

The Use of Similar Accident Evidence in Products Liability Cases

By Eric Dinnocenzo, Esq.

In a Ford Bronco rollover case, a California jury awarded \$290 million in punitive damages after hearing evidence of other accidents involving Broncos along with Ford's actions in testing and marketing the vehicle.¹ Perhaps the most compelling evidence, for a plaintiff in a products liability suit, is other accidents caused by the same or similar product. This evidence primarily serves a two-fold purpose: (1) showing that the product is defective, and (2) establishing that a manufacturer had prior notice of the defect. Coupled with a failure to warn of or remedy the defect, other accident evidence can have a powerful effect on a jury.

This article begins with an analysis of case law from both New York and other jurisdictions addressing the scope of other accident evidence that is allowed in products liability actions, and it then discusses the different purposes for which this evidence is admissible, such as to prove the existence of a defect, notice, and causation. Lastly, it will conclude in reverse chronology with respect to the litigation process by discussing the permissible scope of discovery of other accidents involving the same or similar product as well as effective methods of obtaining this information and readying it for use at trial.

THE ADMISSIBILITY OF SIMILAR ACCIDENTS: WHAT EXACTLY DOES SIMILAR MEAN?

What is the scope of other accidents involving the same or similar model product that are admissible in a products liability action? The legal standard, as enunciated by the Court of Appeals in Sawyer v. Dreis & Krump Mfg. Co., is that the plaintiff must establish that other accidents are similar in their relevant details to the case at bar.² The trial judge, in determining whether other accidents are sufficiently similar, is only subject to reversal if there is an abuse of discretion.³ Sawyer provides little guidance for the application of this vague standard, since it glosses over the factual similarities of the accidents at issue.

The federal district court of the Northern District of New York in Bellinger v. Deere & Co., although citing to Sawyer, set forth a more expansive standard: "[I]t is appropriate to define the similarity of the accidents based upon the product or defect at issue. Differences

in the surrounding circumstances go to the weight to be given the evidence, rather than to its admissibility."⁴ In Bellinger the Court determined that other accidents involving the same model cornpicker, with injuries caused by the same component part, passed the similarity test. Any differences between the accidents, such as whether the insertion of an extremity into the machine was intentional or inadvertent, went to the weight to be given the evidence by the fact-finder and not its admissibility.⁵

More enlightening with respect to the application of the similarity standard, though not heartening for the plaintiffs' attorney, is the Fourth Department decision of White v. Timberjack, Inc., where the plaintiff sustained serious injuries when a model 225C logging skidder machine with a micro-lock hydraulic brake rolled backwards down a slope and ran over his left leg.⁶ The plaintiff sought to introduce four prior accidents into evidence which the Court rejected. The rationale was that only one of the accidents involved the 225C model, and that machine was equipped with a mechanical brake in addition to the micro-lock brake system that was present in the machine that injured the plaintiff. Furthermore, in the other three accidents, the plaintiff failed to establish that the weights of the machines or the degree of the slope on which it was situated were sufficiently similar to the subject accident.⁷

Factual differences between accidents that concern ultimately insignificant matters should not be given weight. As the Ninth Circuit has stated, "[m]inor or immaterial dissimilarity does not prevent admissibility."⁸ Thus, other accidents can be deemed sufficiently similar to the case at bar, even if they involve different circumstances, or different product models, so long as they share characteristics that are pertinent to the litigation.

Decisions from other jurisdictions are illustrative. Moulton v. Rival Co. from the First Circuit demonstrates that other accidents involving different circumstances can be admissible.⁹ In that case, the minor plaintiff suffered a serious burn injury when heated liquid escaped from an electric potpourri pot that was not equipped with a locking lid. It was unknown exactly how the accident happened, but the child's mother found him sitting on the floor in a pool of hot liquid and the cover was off the pot. Other accidents involving the potpourri pot such as one where a child knocked over a table on which the potpourri pot was located, and four others where a child became entangled in the cord and pulled the pot over, were admissible despite their factual differences to the case at bar, because they were relevant to show that the potpourri

pot was defective since it allowed the rapid escape of a significant amount of extremely hot liquid.¹⁰

A similar case, Stokes v. National Presto Industries, Inc., decided by the Missouri Appeals Court, specifically illustrates that other accident evidence need not involve the same model of a product.¹¹ In Stokes, the Kitchen Kettle model deep fryer manufactured by the defendant seriously injured the minor plaintiff when he pulled it over by its electrical cord dumping hot oil over himself. The Appeals Court determined that it was an abuse of discretion for the trial court not to consider admitting into evidence accidents involving three other models manufactured by the defendant – the FryBaby, FryDaddy, and GranPappy – since all of the models shared the same features of an aluminum pot with a cooking oil fill-line and plastic feet, and only differed on the basis of their capacities and that the Kitchen Kettle had a detachable electric cord.¹²

A 1999 opinion issued by the Massachusetts Supreme Judicial Court took an expansive approach with respect to the admissibility of other accidents, allowing those that involved both different facts and different product models. In Santos v. Chrysler Corp., the plaintiff was driving a Plymouth Voyager minivan and when

he applied the brakes, the rear of the minivan slid to the right and the vehicle swerved into oncoming traffic, where it was hit broadside by a Ford Bronco.¹³ The plaintiff alleged that the cause of the accident was premature rear wheel lockup. At trial, six Chrysler minivan owners testified that the rear ends of their minivans skidded or swerved following hard application of the brakes. The Court held that this was proper even though five witnesses owned minivans of a different model year than the plaintiff's minivan, none of the accidents occurred on snow or ice, and four had a shielded height sensing proportioning valve (HSPV) while the plaintiff's was unshielded.¹⁴

As the cases discussed above illustrate, the similarity determination is highly fact-specific. Given that New York decisions in this area are somewhat limited, a plaintiffs' attorney should research decisions from state and federal courts in other jurisdictions that involve the same or similar model products. In addition, he or she should remember to fend off arguments by defense counsel of a lack of similarity by arguing that differences in the surrounding circumstances of other accidents go to the weight to be given the evidence, rather than to its admissibility.¹⁵

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THE ADMISSIBILITY OF SIMILAR ACCIDENT EVIDENCE TO PROVE THE EXISTENCE OF A DEFECTIVE CONDITION, NOTICE, AND CAUSATION

The arguments that typically support the admission of other similar accidents into evidence are: (1) to prove the existence of a defect; (2) notice of the defect; and (3) causation.¹⁶ Simply because an accident is sufficiently similar to the case at bar and is introduced for one of these purposes does not guarantee its admission into evidence. There is always the risk that other accidents may be excluded if there is a danger that they will result in unfair prejudice, confusion of the issues, undue consumption of time, and distraction of the jury to collateral matters.¹⁷

With respect to the first factor, the plaintiff who introduces evidence of other similar accidents to prove that a product is defective is essentially asking the jury to infer that, because the same or similar model product was involved in another accident, the accident to plaintiff was the result of a defective condition.¹⁸ A preliminary requirement for introducing evidence for this purpose is that the other accidents must have been caused by the same malfunction or defect as happened in the case at bar.¹⁹ For example, an accident where a power tool exploded would not be admissible at a trial where it was alleged that the same model power tool caused an amputation injury because it was not equipped with a safeguard.

Accidents introduced into evidence in order to prove that a product is defective may have occurred either before or after the accident to the plaintiff.²⁰ An Illinois Appeals Court has summarized this point:

A subsequent accident at the same or a similar place, under the same or similar conditions, is just as relevant as a prior accident to show that the condition was in fact dangerous or defective, or that the injury was caused the condition. It is common sense that the higher the number of accidents involving a product, the more likely it is that the product is the cause of the accidents and is dangerous or defective. It matters little whether the accidents occurred prior to or subsequent to the accident at issue.²¹

The most often utilized purpose for introducing similar accident evidence is for the second factor listed above, which is to establish prior notice of a defect. The fact that a manufacturer had prior notice that its product injured consumers, yet took no action to either warn of or remedy the defect, can have a powerful effect on a jury. When similar accidents are introduced in order to es-

tablish notice, the standard for admissibility is relaxed. The Ninth Circuit has held: “[The] similar circumstances requirement is much more strenuous when the evidence is being offered to show the existence of a dangerous condition or causation and less strict where the evidence is being offered to show notice.”²² In these instances, the similar accident must have occurred prior to the accident involving plaintiff.²³

The third factor for introducing other similar accident evidence is for the issue of causation. While this is not analytically very different from the first factor of proving the existence of a defect, it is perhaps more complex in nature. An illustrative case is Joy v. Bell Helicopter Textron, Inc., where a helicopter crashed into the Potomac River when it lost power after the failure of a critical part, the spur adapter gearshaft (SAG), resulting in the death of three people.²⁴ The Court held that the plaintiffs were allowed to submit into evidence reports of two unrelated accidents involving the failure of the same part to refute the suggestion of defense counsel that the SAG in the crash helicopter could not have been defective because it was manufactured according to specifications.²⁵

SETTING THE STAGE FOR TRIAL: OBTAINING A BROAD SCOPE OF OTHER ACCIDENT INFORMATION DURING DISCOVERY

The scope of discovery is to be liberally construed to encompass any information that has any possibility of being relevant.²⁶ Furthermore, “[i]t is well-settled ... that discovery is not limited to information that will be admissible at trial.”²⁷ In products liability actions, New York courts routinely allow the discovery of accidents involving other models of a product.

The court in Fine v. Facet Aerospace Products Co. stated, “[g]enerally, different models of a product will be relevant if they share with the accident-causing model those characteristics pertinent to the legal issues raised in the litigation.”²⁸ For example, in Singh v. Hobart Corp., the plaintiff suffered an amputation of his fingers when he inadvertently inserted his hand into a meat chopper.²⁹ His theory of liability was that the meat chopper, with an opening at least 2 ½ inches in diameter, was unreasonably dangerous because there was tendency for operators to feed the machine by hand instead of with a feed stick. The Second Department ordered the defendant “to produce a list of all accidents or claims involving meat choppers manufactured by the appellant, which contained openings of at least 2 ½ inches in diameter.”³⁰

There are a number of other cases allowing the discovery of similar accidents involving other product

models. See e.g., Culligan v. Yamaha Motor Corp., (discovery allowed for Model YT-225 All-Terrain Vehicle alleged to be unstable and extending to all of defendant's other ATV models)³¹; Mestman v. Ariens Co., (disclosure of other claims involving the 1971 model number 910962 snowblower involved in the accident, and also the 1970-71 model number 910962 and 1968-69 and 1969-70 model number 10962)³²; Van Horn v. Thompson & Johnson Equipment Co., Inc., (disclosure of design, engineering, manufacturing and marketing records, and also accident reports, complaints, claims, and lawsuits involving the Bobcat skid-steer models that are similar in design and operation to the Bobcat 742B model and involved in accidents similar to plaintiff's accident)³³; Valet v. American Motors Inc., (disclosure of captions and index numbers for lawsuits involving rollover accidents for both the Jeep CJ-5 model, and the CJ-7 models involved in plaintiff's accident, for a period of three years prior to and subsequent to the date of the accident since both models were similar in regard to center of gravity and track width).³⁴

Plaintiffs should propound discovery requests that will enable them to obtain a wide range of other accident information in the form of complaints, lawsuits, warnings and violations from governmental agencies, accident reports and databases, investigation reports,

photographs of injuries, deposition transcripts, interrogatory answers, and correspondence.³⁵ These requests should be narrowly framed in order to withstand the anticipated objections of defense counsel. For instance, they should identify a broad, yet reasonable, range of product models and also seek accidents that were caused by the same type of defect or mechanism of injury. Otherwise, a trial judge may be reluctant to compel a request which seeks "all accidents" for "all models" of a product.

It cannot be understated how critical the discovery process is for setting the stage for the admissibility of other accident information at trial. Not only should plaintiffs' attorneys request a wide array of information from defendants, but they should also authenticate it with appropriate deposition witnesses such as corporate engineers and product safety managers. Otherwise, there is the risk that the information will lack a proper foundation for admissibility. See Uitts v. General Motors Corp., (not allowing 35 reports of other accidents into evidence due to a lack of reliability since they contained statements by owners concerning accidents, were not the result of detailed and comprehensive investigations, and were not intended to commit General Motors to a specific position).³⁶

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It is critical that plaintiffs review the facts of the other accidents with these deposition witnesses with the aim of verifying how they occurred and establishing a similarity of defect or mechanism of injury with the plaintiff's accident, while ruling out the significance of minor and immaterial differences with the case at bar. Furthermore, these witnesses may be valuable in identifying important sources of discovery such as accident databases and corporate investigations.

Interrogatories can be an effective discovery tool for obtaining concise information concerning other accidents. However, if other accident evidence is obtained through other discovery devices and is in a cumbersome form, a plaintiffs' attorney may consider condensing the information received into an easily digestible form, such as a summary, that can be authenticated by an appropriate deposition witness. This will help to streamline the admissibility of other accident evidence at trial. Otherwise, a plaintiffs' attorney may find herself in the undesirable situation of having to conduct time-consuming "mini-trials" with respect to other accident evidence, making reference to multiple sources, which can run the risk of the trial judge ruling that the evidence is unduly prejudicial, time consuming, and will cause confusion to the jury by creating, as one court has framed it, a "sideshow taking over the circus."³⁷

CONCLUSION

In a products liability case, a history of other accidents involving the same or similar model product can be powerful evidence that the product is defective and that the manufacturer had prior notice of the defective condition. In effect, other similar accidents can be compelling evidence to a jury of a conscious disregard for safety by the manufacturer.

It is imperative that a plaintiffs' attorney obtain comprehensive information about other accidents during the discovery stage and prepare that information for trial. It is also incumbent on him or her to conduct depositions of key witnesses to authenticate the information received and also to establish the nature of the defect or malfunction. By building an arsenal of other similar accident evidence, the attorney will be well-equipped to show the jury that the injury to his or her client was not simply an isolated incident, or a product of human error, but rather one of a line of accidents caused by a defective product. 

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- 1 Egelko, Bob, "Key ruling on punitive damages, Top court urged to slash \$290 million Stanislaus County verdict," *San Francisco Chronicle*, May 19, 2003, at A-2.
- 2 67 N.Y.2d 328, 336; 502 N.Y.S.2d 696, 701, 493 N.E.2d 920, 925 (1986) (citations omitted).
- 3 *White v. Ford Motor Co.*, 312 F.3d 998, 1006 (9th Cir. 2002); *U.S. v. Holmes*, 44 F.3d 1150, 1157 (2d Cir. 1995); *People v. Young*, 7 N.Y.3d 40, 44, 817 N.Y.S.2d 576, 578-79, 850 N.E.2d 623, 625-26 (2006).
- 4 881 F. Supp. 813, 818 (N.D.N.Y. 1995) citing *Jackson v. Firestone Tire & Rubber Co.*, 788 F.2d 1070, 1083 (5th Cir. 1986).
- 5 *Bellinger*, 881 F. Supp. at 818.
- 6 209 A.D.2d 968, 630 N.Y.S.2d 1005 (4th Dept. 1994).
- 7 *Id.* at 969.
- 8 *Ford Motor Co.*, 312 F.3d at 1009.
- 9 116 F.3d 22 (1st Cir. 1997).
- 10 *Id.* at 24, 27.
- 11 168 S.W.3d 481 (W.D. Mo. App. 2005).
- 12 *Id.* at 483-84.
- 13 430 Mass. 198, 715 N.E.2d 47 (1999).
- 14 *Id.* at 202-03.
- 15 See fn 4.
- 16 *Sawyer*, 67 N.Y.2d at 337; *Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549 (D.C. Cir. 1993).
- 17 *Joy*, 999 F.2d at 554; *Uitts v. General Motors Corp.*, 411 F. Supp. 1380, 1383 (E.D.Pa. 1974).
- 18 *Barker v. Deere & Co.*, 60 F.3d 158, 162-163 (3rd Cir. 1995).
- 19 *Sawyer*, 67 N.Y.2d 328, 337; 502 N.Y.S.2d 696, 701, 493 N.E.2d 920 (1986); *Facci v. General Electric Co.*, 192 A.D.2d 991, 596 N.Y.S.2d 928 (3d Dept. 1993); *Uitts*, 411 F. Supp. at 1383.
- 20 *Facci*, 192 A.D.2d at 993.
- 21 *Bass v. Cincinnati, Inc.*, 180 Ill. App. 3d 1076, 1080, 536 N.E.2d 831, 833 (1989).
- 22 *Pau v. Yosemite Park and Curry Co.*, 928 F.2d 880, 889 (9th Cir. 1991); see also *Joy*, 999 F.2d at 555; (D.C. Cir. 1993); *Nachtsheim v. Beach Aircraft Corp.*, 847 F.2d 1261, 1268-69 (7th Cir. 1988); *Jackson*, 788 F.2d at 1083 (5th Cir. 1986).
- 23 *Facci*, 192 A.D.2d at 993.
- 24 999 F.2d 549 (D.C. Cir. 1993)
- 25 *Joy*, 999 F.2d at 555.
- 26 See *Daval Steel Products v. M/V Fakredine*, 951 F.2d 1357, 1367 (2d Cir. 1991); *Allen v. Crowell-Collier Publishing Co.*, 21 N.Y.2d 403, 406-7, 288 N.Y.S.2d 449, 452-53 (1968).
- 27 *Culligan v. Yamaha Motor Corp.*, 110 F.R.D. 122, 124 (S.D.N.Y. 1986).
- 28 133 F.R.D. 439, 441 (S.D.N.Y. 1990).
- 29 302 A.D.2d 444 (2d Dept. 2003).
- 30 *Id.*
- 31 110 F.R.D. 122, 124-126 (S.D.N.Y. 1986)
- 32 135 A.D.2d 516, 521 N.Y.S.2d 745 (2d Dept. 1987)
- 33 291 A.D.2d 885, 737 N.Y.S.2d 194 (4th Dept. 2002)
- 34 105 A.D.2d 645, 481 N.Y.S.2d 364 (1st Dept. 1984)
- 35 *Repka v. Arctic Cat, Inc.*, 300 A.D.2d 1019, 1021, 753 N.Y.S.2d 635, 636 (4th Dept. 2002) (in products liability action ordering the disclosure of transcripts of all deposition and trial testimony of two of defendant's representatives in prior personal injury actions involving snowmobile accidents based upon similar theories of liability).
- 36 411 F. Supp. at 1382-83.
- 37 *Stokes*, 168 S.W.3d at 485.

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