

# Discovery and Using Evidence (or Absence) of Other Similar Incidents: Practical and Strategic Considerations

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# What is “OSI” evidence? Preliminary considerations:

- “OSI” is a misnomer – “similarity” must be proven, not presumed. *See, e.g., Barker v. Deere and Co.*, 60 F.3d 158 (3d Cir. 1995); *Nachtseim v. Beech Aircraft Corp.*, 847 F.2d 1261 (7th Cir 1988); *McKinnon v. Skil Corp.*, 638 F.2d 270 (1st Cir. 1981).
- Substantial similarity, not mere “similarity” is required, and is a case-specific inquiry.
- Form of the proffered incidents – the evidence proffered must be otherwise admissible.

# “Other Incidents” vs. “Other Similar Incidents” Why does it matter? Simple in theory....

- Relevance - Evidence that prior incidents have occurred may be relevant circumstantial evidence on a number of issues:
  - The existence of a defect (design, manufacturing, or warning).
  - Causation, to the extent prior incidents have occurred the same way.
  - Notice of the subject product’s dangerous condition.
- Prejudice – Evidence of other incidents carries a risk of all the classic bases for exclusion under Rule 403 (or state equivalents): unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.



Not simple in practice.

How is “substantial similarity” defined?

- “Determining whether and to what extent proffered evidence of prior accidents involves substantially similar circumstances will depend on the underlying theory of the case advanced by the plaintiffs.” *Bitler v. A.O. Smith Corp.*, 400 F.3d 1227, 1239 (10th Cir. 2004).
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# Practical considerations

The other incidents must be attributable to the defendant.

Variations within product model may defeat substantial similarity (i.e., model year, different components/features).

Similarities between different products may support substantial similarity (i.e., same component used in different product models).

Difficulties in establishing substantial similar causation.

Timing of other incidents (generally must precede subject incident).

Foundational requirements must consider the source of other incidents evidence.

Risk of prejudice requires a preliminary ruling on admissibility.

# Forms of Other Incident Evidence

## Manufacturer's internal records

- Examine level of detail contained.
- Reported by consumer?
- Verified by independent investigation?

## Expert testimony

- What is basis for expert's information?
- Personal involvement/investigation? News articles? Public data?

## Statistics

- Purpose of the data? Expert investigations?

## Fact witness testimony (i.e., consumers/claimants)

- Is testimony within knowledge of a lay witness?

## Other

- News/media reports
- Consumer blogs or other online commentary

# Discovery of Other Incidents

- Objections/Considerations
  - Type of discovery sought (records vs. company testimony)
  - Burden/breadth/proportionality of requested OI searches
  - Corporate representatives must testify only as to information known or reasonably available to the organization
  - May reveal PII of third parties
  - Self Critical Analysis Privilege may protect internal investigation
  - Discovery of internal processes, procedures, methods for logging/storing/searching for information
    - Discovery on discovery of defendant's document collection process generally prohibited
    - Information tools and databases may be privileged and opinion work product (used by company counsel in connection with pending, anticipated or resolved litigation against Ford)
    - Relevance – discovery of company databases have nothing to do with alleged product/components at issue
    - May constitute confidential/trade secret information (how company maintains, records, and responds to other alleged incidents proprietary to the company)



# Example 1 – machine press

- Scenario: Factory worker's arm crushed while operating machine press. He alleges the press was defectively designed and should have incorporated a different safety guard.
- Relevant facts to assess substantial similarity of other incidents:
  - Model of press and guard
  - Press components and operation/purpose
  - Any post-sale modifications made to press
  - Operator's use of press at the time of injury
  - Type of injury
  - Environment of use

# Example 2 – vehicle rollover

- Scenario: Right front passenger is rendered paraplegic from neck injury in highway rollover accident. She alleges crashworthiness design defects in the vehicle's restraint system.
- Relevant facts to assess substantial similarity of other incidents:
  - Defect allegation
  - Ejection
  - Model and model year of vehicle
  - Type and model of restraint system
  - Vehicle speed, velocity, impact forces, number of rolls
  - Passenger's age, height, weight, seatbelt use
  - Specific location and mechanism of injury

# Example 3 – burn from curling iron

- Scenario: Child sustains burns after pulling mother's curling iron from vanity and turning it on. Mother alleges that curling iron should have had recessed buttons to avoid accidental activation.
- Relevant facts to assess substantial similarity of other incidents:
  - Type of defect allegation
  - Product model
  - Warnings accompanying product
  - Age of injured child
  - Maximum temperature of product
  - Safety features present

# Strategic considerations

Fully research foundational evidence to determine level of similarity of other incidents.

Use the evidence available to you, whether evidence of other incidents or evidence of a lack of other incidents.

Raise the issue with the court early and often.

Pretrial motion practice (MILs and Motions to Admit).

How to present OI evidence at trial.

# Pretrial Motion Practice

- Motions in Limine/to Admit Other Incident Evidence
  - Arguments: (1) relevance/substantial similarity; (2) foundation; (3) hearsay; (4) 403 considerations (prejudice, wasting time, invite jury speculation)
    - What is the purpose for which the OI evidence is being offered?
    - Malfunction Theory arguments
    - Punitive Damages arguments/considerations
  - Consider use of “other incident” charts to establish/disprove substantial similarity (within motion or for oral argument)
  - Requests for in-camera review

| Other Incident Factors                         | Present Case: Smith v. John Doe Manufacturer   | Proffered Other Incident  | Substantial Similarity?                          |
|--|--|---|--|
| Model of Press/Guard                           | 2009 John Doe Punch Press/Guard  | 2010 John Doe Punch Press/Guard                                     | Yes (no design changes b/w 2009 and 2010 Models) |
| Press components and Operation                 | No automatic shut-off if guard removed   | Automatic shut-off if guard removed                                 | No   |
| Post-Sale Modifications                        | None   | Yes: OEM guard removed and replaced with smaller after-market guard | No   |
| Operator's use of Press/Accident Circumstances | Factory worker's arm crushed while operating machine press, when guard allegedly broke off | Unknown   | Unknown  |
| Type of Injury/Mechanism                       | Arm crushed from elbow to hand   | Arm crushed from elbow to hand                                      | Yes  |
| Environment of Use                             | Factory  | Factory   | Yes  |
| Defect allegations                             | Insufficient bolting of guard  | Hydraulic system failure  | No   |

# Other Incident Chart: Machine Press

# Other Incident Chart: Vehicle Rollover

| Other Incident Factors     | Present Case: Smith v. John Doe Manufacturer                          | Proffered Other Incident   | Substantial Similarity? |
|----------------------------|---|--|-------------------------|
| Vehicle Make and MY        | 2012 John Doe SUV   | 1999 John Doe SUV  | No                      |
| Type and model of seatbelt | Body mounted 3 pt.; mfg by Jane Doe Manufacturing                     | Seat-mounted 3 pt; mfg by Jane Doe Manufacturing                             | No                      |
| Plaintiff Seating Position | Right front passenger   | Right rear seat passenger  | No                      |
| Defect Allegations         | Body-mounted design allows excessive excursion                        | None   | Unknown                 |
| Vehicle speed/velocity     | Not speeding/45 mph   | Not speeding/40 mph  | Yes                     |
| Accident Circumstances     | Subject vehicle rear-ended; went off road and rolled over into a tree | Tire blow leading to on-road rollover; no impact with other objects or trees | No                      |
| Number of Rolls            | 3   | 3  | Yes                     |
| Injury location/mechanism  | Thoracic spinal caused by head-ground/roof impact                     | TBI caused by partial ejection   | No                      |

| Other Incident Factors   | Present Case: L.S., a minor v. John Doe Manufacturer | Proffered Other Incident                         | Substantial Similarity? |
|--------------------------|--|--|-------------------------|
| Model of Curling Iron    | John Doe Titanium Ultra Smooth, Model No. WXY10035   | John Doe Ceramic Super Smooth, Model No. XYZ3900 | Possibly                |
| Safety features          | Automatic shut-off after 10 minutes                  | Two-step activation switch                       | No                      |
| Age of injured person    | 3 years  | 10 years   | No                      |
| Warnings present         | “Keep away from children – serious burns may occur.” | Unknown  | Unknown                 |
| Type of Injury/Mechanism | Burn to hand from grabbing heated iron               | Burn to arm from leaning on heated iron          | Yes                     |
| Product features         | Maximum temperature of 450 degrees                   | Maximum temperature of 400 degrees               | Possibly                |
| Defect allegations       | Design defect: lack of recessed buttons              | Design defect: lack of automatic shut-off        | No                      |

# Other Incident Chart: Curling Iron



# Lack of Other Incidents

- Purpose: Rebut design defect, warnings, and punitive damages claims by showing no known issue or probability of alleged injury
- Foundational Requirements
  - Products are substantially similar or identical
  - Products are used in settings and circumstances sufficiently similar to the subject product at the time of the accident
  - Number of units sold
  - Number of uses by each unit (i.e. 100,000 vehicles sold multiplied by number of times driven daily)
  - Methods of reporting/record keeping (i.e. how and why any other incident would have been identified by the company)
  - Data bases and searches conducted to identify potentially similar incidents

# Lack of Other Incidents: Example

- Plaintiff alleges the rear door latch striker mechanism of a cargo van is defective in design/warnings because of its placement and shape, leading to a head laceration/injury
- Defendant proffers company testimony that:
  - In response to Plaintiff's discovery request, the company searched for lawsuits, claims, customer contacts and technical contacts containing allegations of personal injury due to an alleged defect in the rear cargo door latching mechanism, door openings, and rear cargo doors in the subject vehicle model line
  - The company searched various databases that monitor field performance for a 4-model-year span of production of the vehicle
  - The company sold 105,000 units for the relevant MY
  - The company did not identify any incidents other than the subject incident
  - The absence of other incidents shows head impacts and injuries for this model vehicle and door latch mechanism are not probable



# Advising your client

- Duty to identify, record, and/or maintain OI information?
  - Establish system for reporting and recording incidents involving products.
  - Conduct investigation to develop complete record.
  - Indicate source of any information (customer versus internal).
  - Balance record-keeping with practical considerations (every “incident” cannot be investigated)
  - Identify appropriate corporate representatives
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**QUESTIONS?**