

### **Offering Evidence of Prior Occurrences**

Facts win cases. Obtaining “favorable” facts can increase the chances of a meritorious verdict. One effective way to procure favorable facts is to acquire evidence of prior similar incidents. Obtaining this information takes some work, and is typically laborious and boring. The results, however, are worth it. The manner by which attorneys offer this evidence is limited only by their imagination and lack of effort. This paper will address various ways of offering prior incidents at trial.

#### **A. Judicial Opinions**

With the advent of computer technology, it is quite easy to obtain information regarding various defendants. Specifically, with Westlaw, Lexis, and other computer generated research aids, information regarding a defendant’s involvement in similar cases can be obtained in minutes.

For example, in *Johnson v. Colt Industries*,<sup>1</sup> a United States District Court allowed an earlier decision to establish knowledge of other similar accidents on the part of the defendant. Defendant argued the facts of the *Bender v. Colt*<sup>2</sup> opinion were not substantially similar to those of the case at bar. After analyzing both cases, the court permitted the use of the prior opinion to show knowledge attributable to the defendant. With a touch of a button, it is effortless and cost efficient to determine whether or not a given defendant has been involved in any judicial opinions. It is quite probable that a manufacturer would have had other cases reach the various appellate courts throughout the United States. After locating an opinion, contact the plaintiff’s attorney to get as much information as you can regarding the product, potential witness, and/or documents obtained during discovery.

#### **B. Prior Lawsuits**

Typically, a manufacturer will have prior lawsuit filed against them. It is not enough that a “complaint” has been filed against the defendants. It is imperative that the plaintiff’s attorney show and prove that the prior complaints are substantially similar to the issues in the case at bar.

In *Gryc v. Dayton-Hudson*,<sup>3</sup> the Supreme Court of Minnesota affirmed the lower court and allowed evidence of six prior lawsuits. The facts of the *Gryc* case dealt with the flammability of children’s pajamas. The court permitted evidence of prior lawsuits against the same defendant as the *Gryc* case involved the same cotton material as the prior lawsuits.

In *Soden v. Freightliner Corporation*,<sup>4</sup> the Fifth Circuit Court of Appeals upheld the district court's admission into evidence of prior litigation against the same defendant. The court reasoned that the evidence of prior litigation was relevant to the issue of notice as the complaints contained allegations of a design defect similar to the case before the court.

Not all will uniformly allow evidence of prior complaints to go before a jury. For example, in *Uitts v. General Motors*,<sup>5</sup> the district court rejected plaintiff's offer a thirty-five percent prior accident reports into evidence. Plaintiff offered the reports to show evidence of the malfunctioning of the motor vehicle. The court noted that some of the reports contained inflammatory letters from owners and others were actually police reports relating to specific details of the other accidents. Plaintiff made no attempt to limit or delete the hearsay portions of the reports. Moreover, it is important to note that plaintiff chose not to prove a specific defect of the vehicle. Conversely, plaintiff attempted to establish liability under Section 402 (a) of the Restatements of Torts. Therefore, the court rejected the evidence of prior malfunctions.

Similarly, in *Julander v Ford Motor Company*,<sup>6</sup> the court of appeals rejected plaintiff's offer of evidence that seven other individual had brought suit against Ford over the alleged design of the Bronco. There, the record failed to disclose when Ford was served and/or notified of any of the seven complaints. Thus, the court rejected evidence of prior "notice."

### **C. Evidence Regarding Prior Injured Parties**

There may be no more compelling way to offer evidence of a prior incident than bringing in an injured party. Specifically, if this individual was injured by the same type of product, not only is the notice requirement satisfied, it could assist the attorney in proving that this type of defect caused the injuries complained of.

In *Stambaugh v. International Harvester*,<sup>7</sup> the plaintiff sustained burn injuries when sprayed with gasoline from the tank of his tractor. The court permitted a deformed burn victim to testify in person on the issue of causation by showing that these types of occurrences could, in fact, occur as it had to him years earlier. The appellate court affirmed and allowed this testimony, especially in light of the fact that no questions were asked concerning the extent of the injuries to the witness.

In *Bolm v. Triumph Corporation*,<sup>8</sup> the NY supreme court reversed a lower court decision which allowed live testimony from a witness who was involved in a similar type of injury. In the *Bolm* case, the motorcyclist sued a distributor and manufacturer of a motorcycle for injuries allegedly caused by the negligent and defective design of a gas tank and middle grid package. A witness named Ferrari was permitted to testify that he had a similar accident while operating one of defendant's motorcycles and as a result he lost his penis, his scrotum was ripped, and his testicles were pushed inside his body. The trial court permitted the testimony and instructed the jury that the testimony was in accord with the general rule that proof of similar accidents may be received to establish a

dangerous condition. Defendants attempted to offer evidence that the Ferrari accident occurred after the *Bolm* accident. The trial court refused to allow defendants to present this evidence and the supreme court reversed the lower court and held that the defendants were entitled to prove that the accident in question was the first of its kind.

A Texas Court of Appeals reversed a lower court and held that the trial court erred in sustaining an objection to evidence of two previous fatal accidents which occurred under circumstances, and in the use of the product, similar to the case at bar, *Rush v Bucyrus-Erie*.<sup>9</sup> In *Rush*, the plaintiff offered evidence that two men had been killed while dismantling similar booms manufactured by the defendant. The court held that the evidence of the two accidents was admissible on the theories of defective design and failure to warn of the dangerous nature of the product.

In *Sears Roebuck and Co. v Menegay*,<sup>10</sup> a court of appeals affirmed in part and remanded in part and held that the evidence of a prior accident involving the same propane gas grill was properly admitted. The plaintiff was injured when the propane tank under his gas grill exploded. The incident occurred on May 28, 1989. The court permitted a videotaped evidence deposition of Everett Long, who was injured on July 19, 1987, when the propane tank stored under his gas grill exploded. The court held that the prior accident occurred under reasonably similar circumstances to the accident in question to make Long's testimony admissible.

#### **D. Customer Complaints, Letters and Responses**

One area of discovery that is often neglected in a product liability action is information regarding customer complaints and responses to those complaints. This can be an effective means of proving notice. In *Hasson v. Ford Motor Company*,<sup>11</sup> the Supreme Court of California affirmed a superior court's admission into evidence of letters sent to Ford and testimony describing incidents of brake failure in 1965 and 1966 Lincoln Continentals. The evidence was offered as proof that Ford had noticed the fuel boil problem persisted after the brake system modified by the addition of different brake fluid invented dust shields. Moreover, the superior court admitted evidence of pre-recall brake failures in 1965 models. As the court noted, "[p]laintiffs were not required to prove that this 1965 system was exactly the same as the 1966 system. Identical conditions will rarely be found."<sup>12</sup>

In *JKT Company, Inc. v Hardwick*,<sup>13</sup> the court permitted two documents into evidence. The first document was a reprint of an article appearing in the defendant's publication. The second document was from defendant's division manager to a Georgia roofing contractor admitting the defendant had supplied defective roofing materials to him. Due to the fact the case at bar involved allegations of defective roofing materials, the court held that such evidence was admissible.

In *JKT*, an expert witness who had once worked for the defendant from the mid-1950's through the mid-1960's, was allowed to testify that in 1966 the defendant's plant also produced two substantially identical shipments which were rejected due to

inadequacy. The witness testified that the manufacturing process used in the two rejected shipments was identical with the process used to produce the materials at issue in a case where the roof had leaked. The court submitted such testimony.

The U.S. Court of Appeals, Fifth Circuit held that a letter sent to all backhoe dealers warning them about dangers of using their backhoe while affixed to row bar-equipped tractors was admissible to impeach the backhoe manufacturer's design engineer.<sup>14</sup> During discovery efforts, counsel for the plaintiff learned of a letter sent to all backhoe dealers by the defendant's expert witness, warning them about the death dealing propensity of the backhoe when used in the fashion employed as the case at bar. The court held that no "unfair" prejudice to the defendant would have resulted in his having been confronted by his own letter warning of exposure to death by such use.

#### **E. Internal Reports and Memorandums**

In *Galindo v Riddell*,<sup>15</sup> plaintiff brought suit to recover damages for personal injuries sustained by him during a football game while wearing a helmet manufactured by the defendant. The circuit court entered judgment for defendant and the plaintiff appealed. The appellate court reversed the lower court and remanded the case for a new trial. There, the lower court would not allow into evidence a Riddell engineering report dealing with comparison studies and impact performance tests of other helmet designs. Plaintiff contended that the report was relevant as the helmet tested was similar to the others tested. The appellate court held that the report was relevant and should have been admitted into evidence in that it showed the helmet in question had serious impact resistance problems. Similarly, Riddell report No.: 1076 was offered by the plaintiff for the purpose of showing the defendant had notice of the helmet's unreasonable dangerous condition. The report indicated that serious injuries to the neck and spinal cord could be caused by the back rim of a football helmet pushing against the wearer's neck by hyperextension. The trial court sustained the defendant's objection on the grounds of relevancy. Once again, the court held it was error to not admit the report.<sup>16</sup> In *Gryc*<sup>17</sup> one of the defendant's top officials sent a memorandum to the head of research listing a number of clothing fire injuries which occurred to people wearing defendant's flannelette garments. The memorandum stated that defendant's company was sitting on a "powder keg" with respect to the flammability of their flannelette. Similarly, an official of defendant's company explained that satisfactory runs were made with a flame-retardant flannelette using various chemicals, however, defendant was not going to use those products until federal law required them to do so. Thus, the court held that such testimony was admissible in that the decision not to use the flame-retardant cotton flannelette was merely an economic choice for the benefit of the defendant.

#### **F. Government Reports**

There is a plethora of case law regarding the admissibility of various reports from governmental agencies. For example, the admissibility of NTSB reports and other documents from governmental services have been hotly litigated. Whether or not these reports are admissible are somewhat fact sensitive. One thing that cannot be neglected is

obtaining this information. If anything, it will give you leads to key witnesses, documentation, and other evidence at trial. Periodically, an attorney can stumble upon a report wherein a governmental agency has investigated this product and determined that this was not the first incident involving the product. This information makes your job a little easier in requesting documents during discovery. For example, it will be difficult for the manufacturer to contend that it did not have notice of a dangerous condition when a governmental agency has written a report indicating that their research had showed prior accidents involving the same product.

In *held v Mitsubishi Air Craft international*,<sup>18</sup> a U.S. District Court held that a report issued by the Federal Aviation Administration (FAA) reporting the investigation of one model made by an aircraft was admissible in an accident involving a different model aircraft. Plaintiffs brought a motion to preclude the admission of the FAA report on the basis of relevancy. The court concluded that the FAA report met the relevancy requirements in that the reevaluation of the FAA applied to all species of Mitsubishi Aircrafts as the FAA evaluated both the Mitsubishi long and short body type airplanes.<sup>19</sup>

#### **G. Professional Journals**

There is a wealth of information available in the trade literature. This is an area where an expert's involvement at the outset can be of great assistance. The expert can direct you to what trade journals, governmental regulations, and/or other literature is available.

In *Galindo*,<sup>20</sup> plaintiff offered an article entitled, *Serious and Fatal Football Injuries Involving the Head and Spinal Cord*, which appeared in the Journal of the American Medical Association. In the article, the physician related a study of serious head and neck football injuries and made suggestions for changes in the football helmet construction in order to prevent such injuries. Plaintiff offered the article for admission into evidence to prove the defendant had been placed on notice prior to the plaintiff's injury of the unreasonable dangerous condition of the helmet. The trial court sustained the defendant's objection to the admission of the article on the grounds of hearsay. The appellate court reversed the lower court and held the refusal to admit the article as error was one of the counts in the complaint sought punitive damages. Based on the defendant's alleged knowledge of the unreasonable condition of the helmet, the court noted that the article was relevant in proving the allegations of that court.

#### **H. Discovery Responses<sup>21</sup>**

Obviously, the body of case law which is the target with respect to introducing evidence of prior incident involves responses to discovery. While many courts will allow evidence of discovery response to prove knowledge on the part of the defendant, it is not a truism that all courts will "rubber stamp" the admission of such evidence.

In *Warn Industries v. Geist*,<sup>22</sup> a District Court of Appeals of Florida, held that the trial court did not abuse its discretion in allowing plaintiffs to read into evidence

interrogatories and answers regarding prior accidents involving the same product manufacturing by the defendants, where the accident had been shown to be reasonably similar to the occurrence in question. Similarly, in *Cohen v. Proctor & Gamble*,<sup>23</sup> the court held that interrogatories which requested answers from the defendant as to persons who may have been injured in other circumstances and the extent of their injuries from their use of the same product were proper matters for disclosure in a products liability action. In *Bowen v. Whitehall Laboratories*,<sup>24</sup> the court held that prior complaints against a manufacturer are relevant to the subject matter and the pending action.

As stated above, there is no blanket rule of law that will permit the use of discovery at trial. Several courts have rejected such evidence. The reasons for rejection differ, however, it is safe to say that many courts will limit the use of discovery where the proper foundation has been laid nor any applicable time period was provided.

For example, in *Eickelber v. Deere & Company*,<sup>25</sup> plaintiff directed an interrogatory to the defendant asking whether it had received any claims alleging injury from the product in question. Defendant responded by listing four such claims. During trial, plaintiff offered that answer as evidence to show the belt assembly by which he was injured was unreasonably dangerous. The court sustained an objection to relevancy. Two of the four claims described in answer to interrogatory were dissimilar to the situation from how plaintiff's injury arose. Due to the fact that the answer to interrogatory was offered as a unit, the failure to offer specific portions was fatal. As the court noted:

“[W]e need not determine whether a sufficient showing was made that the second and fourth claims reported and the answer arose out of substantially similar conditions. The demonstrated dissimilarity of the first and third claims infected the entire offer, rendering it inadmissible.”<sup>26</sup>

In *Keller v. International Harvester Corporation*,<sup>27</sup> plaintiff offered proof to show that defendant's lawnmower had been involved in other accidents in a similar fashion before and after the injuries suffered by the plaintiff. The court rejected the answer to interrogatory noting that the interrogatory did not restrict accidents to those involving the same model, nor did the interrogatory focus upon the causal design defect. The court noted that some of the accidents included in the reports could well have resulted from entirely different mower models and under entirely different conditions of terrain or usage. Therefore, the evidence in this broad format was rejected.

In *McKinnon v. Skil Corporation*,<sup>28</sup> plaintiff attempted to offer defendant's answers identifying six complaints, the injuries allegedly sustained and, in some cases, the model saw used. The answers did not indicate how the injuries occurred or whether or not they resulted from defective lower blade guards. The court noted that plaintiff's failure to make the requisite showing that any of the alleged incident had involved a defective lower blade guard rendered the answers to interrogatories inadmissible.

## **I. Conclusion**

Obviously, the manner by which plaintiffs establish prior similar accidents is next to limitless. It is imperative that counsel for the plaintiff diffuse the typical argument for the defense that the court would be burdened by litigating numerous “collateral” issues concerning these other incidents. The “burden” argument is inappropriate. These prior incidents are justified as the probative value of the evidence will most certainly be substantial and raise the defendants duty to warn those in the future. Arguably, the probative value may be influenced by the type of product and the extent to which factors can affect safety. Regardless, it is imperative to do your homework and find as much as you can about the product in question. The AAJ Exchange, discovery, trade journals, and expert witnesses are excellent places to begin. Typically, some of the experts you are involved with will have worked against this same defendant in other cases. Send a request to admit facts to the defendant immediately after obtaining this information from the various sources. For example, if a defendant identifies in an answer to interrogatory prior claims against them, immediately send a request to admit facts regarding each and every claim. Try and be as detailed as possible in your request to admit facts so that you can determine before trial which causes and/or claims lack substantial similarity.

It is true, facts win cases. Help develop the facts in your case to obtain a favorable verdict. There is no substitute for preparation, hard work, and ingenuity.

Mr. Kröll is a member of the Executive Committee of the Products Liability Section. Mr. Kröll would like to thank Brian Nash, a law student at DePaul University, for his assistance.

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<sup>1</sup> 609 F.Supp. 776, 780 (D. Kan. 1985).

<sup>2</sup> 517 S.W. 2d 705 (Mo. App. 1972).

<sup>3</sup> 297 N.W. 2d 727 (Minn. 1980).

<sup>4</sup> 714 F. 2d 498 (5<sup>th</sup> Cir. 1983).

<sup>5</sup> 411 F. Supp. 1380, 1383 (E.D. Penn. 1974).

<sup>6</sup> 488 F. 2d 839, 846 (10<sup>th</sup> Cir. 1973).

<sup>7</sup> 106 Ill. App. 3d (5<sup>th</sup> Dist. 1982).

<sup>8</sup> 744 N.Y.S. 2d 969, 975 (N.Y. App. Div. 1979).

<sup>9</sup> 646 S.W. 2d 298 (Tex. Ct. App. 1983).

<sup>10</sup> 907 S.W. 2d 72 (Tex. Ct. App. 1995).

<sup>11</sup> 650 P. 2d 1171 (Cal. 1982).

<sup>12</sup> Id. at 1180-81

<sup>13</sup> 265 S.E. 2d 510 (S.C. 1980).

<sup>14</sup> Dollar v. Long Manufacturing, 561 F.2d 613 (5<sup>th</sup> Cir. 1977).

<sup>15</sup> 107 Ill. App. 3d 139, 147 (3d Dist. 1982).

<sup>16</sup> But, see, Carrizales v. Rheem Manufacturing Company, 226 Ill. App. 3d. 20 (1<sup>st</sup> Dist. 1991) (“The [ANSI] standards for installers in this case is simply not relevant to the conduct or the standard of care at the time of manufacture.”)

<sup>17</sup> 297 N.W. 2d at 740.

<sup>18</sup> 672 F. Supp. 369 (D. Minn. 1987).

<sup>19</sup> See also Swain v. General Motors Corporation, 81 F.R.D. 698, 700 W.D. (Pa. 1979). (Precursor of the component part at issue, as well as the model of the product at issue have been held discoverable)

<sup>20</sup> 107 Ill. App. 3d at 148.

<sup>21</sup> See also, Discovery, In Products Liability Case, of Defendant’s Knowledge as to Injury to or Complaints by Others than Plaintiff, Related to Product, 20 A.L.R. 3d 1430 (1969).

<sup>22</sup> 343 So. 2d 44, 46 (Fla. Dist. Ct. app. 1977).

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- <sup>23</sup> 18 F.R.D. 301 (D. Del. 1955).  
<sup>24</sup> 41 F.R.D. 359 (S.D.N.Y. 1966).  
<sup>25</sup> 276 N.W. 2d 442 (Iowa 1979).  
<sup>26</sup> Id. at 445-46.  
<sup>27</sup> 648 S.W. 2d 584, 589 (Mo. Ct. App. 1983).  
<sup>28</sup> 638 F. 2d 270, 277 (1<sup>st</sup> Cir. 1981).

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