsuit against a manufacturer of a paper processing machine. The Trial Court allowed admission of seven pending lawsuits against the manufacturer of the rewinding machine as probative to the issue of notice.

<sup>104</sup> *Id.* at 625.

<sup>105</sup> *Id.* at 625.

weaknesses were attributed to the weight of the evidence, not its admissibility; any alleged deficiencies are appropriately the subject matter for exposure during cross examination.<sup>106</sup>

## 2. Negligence

Other similar incidents may be admitted to show that the defendant manufacturer was negligent. A finding of negligence requires that the injury causing incident must be foreseeable.<sup>107</sup> At least one court has recognized a relaxed requirement for similarity when introducing evidence of other accidents to prove negligence.<sup>108</sup> Evidence of another grenade assembled and x-rayed by the same manufacturer having prematurely detonated was reasonably probative of the plaintiff's contention that the assembler of the grenade was negligent.<sup>109</sup> However, the appellate court concluded that the trial court committed error in failing to exclude evidence of the premature detonation of a grenade not assembled by the defendant manufacturer and another manufacturer's grenades having short fuses.<sup>110</sup> The court concluded the error was harmless because the jury was made fully aware that the manufacturer did not assemble the grenades involved in the other three episodes.<sup>111</sup>

Evidence of similar accidents is admissible to show primary negligence in an appropriate case.<sup>112</sup> Even when the facts are identical, a judicial opinion from another lawsuit should be admitted as substantive evidence of a similar accident only in the rarest of cases such as, when no other form of

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<sup>106</sup> *Id.*

<sup>107</sup> Notice is essential to show that the injury was probable.

<sup>108</sup> *Jackson v. Firestone Tire & Rubber Co.*, 788 F. 2d 1070, 1083 (citing *McCormick on Evid.* §200 (E. Clearly 2d ed. 1972)).

<sup>109</sup> *McConigal v. Gearhart Industries, Inc.*, 851 F. 2d. 774 (5th Cir. 1988).

<sup>110</sup> 851 F. 2d at 778.

<sup>111</sup> *Id.*

<sup>112</sup> *Johnson v. Colt Industries Operating Corporation*, 797 F. 2d 1530, 1534 (10th Cir. 1986) (citing *Julander v. Ford Motor Company*, 488 F. 2d 839, 846-47 (10th Cir. 1973).

evidence is available and then only with detailed limiting instructions.<sup>113</sup> The court concluded that the evidence was admissible as substantive evidence of the manufacturer's negligence but admitting this specific form was objectionable. The court in the *Johnson* case found that the circumstances of the *Bender* case were probative to the manufacturer's awareness of the "drop-fire hazard" and its consequences.<sup>114</sup> However, the appellate court decided that the admission of the opinion from the *Bender* case was harmless error because it represented only a small portion of the plaintiff's case-in-chief. The defendant presented other overwhelming evidence of unsafe design which greatly diminished the possible prejudicial affect. Furthermore, the court noted that the defendant did not challenge the plaintiff's assertion that the gun model was likely to drop-fire and the defendant refused the court's offer to issue a limiting instruction.<sup>115</sup>

### **3. The Existence of a Defect**

#### **a. Magnitude of the Danger**

The other similar incidents may provide proof of the magnitude of the danger associated with a defective product. Plaintiffs may use other similar incidents to show that a product is "unreasonably dangerous." Subsequent, as well as prior, similar incidents are admissible as proof of an "unreasonably dangerous condition".<sup>116</sup> In *Van Marter*, the other similar incident evidence was the deposition testimony of Mr. and Mrs. Couch. The Couches testified that their 1980 Buick Regal caught fire. The

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<sup>113</sup> *Johnson*, 797 F. 2d at 1534.

<sup>114</sup> *Id.*

<sup>115</sup> 979 F. 2d at 1535.

<sup>116</sup> *General Motors Corporation v. Van Marter*, 447 So. 2d 1291 (Ala. 1984). Plaintiffs sued General Motors Corporation alleging that a defect in their 1978 Oldsmobile Regency caused a fire. The fire extensively damaged their carport, home and its contents. The Van Marters sued General Motors under the Alabama Extended Manufacturer's Liability doctrine. The jury returned a verdict in favor of the Plaintiffs.

fire started under the front seat of the vehicle and was caused by a shortage in the wiring system.<sup>117</sup> General Motors argued that the 1978 Oldsmobile Regency and the 1980 Buick Regal were different products and that an incident occurring two years after the incident in question was too remote to have any probative value.<sup>118</sup> Under Alabama law, whether a thing was safe or dangerous at the time of the accident in question can be determined by evidence of the occurrence or non-occurrence of another accident to others at other times. The evidence is admissible if the condition of the thing at such other times was substantially the same as the condition existing at the time of the accident in suit.<sup>119</sup> The plaintiff produced an expert witness with extensive experience with General Motor automobile wiring systems. He examined both vehicles and testified that the power accessory system in both vehicles was basically the same.<sup>120</sup> The distinguishing features were brought out by the defense in cross examination. The expert considered these differences to be of no significant import in the case. The Court upheld the trial court's decision to admit this evidence.

In *Newman v. Ford Motor Company*,<sup>121</sup> plaintiff sued Ford Motor Company in a products liability action alleging that a product defect resulted in serious permanent injuries. During the trial

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<sup>117</sup> *Van Marter*, 447 So. 2d 1291 at 1293.

<sup>118</sup> *Id.*

<sup>119</sup> *See Id.* (citing C. Gamble, *McElroy's Alabama's Evidence* §83.01 (3rd ed. 1977)).

<sup>120</sup> 447 So. 2d 1291 at 1293.

<sup>121</sup> Nos. 20573, 20560, 1997 WL 778512 (Mo. App. Dec. 1997). Ford Motor Company appealed from a jury verdict finding that it and the defendants CBS Redi Mix, Inc. and William McCoy jointly and severally liable for a multi-million dollar judgment to Plaintiff and her spouse. The decision arose from a products liability action commenced on behalf of Plaintiff when the rear impact caused the seat cushion from her Ford Aerostar to crack from top to bottom resulting in serious permanent injury. This alleged defect permitted the seat back to collapse rearward at a maximum angle of 60 degrees. Plaintiff was propelled rearward and struck the middle bench seat with her shoulders. None of the other occupant seats in either of the Ford vehicles involved in the collision collapsed. The seat the Plaintiff occupied was a captain's chair with a head rest and a single recliner mechanism on the door side of the seat. The primary support from the seat back was from the single recliner near the side door. The metal near the recliner

plaintiff offered, and the court allowed, evidence of other accidents in plaintiff's case-in-chief. Plaintiff proffered the evidence for the limited purposes of determining whether an occupant of a vehicle that utilizes this particular type of seat is more likely or less likely to be ejected while wearing their seatbelt. This evidence was offered to demonstrate that the change in circumstances varies the magnitude of the danger. The court stated "[w]e're all talking now about the issue of seatbelts and how that affects ejection."<sup>122</sup> Plaintiffs called an expert, Dr. Kenneth Saczalski to testify about four specific collisions.<sup>123</sup> The trial court allowed parties, out of the presence of the jury, to question the witness about each incident.<sup>124</sup> Without finding that they were substantially similar, the court ruled that Dr. Saczalski could testify regarding these four collisions and that the court would issue a limiting instruction to the jury. Thereafter, the court then brought the jury in and issued a proper limiting instruction prior to plaintiff's expert testimony.<sup>125</sup>

Later in the *Newton* trial, plaintiff offered the live testimony of two witnesses and video taped depositions of two other witnesses all having suffered spinal cord injuries and paralysis after rear end collisions in their vehicles manufactured by the Ford Motor Company.<sup>126</sup> The trial court allowed plaintiff to introduce this evidence in their case in chief on the limited issue of whether a belted occupant can ramp up from under a seat belt in a rear impact collision.<sup>127</sup> It is important to note that a seat belt issue

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mechanism had been thinned out in a production process, by design, creating a weak point in the system. This was the area torn in the collision.

<sup>122</sup> 1997 WL 778512, at \*5.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at \*6.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

was interjected into the case in Ford's answer which alleged that the plaintiff was contributorily negligent for failing to wear her seat belt, and that this failure caused or contributed to her injuries.<sup>128</sup>

**b. The Defendants Ability to Correct a Known Defect**

When determining the existence of a design defect, alternative safer design is a factor. As a consequence, the defendant's ability to correct a known defect has been offered and accepted by courts as a permissible purpose for admitting evidence of prior and subsequent accidents caused by the same instrumentality. In *Robinson v. G. G. C., Inc.*,<sup>129</sup> plaintiff offered evidence of safety devices on similar machines to show that the interlocking guards had been available for many years.<sup>130</sup> The court in *Robinson* recognized that the availability of existing alternative safer designs is a factor in determining the existence of a design defect. The court opined that when commercial feasibility is disputed, courts must permit the plaintiff to impeach the defense expert with evidence of alternative design.<sup>131</sup> In *Robinson*, the defendants' expert testified that the design was reasonably safe and that it was the state of the art at the time it was built. The trial court stated that plaintiff should have had an opportunity to dispute the claim that alternative designs were unavailable at the time.<sup>132</sup>

**c. Lack of Safety for Intended Use**

One of the numerous other purposes for which evidence of other similar incidents has been admitted by courts is to show that the product is not safe for its intended usage. In determining whether

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<sup>128</sup> *Id.* Materiality in this case arose from the Defendants responsive pleading. The Defendants specifically alleged that the Plaintiff was contributorily negligent in failing to wear her seat belt. This defense raised in the answer allowed the Plaintiff to introduce similar incidents through expert testimony, two similar incidents through live witness testimony and two similar incidents through deposition testimony.

<sup>129</sup> 808 P. 2d 522 (Nev. 1991).

<sup>130</sup> 808 P. 2d at 525.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

a product is defective, the design and operation of the product must be considered.<sup>133</sup> This includes determining whether the product was equipped with proper safety devices which would allow the user to avoid danger when using the product.<sup>134</sup>

The proper inquiry is whether the product should have been designed more safely.<sup>135</sup> In *Di Francesco v. Excam, Inc.*,<sup>136</sup> plaintiff was injured when a derringer pistol that he was carrying in his pocket inadvertently discharged when the exposed hammer was accidentally bumped.<sup>137</sup> The defendants argued that they were entitled to a new trial because the trial court admitted evidence of dissimilar gun discharges. The court stated that evidence concerning other incidents involving the instrumentality that caused a plaintiff's harm may be relevant to a number of issues.<sup>138</sup> "It may tend to show that the instrumentality was unsafe . . ."<sup>139</sup> The transcript revealed that the evidence was introduced by plaintiffs and did not pertain specifically to the Excam TA38S derringer pistol.<sup>140</sup> The court specifically held that evidence from similar model derringers which accidentally discharged when their exposed hammer is inadvertently bumped is substantially similar as long as these other weapons possess the identical design features of the TA38S derringer model.

#### **d. Strength of a Product**

When strength of a purportedly defective product is an issue other similar incidents have been admitted as proof that the product lacks or has sufficient strength for its design purpose. In *Newman v.*

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<sup>133</sup> 642 A. 2d at 531

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* (citing by *Dambacher v. Malice*, 336 Pa. Super. 22, 485 A. 2d 408 (1984)).

<sup>136</sup> 624 A. 2d 529 (Pa. Super. 1994)

<sup>137</sup> *Id.* at 530.

<sup>138</sup> 642 A. 2d at 535.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

*Ford*, plaintiffs contended that the Ford seatback was “far too weak and should not have broken in the collision . . .”<sup>141</sup>

Ford took the position, that plaintiffs’ seat performed as it was designed to perform and that all production seats, including the one at issue, are similarly designed to collapse backward in a rear impact collision. Ford also contended that collapsing production seats are responsible for very few severe injuries in real world rear impact collisions.<sup>142</sup> Thus, Ford lumped all yielding production seats together in a class for comparison, starting with the opening statement and continuing to do so throughout the trial.<sup>143</sup> Ford spent several days at trial presenting evidence to show that all production seats were similarly designed.<sup>144</sup> The court found that Ford defined the parameters of substantial similarity in the case by comparing a very wide variety of rear impact collisions without regard to the type of vehicle, type of seat, type of seat belt, or collision forces.

In response, plaintiffs offered evidence through their expert, Mr. William Muzzy, three different accidents in which vehicle occupants were seriously and permanently injured as a result of yielding production seats. Another plaintiff’s expert, Mr. Mark Pozzi, testified about fifteen additional specific incidents in which yielding production seats allegedly caused serious injury or death.<sup>145</sup> The court stated that frequency of occurrence of severe injury rear impact accidents was made an issue by Ford, and the trial court was within its discretion to permit the testimony of plaintiff’s experts in their case in rebuttal, in order to refute the inferences raised by Ford’s evidence.<sup>146</sup> Since the strength of the product was raised

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<sup>141</sup> 1997 WL 778512, at \*8.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at \*9

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at \*9 (citing several Missouri cases)

as an issue by the defendants during the trial, the court properly allowed the plaintiffs to rebut defendants' claims.

#### 4. Causation

Often in a products liability action there is a question of whether the alleged defect caused the accident or injury. Other similar incidents are often admissible to show that the alleged defect caused the litigated accident and the resulting injury. This rule applies irrespective of whether the proponent attempts to introduce evidence of other accidents which occurred before or after the litigated accident.

<sup>147</sup> A court is more likely to accept an offer of evidence of another incident to support a claim that the present accident was caused by a specific defect which also caused the other incidents if the plaintiff establishes the following factors: (1) the products are similar; (2) the alleged defect is similar; (3) causation relates to the same defect in the offered incidents; and (4) exclusion of all reasonable secondary explanations for the cause of the other incident. <sup>148</sup>

Evidence of a subsequent incident to show that the instrumentality used was in some way defective may be offered to refute the defendants' allegation that some third-parties' negligence caused the accident.<sup>149</sup> In *Bailey v. Kawasaki-Kisen, K.K.*, the Court stated that another incident was offered to refute the ship owner's theory that the negligence of fellow workers caused the accident.<sup>150</sup> It went to cause, not blame.<sup>151</sup> It was clear to the Court in *Bailey* that this evidence falls within the rule favoring admission. By showing that the apparatus failed a short time after the accident, with no intervening

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<sup>147</sup> 893 F. Supp. at 552 (citing *Brooks v. Chrysler Corporation*, 786 F. 2d 1191, 1195 (D.C. Cir.) cert. denied, 479 U.S. 853, 107 S. Ct. 185, 93 L. Ed. 2d 119 (1986)).

<sup>148</sup> 893 F. Supp. at 552 (citing *Hale v. Firestone Tire & Rubber Co.*, 756 F. 2d 1322, 1332 (8th Cir. 1985); and citing *Uitts*, 411 F. Supp. at 1383)).

<sup>149</sup> *Bailey v. Kawasaki-Kisen, K. K.*, 455 F. 2d 392 (5th Cir. 1972)

<sup>150</sup> *Bailey*, 455 F. 2d 395.

<sup>151</sup> *Id.* at 397.

changes, the jury might have concluded that the apparatus had a tendency to operate defectively.<sup>152</sup> The Court stated that while it is true that admission is a discretionary decision of the trial judge, this discretionary power does not allow the trial court to exclude competent evidence which is essential and vital to a litigant's case unless there is a sound practical reason for barring it.<sup>153</sup> The Court stated that all must be examined in terms of the purpose of the rule of exclusion, the interest to be served by admissibility and the qualifying instructions, if any, needed to eliminate the probability of harm.<sup>154</sup> Evidence of post-sale accidents are admissible to demonstrate that the product was defective when it left control of the manufacturer and that the defect in the product caused the injury.<sup>155</sup>

Similarly, a defendant in its case may introduce evidence of the absence of similar accidents in the past in order to establish the lack of a causal relationship between the injury and the claimed defect.<sup>156</sup> Such evidence may be relevant to a contested issue of causation, under appropriate instructions from the court and subject to the exercise of the trial court's discretion as to the probative value of the evidence, where the requirement of substantially identical circumstances is satisfied.<sup>157</sup>

## 5. Experimental Evidence

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 398, (citing *United States v. 60.14 acres of land*, 362 F. 2d 660 (3rd Cir. 1966)).

<sup>154</sup> *Id.*

<sup>155</sup> *Burke v. Deere & Co.*, 6 F. 3d 497, 506 (8th Cir. 1993). Plaintiff was injured when a vertical auger on a model 6620 John Deere Titan Series combine cut his right hand. Plaintiff's employer purchased the combine new in 1979. Plaintiff's injuries occurred when he reached through a clean-out door in the vertical auger's housing to remove debris

in the grain delivery system while preparing the combine for transfer to Deere's dealer for a design modification of the clean-out door. The employer turned on the auger from the operator's cab just before or just after Plaintiff placed his hand in the combine. At trial, the District Court permitted Plaintiff to present evidence of other accidents involving the Titan Series combine and admitted evidence of post-sale and post-accident acts by Deere and its dealers. The Trial Court admitted evidence of other post-control accidents only on the issues of defect, causation and foreseeability of use or mis-use of the product.

<sup>156</sup> *Michetti v. Linde Baker Material Handling Corporation*, 969 F. Supp. 286, 287 (E. D. Ta. 1997) (citing *Spino v. John S. Tilley Ladder Co.*, 448 Pa. Super. 327, 671 A. 2d 726 (1996)).

In ruling on the admissibility of experiments, the circumstances surrounding the experimental evidence are not required to be identical.<sup>158</sup> Experiments purporting to simulate actual events may be admissible if executed under conditions which are substantially similar to those that are the subject of litigation.<sup>159</sup> While the conditions need not be identical, they must be sufficiently similar to provide a fair comparison.<sup>160</sup> The appeals court, in *Four Corners*, noted that experiments offered to demonstrate physical principles can be admitted for that limited purpose, provided that the experiment is not conducted in a manner that suggests that it simulates the actual events.<sup>161</sup> The court believed that the experiment in *Four Corners* was offered to demonstrate what the defendants believed occurred in the helicopter engine.<sup>162</sup> The trial court excluded the defendants' experimental evidence because it lacked sufficient similarity to the actual event.

## 6. Other Similar Incidents Admitted Via Expert Testimony

One case has held that other similar incidents introduced through expert testimony and offered to demonstrate the physical principles involved in the accident are not subject to the "substantial similarity" foundational requirement prior to admission. Although the same defect is essential, the same

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<sup>157</sup> See *Espeaignnette v. Gene Tierney Co.*, 43 F. 3d 1, 9 (1st Cir. 1994).

<sup>158</sup> 979 F. 2d at 1442.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 1442. (citing *Jackson v. Fletcher*, 647 F. 2d 1020, 1027 (10th Cir. 1981). The Court held that since a substantial dissimilarity in conditions prevented a fair comparison and could possibly mislead the jury on a critical element of the case, the admission of the evidence is prejudicial)

<sup>161</sup> *Id.* at 1442; *Jackson*, 647 F. 2d at 1027 (stating that experiments used to simply demonstrate the principles used in forming the expert opinion, need not strictly adhere to the facts).

<sup>162</sup> The Defendant's view was that a three horse power lathe engine was unaffected by the screw impeller contact made it improbable that an 800 horsepower engine would be affected by a similar contact. The Court of Appeals upheld the trial court decision stating that the trial court did not abuse its discretion in excluding the experiment after determining the conditions presented in the out-of-court experiment were not substantially similar to those present at the time of the accident. The offered experiment did not use the same product, engine impeller and labyrinth screw, nor did it use conditions that were sufficiently similar to justify its admission into evidence.

or similar product is not required. In *Heath v. Suzuki Motor Corporation*,<sup>163</sup> plaintiffs offered evidence through expert testimony to demonstrate and explain how roll-over accidents occur.<sup>164</sup> Plaintiff argued that if the proponent does not seek the admission of the other incident evidence to prove the defendant's notice of the alleged defect, the magnitude of the danger involved, the defendant's ability to correct a known defect, the lack of safety for intended use, strength of the product, the standard of care and causation then substantial similarity is not a condition precedent to its admission.<sup>165</sup> The rationale of the "substantial similarity" doctrine is to protect parties against the admission of unfairly prejudicial evidence which, because it is not substantially similar to the incident or accident at issue, is apt to confuse or mislead the jury.<sup>166</sup> These were not concerns raised by evidence used by an expert to illustrate the physical principles involved in the type of accident that was at issue in the case.<sup>167</sup> Based on the above reasoning, the 11th Circuit Court of Appeals held that the trial court admitting evidence of rollover accidents involving three dissimilar vehicles was not an abuse of discretion.<sup>168</sup>

## V. DISCOVERY OF OTHER SIMILAR INCIDENTS

### A. Discoverability

The scope of discoverability is broader than the scope of admissibility. The test for relevance in the discovery area is extremely broad. The proper inquiry is whether there is any possibility that the information sought may be relevant to the subject matter of the pending action.<sup>169</sup> If this inquiry illicit

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<sup>163</sup> 126 F.3d 1391 (11th Cir. 1997)). The owner of a sports utility vehicle brought a products liability lawsuit against the manufacturer. Plaintiff claimed that his 1987 Suzuki Samurai was dangerously defective in its design and that the defendants failed to adequately warn him about the alleged defect causing roll-over accidents. After the jury found for the plaintiff, defendant appealed alleging, among other errors, that the trial court erred in admitting other instances of roll-over accidents involving other manufacturer's sports utility vehicles.

<sup>164</sup> 126 F.3d at 1396.

<sup>165</sup> *Id.*

<sup>166</sup> 126 F.R.D. at 1396.

<sup>167</sup> *Id.* at 1396.

<sup>168</sup> *Id.*

<sup>169</sup> *Briney v. Deere & Co.*, 150 F. R. D. 159 (S.D. Iowa 1993).

an affirmative response, then the requested information is discoverable. In *Dollar v. Long Mfg. Company N.C., Inc.*,<sup>170</sup> the court stated that discovery, together with the pre-trial procedure makes a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.<sup>171</sup> The court in *Dollar* relying on *Hickman v. Taylor*<sup>172</sup> opined that "no longer can the time honored cry of 'fishing expedition' preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all relevant facts gathered by both parties is essential to proper litigation. Either party may compel the other to disgorge whatever facts he has in his possession."<sup>173</sup> The discovery procedures simply advance the stage at which the disclosure must be compelled during the time preceding trial, thus reducing the possibility of surprise.<sup>174</sup>

The scope of discovery is within the sound discretion of the trial judge, but, the trial judge may be reversed if this discretion is abused. Often defendants attempt to prevent discovery of the facts surrounding other incidents or accidents involving the defective product. For example, the Court in *Dollar* found the trial judge's denial of plaintiff's motion to compel, in the absence of a sound reason for the denial, an abuse of discretion.<sup>175</sup> In *Dollar*, plaintiffs sought answers to interrogatories requesting knowledge of any accidents, incidents or occurrences resulting in bodily injury or death of a backhoe operator using a model similar to the one involved in the pending lawsuit.<sup>176</sup> Defendants, in response to plaintiff's interrogatory, denied knowledge of any prior incidents responsive to this interrogatory.<sup>177</sup>

During one of the defendant's design engineer's deposition, plaintiffs obtained testimony which disclosed

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<sup>170</sup> See *Dollar v. Long Mfg., N.C., Inc.*, 561 F. 2d at 613 (5th Cir. 1977).

<sup>171</sup> 561 F. 2d at 615 (citing *United States v. Procter & Gamble*, 356 U. S. 677, 78 S. Ct. 983 (1958)).

<sup>172</sup> See *Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 613 (5th Cir. 1977)(citing *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385 (1947)(providing standard for the scope of discovery)).

<sup>173</sup> See *Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 613 (5th Cir. 1977).

<sup>174</sup> *Dollar*, 561 F.2d at (citing *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385 (1947)(defining the scope of discovery)).

<sup>175</sup> See *Dollar*, 561 F. 2d at 618.

the occurrence of two subsequent accidents.<sup>178</sup> The witness, upon the advice of counsel, refused to reveal the details of the subsequent accidents. Plaintiffs filed a motion to compel the defendants to provide the information sought by the interrogatory.<sup>179</sup> The fifth circuit reversed the trial court's decision which denied plaintiff's motion to compel because the information sought concerning the existence and details of other injuries and deaths resulting from the use of similar models was reasonably calculated to lead to the discovery of admissible evidence.<sup>180</sup>

The Court stated that subsequent incidents are relevant to causation and to rebut opposing parties causation theory. Thus, the information sought by the interrogatory may well have constituted admissible evidence. The test of relevance in the discovery context is a very broad one.<sup>181</sup> For discovery purposes, the court need only find that circumstances surrounding the other accidents are similar enough that discovery concerning those incidents is reasonably calculated to lead to the uncovering of substantially similar occurrences.<sup>182</sup> The mere fact that plaintiff expert's observations came from the manipulation of the equipment subsequent to the incidents investigated did not serve to make this information objectionable.<sup>183</sup> Other occasions upon which the movement had taken place, observations made then might well have established the proof of what happened on the unobserved occasion at issue in the present litigation.<sup>184</sup>

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<sup>176</sup> *See Dollar*, 561 F. 2d at 615.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *See Dollar*, 561 F. 2d at 617-618.

<sup>181</sup> *See id.*

<sup>182</sup> 150 F.R.D. at 164.

<sup>183</sup> 561 F. 2d at 617.

<sup>184</sup> *See id.*

Although broad, the discovery of other similar incidents and accidents has limitations. For example, in *Lohr v. Stanley Bostitch*,<sup>185</sup> the court held that evidence of other accidents involving dissimilar products would not be admissible at trial and its production and discovery would be abusive.<sup>186</sup> This decision was made in response to plaintiff's request that the defendant provide information on all previous accidents involving facial injuries or personal injuries of any kind caused by defendant's products.<sup>187</sup> The court found this request much too broad. However, the court in *Lohr* allowed discovery of other similar incidents involving the same design feature which was alleged to have caused plaintiff's injury.<sup>188</sup>

Timing of the collateral incident is also a consideration. The court in *Lohr*, permitted plaintiff to discover documents concerning incidents prior to and subsequent to the litigated incident. The documents prior to date of accident were found relevant to knowledge. The facts indicated that the manufacturer owned the tools and monitored its use up to and including the date of the accident, in contrast to the usual case where only those events prior to the date of sale are relevant to issues of notice of the defect.<sup>189</sup> Also, the defendant's requested time limitation was found untenable because the existence of a defect was an issue making subsequent and prior accidents with the same product potentially admissible and certainly discoverable.

## VI CONCLUSION

Ultimately the decision to admit or deny admission to highly probative other similar incident evidence is a discretionary decision of the trial judge. Other similar incident evidence is an almost

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<sup>185</sup> 13 F.R.D. 162, 165 (W.D. Mich 1991).

<sup>186</sup> 13 F.R.D. at 165.

<sup>187</sup> *Id.* at 164.

<sup>188</sup> *Id.* at 165.

indispensable part of products liability litigation. A showing of substantial similarity is a necessary condition precedent to admissibility for almost all substantive purposes. The proponent of this very useful evidence increases his chances of gaining admission of this evidence if the proper groundwork for admissibility begins at the inception of discovery and is developed throughout discovery and into trial.

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<sup>189</sup> *Id.*