A SURE WAY TO INCREASE THE VALUE OF A PRODUCT LIABILITY CASE: OTHER SIMILAR INCIDENTS EVIDENCE

By: LaBarron N. Boone

I. INTRODUCTION

A crucial issue in litigating a product liability action is whether the jury will hear evidence of other incidents involving the same or a similar product. "[T]he primary reason the evidence is so important is that it has high probative value and trustworthiness attached to it."[1]

This article discusses similar acts, happenings, transactions or claims related to the facts involved in a dispute. In a product liability case, this includes other incidents, accidents or injuries caused by the same defect.

II. THE RELEVANCY TEST

A. Substantial Similarity

Similarity is closely related to relevance. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact of consequence to the action more or less probable than it would be without the evidence."[2] Unless the circumstances surrounding an incident are similar to the one in question, it will fail the relevancy test. The issue of what constitutes similarity involves two questions. First, whether the same or a substantially similar product is involved, and second, whether there are similar circumstances surrounding the other accident. 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.

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Unfortunately, the similarity test is applied differently from judge to judge. This leads to inconsistent decisions regarding the admissibility of prior incident evidence. The most serious consequence of this inconsistency is that courts often improperly exclude logically relevant evidence.

B. The Degree of Similarity Required

Standards of similarity required between the collateral incident and the incident that is the subject of litigation vary. The most lenient standard merely requires the defendant to have knowledge of the prior incident. The strictest standard demands identity of conditions between the two incidents. This stricter standard is illustrated in *Nachtsheim v. Beech Aircraft Corp.*[3] The court reasoned 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." [4]

In *Four Corners Helicopter, Inc. v. Turbomeca,* [5] Defendants argued that the trial court erred in admitting evidence of other incidents of labyrinth screw backouts.[6] The incidents offered in *Four Corners* consisted of sixteen reports that involved the same product and similar incidents. The appellate court opined that two cases are never identical.[7] Slightly different factors do not render any of the proffered incidents "not substantially similar" for the purposes for which they are offered.[8]

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

Albeit relevant, evidence 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

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presentation of cumulative evidence.[9] The wise practitioner will anticipate these arguments and be prepared to rebut them.

A. Degree of Prejudice

Potential for prejudice is not an absolute justification for the exclusion of a proponent's similar incidents – evidence must be substantially more prejudicial than probative to be excluded.[10] Such prejudicial evidence must have a tendency to suggest that a decision will be made on an improper basis, commonly an emotional one, such as bias, sympathy, hatred, contempt, retribution or horror.[11] Since the aforementioned arguments and arguments presented below are so subjective, the practitioner is advised to obtain as much information as possible about past rulings made by the Court the case is before.

B. Confusion of the Issues

Relevant evidence may also be excluded if confusion of the issues will likely burden the litigation and work unfairness to its opponent. In *Nachtsheim,*[12] the Court reasoned that if evidence of similar incidents were introduced, it would unnecessarily prolong the trial and create a risk of confusion of the issues. Consequently, such evidence was excluded.

C. Undue Delay - Mini-trials

Undue delay and waste of time allows courts to exclude relevant evidence. In *Uitts v. General Motors Corp.,* the Court held that "[p]roof of prior accidents or occurrences . . . often result in unfair prejudice, consumption of time and distraction of the jury to collateral matters."[13] In *Uitts*, Plaintiffs offered into evidence thirty-five reports concerning similar incidents involving identical or substantially similar vehicles.[14] The court stated that to minimize the prejudicial effect of these

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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, which would lengthen the trial considerably.[15] Thus, the Court held that the reports were not admissible.

D. Rebuttal

Evidence may be rebutted when the opponent "opens the door" to its admission. 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.[16] The appellate court stated that Plaintiff's proffered testimony was submitted for the legitimate purpose of rebutting testimony of the Defendants' expert. 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.[17] 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.[18]

IV. SPECIFIC PURPOSES

Evidence of prior or subsequent similar incidents may be admitted when offered to demonstrate notice or knowledge of a defect or to prove magnitude of the danger, the defendant's ability to correct a known 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.[19] The purposes for admission are limited only by the principles of materiality, relevancy, the

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application of the Rule 403 balancing test and the creativity of the lawyer. Several specific applications are discussed herein.

1. Notice of a Defect

Defendant's notice or knowledge of an alleged defect is the most often utilized purpose for admitting evidence of other similar incidents. This evidence is often indispensable as proof of wantonness and the reprehensibility of the Defendant's conduct to justify punitive damages. Such evidence can be offered through testimony of other victims of the defective product,[20] documents that embody the facts and circumstances surrounding the other incidents,[21] and reports generated and maintained by the defendants that provide cumulative accounts of other similar incidents.

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.[22] 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.[23] The court rejected the Plaintiffs' argument, due to the lack of laying the proper foundation.[24]

However, at least one court has held that the use of a limiting instruction in conjunction with other mitigating factors justified the trial court's admission of evidence of other accidents involving

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the product. In *Soden v. Freightliner Corporation*[25] the trial court issued a limiting instruction designating the permissible use of the proffered evidence as well as the impermissible evidence.[26] 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.[27] The court stated that weaknesses were further mitigated by several other factors.[28]

2. Negligence

Other similar incidents may be admitted to show that the defendant manufacturer was negligent. A finding of negligence requires foreseeability of the injury. At least one court has recognized a relaxed requirement for similarity when introducing evidence of other accidents to prove negligence.[29] In *Jackson v. Firestone Tire & Rubber Co.*, the Court found that evidence of other prematurely detonated grenades was reasonably probative of the Plaintiff's contention that the assembler of the grenade was negligent.[30] Although the appellate court concluded that the trial court erred in failing to exclude evidence of premature detonation of grenades assembled by another defendant manufacturer, 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.[31]

3. The Existence of a Defect

a. Magnitude of the Danger

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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." [32] 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 fire started under the front seat of the vehicle and was caused by a shortage in the wiring system. [33] 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.[34] 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.[35] 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.

b. Defendant's Ability to Correct a Known Defect

When determining the existence of a design defect, an 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. In *Robinson v. G. G. C., Inc.,*[36] Plaintiff offered evidence of safety devices on similar machines to show that the interlocking guards had been available for many years.[37] The court in *Robinson* recognized that the availability of existing alternative safer designs is a factor in determining the existence of a design defect. When commercial feasibility is disputed, courts must permit the plaintiff to impeach the defense expert with evidence of alternative design.[38]

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c. Lack of Safety for Intended Use

Similar incidents have been admitted by courts to show that a product is not safe for its intended use. In determining whether a product is defective, the design and operation of the product must be considered.[39] This includes determining whether the product was equipped with proper safety devices, which would allow the user to avoid danger when using the product.[40] The proper inquiry is whether the product should have been designed more safely.[41] In *Di Francesco v. Excam, Inc.*, [42] Plaintiff was injured when a derringer pistol that he was carrying in his pocket inadvertently discharged when the exposed hammer was accidentally bumped.[43] 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.[44] "It may tend to show that the instrumentality was unsafe . . ."[45] The transcript revealed that the evidence was introduced by plaintiffs and did not pertain specifically to the Excam TA38S derringer pistol.[46] The court specifically held that evidence from similar model derringers that 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 the strength of a purportedly defective product is at issue, other similar incidents have been admitted as proof that the product lacks sufficient strength for its design purpose. In *Newman v. Ford*, plaintiffs contended that the Ford seatback was "far too weak and should not have broken in the collision . . ."[47] Ford took the position that Plaintiffs' seat performed as it was designed to

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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.[48] In response, Plaintiffs offered evidence of different accidents in which vehicle occupants were seriously and permanently injured as a result of yielding production seats.[49] 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.[50]

4. Causation

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. [51] A court is more likely to admit such evidence 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. [52]

5. 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 or similar product is not required. In *Heath v. Suzuki Motor Corporation,*[53]

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plaintiffs offered evidence through expert testimony to demonstrate and explain how rollover accidents occur.[54] 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. [55] Based on this reasoning, the Eleventh Circuit held that the trial court admitting evidence of rollover accidents involving three dissimilar vehicles was not an abuse of discretion.[56]

V. DISCOVERY OF OTHER SIMILAR INCIDENTS

A. Discoverability

The scope of discoverability is broader than the scope of admissibility. The proper inquiry is whether there is any possibility that the information sought may be relevant to the subject matter of the pending action. [57] If this inquiry elicits an affirmative response, then the requested information is discoverable.

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 appellate court in *Dollar v. Long Mfg,* found the trial judge's denial of Plaintiff's motion to compel an abuse of discretion.[58] 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.[59] Defendants denied knowledge of any prior incidents responsive to this interrogatory.[60] A

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deposed Defendant' 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.[61] The Fifth Circuit reversed the trial court's denial of the motion because the information sought was reasonably calculated to lead to the discovery of admissible evidence.[62] The Court reasoned that subsequent incidents are relevant to causation and to rebut opposing parties causation theory may well have constituted admissible evidence.

VI. CONCLUSION

The presentation of similar incident evidence at trial can make or break a product liability case. The groundwork for admissibility of such evidence begins at the inception of discovery and is developed throughout discovery and into trial. Although there are variations in the standard of admissibility of such evidence, a showing of substantial similarity is generally the norm. Counsel must work diligently to obtain such evidence and to meet the standard of admissibility required for each jurisdiction. Effective lawyering in this area will play a major role in determining the outcome of the case and the amount of any potential verdict.

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[1] Francis H. Hare, Jr., *Admissibility of Evidence Concerning Other Similar Incidents in a Defective Design Product Case: Courts Should Determine "Similarity" by Reference to the Defect involved*; American Journal of Trial Advocacy*, Vol. 21:3, Spring, 1998*, cited by R. Ben Hogan, III and Chris D. Glover, *2003 ATLA Annual Convention*.
[2] Fed. R. Evid. 401 & parallel state rules, including Ala. R. Evid. 401.
[3] 847 F. 2d 1261, 1268 (7th Cir. 1988). 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.
[4] *Id.* at 1269.
[5] 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

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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.[5] 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.

[6] 979 F. 2d at 1439.

[7] 979 F. 2d at 1439.

[8] *Id*.

[9] Fed. R. Evid. 403 and parallel state rules.

[10] *See, e.g.* Koehn v. R.D. Warner Co., Inc., 809 P. 2d 1045, 1048 (Colo. App. 1990); *see also* Fed. R. Evid. 403 and parallel state rules.

[11] *Id*.

[12] *See id.* 847 F. 2d at 1269.

[13] 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.)

[14] 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.)

[15] *See id.* at 1383.

[16] 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.

[17] *Id*. (citing Ringelheim v. Fidelity Trust Co., 198 A. 628 (Pa. 1938)).

[18] *Id*. at 1047-8.

[19] Ramos v. Liberty Mutual Insurance Co., 615 F. 2d 334(5th Cir. 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).

[20] *See id*.

[21] *See id*.

[22] General Motors Corp. v. Moseley, 447 S.E. 2d 302 (Ga. App. 1994) *abrogated on other grounds*, Webster v. Boyett, 496 S.E.2d 459, (Ga. 1998) . *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(5th Cir. 1986).

[23] Moseley, 447 S.E. 2d at 307.

[24] *Id.*

[25] 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.

[26] *Soden*, 714 F. 2d at 507, n. 12.

[27] *Soden*, 714 F. 2d at 508.

[28] *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' 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.

[29] Jackson v. Firestone Tire & Rubber Co., 788 F. 2d 1070, 1083 (5th Cir. 1986) (citing McCormick on Evid. §200 (E. Clearly 2d ed. 1972)).

[30] McConigal v. Gearhart Industries, Inc., 851 F. 2d. 774 (5th Cir. 1988).

[31] *Id.*

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[32] 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.
[33] *Van Marter,* 447 So. 2d 1291 at 1293.
[34] *Id*.
[35] 447 So. 2d 1291 at 1293.
[36] 808 P. 2d 522 (Nev. 1991).
[37] 808 P. 2d at 525.
[38] *Id*.
[39] *See* DiFrancesco v. Excam, 642 A. 2d 529, 531 (Pa. Super. 1994).
[40] *Id*.
[41] *Id*. (citing by Dambacher v. Malice, 336 Pa. Super. 22, 485 A. 2d 408 (1984)).
[42] 624 A. 2d 529 (Pa. Super. 1994)
[43] *Id*. at 530.
[44] 642 A. 2d at 535.
[45] *Id*.
[46] *Id*.
[47] *See* Newman v. Ford Motor Co., 1997 WL 778512 at *8 (Dec. 19, 1997), *transferred to the Supreme Court of Missouri*.
[48] *Id*.
[49] *Id.*
[50] *Id*. at *9 (citing several Missouri cases)
[51] 893 F. Supp. 547, 552 (E.D.N.C. 1995) (citing Brooks v. Chrysler Corp., 786 F. 2d 1191, 1195 (D.C. Cir.) cert. denied, 479 U.S. 853, 107 S. Ct. 185, 93 L. Ed. 2d 119 (1986)).
[52] 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)).
[53] 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.
[54] 126 F.3d at 1396.
[55] *Id.*
[56] *Id.*
[57] Briney v. Deere & Co., 150 F. R. D. 159 (S.D. Iowa 1993).
[58] 561 F. 2d 613, 618 (5th Cir. 1977).
[59] *Id.* at 615.
[60] *Id.*
[61] *Id.*
[62] *Id. at* 617-618.

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