

[c]—Substantial Similarity Not Requirement When Evidence is Offered to Explain Physical Principles. The “substantial similarity” requirement does not necessarily apply to every prior occurrence, depending on the purpose for which the evidence of a prior occurrence is being offered. For example, in an action arising out of a sport utility vehicle rollover accident, the Eleventh Circuit held that the manufacturer was properly permitted to introduce evidence of other rollover incidents involving dissimilar vehicles. The evidence was offered not to reenact the accident, but to explain how rollovers occur, and the introduction of the evidence for the purpose of illustrating the physical principles behind rollover accidents was not unduly confusing to the jury or prejudicial to the plaintiff.^{12.1}

[d]—Grounds for Admission of Substantially Similar Occurrences. Evidence of substantially similar occurrences may be admitted, depending upon the court, for a variety of different reasons, including the defendant’s ability to correct known defects, the magnitude of the danger, the lack of safety for intended use, causation or notice.¹³

whereby a relevancy hearing with respect to another accident is held outside the hearing of the jury, citing *Schaeffer v. Kansas Dept. of Transp.*, 227 Kan. 509, 608 P.2d 1309 (1980) and *Hampton v. State Highway Comm’n*, 209 Kan. 565, 498 P.2d 236 (1972). Further, while the court indicated that such procedure might be “preferable,” it may not be indicated in every instance.

But see *Bass v. Cincinnati Inc.*, 667 N.E.2d 646, 650–651 (Ill. App. Ct. 1996). Where, the plaintiff, on its case in chief, introduced evidence of 128 other accidents involving press brakes, on the defense case, the witness who was the author of the exhibits identifying the claims which the plaintiff received, presumably in discovery, was permitted to testify about each of those accidents to show that they were dissimilar to the accident in the case at bar, and to show that the proximate cause of those other accidents was not an unreasonably dangerous aspect of the press brake involved.

12.1 Prior occurrences; substantial similarity doctrine. *Heath v. Suzuki Motor Corp.*, 126 F.3d 1391, 1396 (11th Cir. 1997), applying federal law.

¹³ *See, e.g.:*

Joy v. Bell Helicopter Textron, Inc., 999 F.2d 549 (D.C. Cir. 1993), applying District of Columbia law. In a products liability case, evidence of other incidents involving the same product are relevant under Fed. R. Evid. 401 and presumptively admissible under Rule 402 if plaintiff shows substantial similarity. A trial judge’s ruling on similarity, moreover, will only be reversed for an abuse of discretion. In this case similarity is a close question. Plaintiff claims spur adapter gearshaft (SAG) failures occurred in two other accidents, but in those accidents, the failure occurred because of severe wear while in this case it was claimed to have occurred from

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improper carburization. All three failures, however, occurred at the same place. Moreover, the substantial similarity standard is relaxed when the incidents are introduced, not to show unreasonable danger, but to refute a suggestion by the defendant that there was no defect because the helicopter was manufactured to specifications.

Drabik v. Stanley-Bostitch, Inc., 997 F.2d 496 (8th Cir. 1993), applying Missouri law. Evidence of other accidents, which are substantially similar to the case at bar, may be relevant on the defendant's ability to correct known defects, the magnitude of the danger, the lack of safety for intended use, causation or notice.

Datskow v. Teledyne Continental Motors Aircraft Prods., 826 F. Supp. 677 (W.D.N.Y. 1993), applying federal and New York law. In this case involving an aircraft accident allegedly caused by an in-flight fire resulting from a clogged fuel injector nozzle in the engine, correspondence between one of the decedents and the defendant regarding problems with the aircraft's engine was admissible under Fed. R. Evid. 703 as evidence relied upon by plaintiff's expert. It may be admitted "for the limited purpose of explaining the basis of an expert's opinion." *Id.* at 684.

Wheeler v. John Deere Co., 862 F.2d 1404 (10th Cir. 1988), applying federal and Kansas law. Under both state and federal law, evidence of substantially similar accidents is admissible on the issues of notice, the existence of the defect, or to refute the testimony given by a defense witness that a product, such as a combine, was designed without safety hazards. Prior to introduction, the proponent must show substantial similarity, usually out of the presence of the jury, and whether there is such substantial similarity depends largely upon the plaintiff's theory of proof. Differences not affecting substantial similarity go to the weight of the evidence.

Rexrode v. American Laundry Press Co., 674 F.2d 826 (10th Cir. 1982), applying federal and Kansas law. Evidence of substantially similar accidents may be admitted in a strict liability case "to establish notice, the existence of a defect, or to refute testimony by a defense witness that a given product was designed without safety hazards." *Id.* at 829. This case dealt with a laundry press.

Julander v. Ford Motor Co., 488 F.2d 839, 846 (10th Cir. 1973), applying federal law. Although prior complaints may be admitted into evidence in a negligence case to show notice, where the record failed to show when the defendant received notice, the court remarked: "Without belaboring what we deem to be the obvious, the admission of exhibit 32 simply cannot be upheld on the basis of a 'notice' theory, because such did not constitute prior notice." *Id.* at 846.

Lohr v. Stanley-Bostitch, Inc., 135 F.R.D. 162 (W.D. Mich. 1991), applying Michigan law. The court noted that the law is "well-settled" that evidence of substantially similar accidents is admissible to prove the existence of a defect, causation, or the defendant's knowledge of the danger, and the court ordered that discovery be permitted on that issue.

Schaffner v. Chicago & Northwestern Transp. Co., 161 Ill. App. 3d 742, 515 N.E.2d 298 (1987), *aff'd*, 129 Ill. 2d 1, 541 N.E.2d 643 (1988). The plaintiffs were permitted to introduce evidence of 131 accidents, similar to that experienced by the plaintiff, where a front wheel of a bicycle disengaged from the frame by use

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of the quick-release device. In referring to such evidence, the court noted that prior-accident evidence is admitted to show the existence of a particular defect or condition, the existence of a dangerous situation, or knowledge on the part of a defendant.

Ryan v. KDI Sylvan Pools, Inc., 121 N.J. 276, 579 A.2d 1241 (1990) (per curiam). "Evidence of prior similar accidents is relevant and should be admissible as evidence of the risk, or lack thereof, of a product." 121 N.J. at 290, 579 A.2d at 1248. This case involved injuries sustained when the plaintiff dove into an in-ground swimming pool from a diving board.

Vernon v. Stash, 367 Pa. Super. 36, 532 A.2d 441 (1987). Where a car rolled down a hill and crashed into a house, the plaintiff was permitted to show the existence of a defect or dangerous condition, or to demonstrate knowledge on the part of the defendant car manufacturer that a hazard existed with respect to its manual transmission and hand brake by introducing evidence of prior incidents, occurring under the same or similar circumstances, involving the accident vehicle.

Firestone Tire & Rubber Co. v. Battle, 745 S.W.2d 909 (Tex. Ct. App. 1988). Evidence of prior, similar accidents involving tire "spin-break phenomena" was admissible regarding the knowledge of a tire manufacturer of a dangerous condition, the magnitude of the risk, and the issue of conscious indifference with respect to punitive damages. Moreover, it was permissible for an individual involved in such prior accident to testify regarding the noise and vibrations occurring at the time of the event.

General Motors Corp. v. Lupica, 237 Va. 516, 379 S.E.2d 311 (1989). Evidence of prior accidents which meet the substantial similarity test are admissible in evidence on the issues of notice and foreseeability.

See also Needham v. White Labs., Inc., 847 F.2d 355 (7th Cir. 1988), applying Illinois law. **Treatise** cited.

See, e.g., Ramos v. Liberty Mut. Ins. Co., 615 F.2d 334 (5th Cir. 1980), applying federal law. In a case involving a mast on an offshore oil-drilling rig, the court stated: "Evidence of similar accidents might be relevant to the defendant's notice, magnitude of the danger involved, the defendant's ability to correct a known defect, the lack of safety for intended uses, strength of a product, the standard of care and causation." *Id.* at 338-39.

King v Emerson Elec. Co., 837 F. Supp. 1096 (D. Kan. 1993), applying federal law. The court stated: "Evidence of similar accidents involving the same product is admissible to establish notice, the existence of a defect, or to refute testimony by a defense witness that a given product was designed without safety hazards." *Id.* at 1099, citing *Ponder v. Warren Tool Corp.*, 834 F.2d 1553, 1569 (10th Cir. 1987).

Datskow v. Teledyne Continental Motors Aircraft Prods., 826 F. Supp. 677 (W.D.N.Y. 1993), applying federal and New York law. In this case involving an aircraft accident allegedly caused by an in-flight fire resulting from a clogged fuel injector nozzle in the engine, correspondence between one of the decedents and the defendant regarding problems with the aircraft's engine was admissible on the issue of notice that "the engine had certain fundamental problems that made it

Where prior complaints are admitted on the issue of notice, as opposed to being admitted to prove defect, case summaries have been held to be admissible, with a limiting instruction to the effect that such items could only be considered on the issue of notice.¹⁵

In some courts, such evidence has also been held admissible for purposes of proving punitive damages,¹⁶ while in other courts this type of evidence has been rejected.¹⁷ Prior complaints have also been held admissible for purposes of impeachment;¹⁸ yet where a

more likely that solid matter would be blown into, and clog, the fuel injector nozzles." *Id.* at 684.

DiFrancesco v. Excam, Inc., 642 A.2d 529, 535 (Pa. Super. Ct. 1994). Evidence of prior accidents are admissible "to show that the instrumentality was unsafe, or it may tend to show that the defendant had actual or constructive notice of a condition that could cause harm."

¹⁴ Reserved

¹⁵ *See, e.g.*, *Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378 (4th Cir. 1995), applying federal and Virginia law. This case involved Drug Experience Reports with respect to acetaminophen and liver damage. In permitting the case summaries to be admitted, the court referred to two circuits court opinions, *Gardner v. Southern Ry. Systems*, 675 F.2d 949, 952 (7th Cir. 1982), and *Young v. Illinois Central Gulf R.R.*, 618 F.2d 332, 339 (5th Cir. 1980), both of which involved prior accidents, rather than the prior complaints involved in this situation.

¹⁶ *See, e.g.*:

Bastian v. TPI Corp., 633 F. Supp. 474 (N.D. Ill. 1987), applying federal law. Instances of similar occurrences with respect to a baseboard heater were admissible for punitive damages purposes to show that the defendant was on notice of a condition in the product that could result in further injuries if nothing were done. However, the court exhorted the plaintiffs to consider carefully the evidence they wished to use and to exercise their best judgment because if their evidence was off the mark, and not sufficiently similar, the price could be a mistrial.

Rose v. Figgie Int'l, Inc., Nos. A97A1495, A97A1496, 1997 WL 795237, at 2 (Ga. App. Dec. 5, 1997); *Skil Corp. v. Lugsdin*, 168 Ga. App. 754, 309 S.E.2d 921 (1983). In an action involving a circular saw, evidence of prior accidents was admissible with respect to punitive damages, as well as notice, knowledge, and defect.

¹⁷ *See, e.g.*, *Bass v. Cincinnati, Inc.*, 180 Ill. App. 3d 1076, 536 N.E.2d 831 (1989). "Evidence of similar postaccident occurrences or injuries involving the same or substantially similar products may be admissible to establish that the product is defective." *Id.* at 834. Such accidents, however, are not admissible to support a punitive damage claim.

¹⁸ *See, e.g.*:

Ramos v. Liberty Mut. Ins. Co., 615 F.2d 334, 340 (5th Cir. 1980), applying federal law. This case dealt with a mast on an offshore oil-drilling rig.

Hale v. Firestone Tire & Rubber Co., 820 F.2d 928 (8th Cir. 1987), applying

witness testified that “he, through personal knowledge or by hearsay, knew nothing at all about the various complaints,”¹⁹ and his testimony was undisputed, the complaints would not be admitted because they did not impeach.

[e]—Grounds for Excluding Substantially Similar Occurrences. Courts exclude evidence of substantially similar occurrences for a variety of reasons, such as when the danger of accidents is common knowledge.^{19.1} Furthermore, depending upon the cause

federal law. The trial court allowed the plaintiff to introduce evidence of similar accidents involving the explosion of identical multi-piece rims, for the purpose of impeaching the defendant’s expert and disproving his theories.

Rexrode v. American Laundry Press Co., 674 F.2d 826 (10th Cir. 1982), applying federal and Kansas law. The Supreme Court of Kansas has adopted a procedure whereby a relevancy hearing with respect to another accident is held outside the hearing of the jury, citing *Schaeffer v. Kansas Dept. of Transp.*, 227 Kan. 509, 608 P.2d 1309 (1980) and *Hampton v. State Highway Comm’n*, 209 Kan. 565, 498 P.2d 236 (1972). Further, while the court indicated that such procedure might be “preferable,” it may not be indicated in every instance.

Wilson Court, Inc. v. Teledyne Laars, 747 S.W.2d 239 (Mo. Ct. App. 1988). It was error for the trial court not to permit plaintiff to cross-examine an adverse rebuttal witness with respect to prior, substantially similar accidents involving a swimming-pool heater.

Cf. Wheeler v. John Deere Co., 862 F.2d 1404 (10th Cir. 1988), applying federal and Kansas law. It was reversible error, however, for the court to allow the plaintiff to impeach the defendant’s expert regarding prior accidents involving a combine where there was no substantial similarity because it improperly shifted the burden of proving dissimilarity to the defendant on redirect examination.

¹⁹ *Julander v. Ford Motor Co.*, 488 F.2d 839, 846 (10th Cir. 1973), applying federal law. This case involved an alleged steering problem in a multipurpose passenger vehicle.

See also McKinnon v. Skil Corp., 638 F.2d 270 (1st Cir. 1981), applying Massachusetts law. In this action where the plaintiff was injured while operating a circular saw, the defendant’s answers to interrogatories concerning prior occurrences were inadmissible for the purpose of impeaching the defendant’s expert. “The plaintiff failed to show that Consoli signed the answers, assisted in their preparation, made any statements about the subject matter, or had any personal knowledge of the facts represented.” *Id.* at 278 (footnote omitted).

^{19.1} **Substantially similar accidents are excluded when danger is common knowledge.** *Dickens v. Avanti Res. & Dev., Inc.*, 161 Ill. App. 3d 565, 515 N.E.2d 208 (1987) (danger of electrocution by touching electrical wire, such as CB antenna, is “common knowledge”).

of action, some state courts continue to refuse to admit evidence of prior occurrences to prove defect.²⁰

Great care must be taken by the trial court to assure itself that such evidence of prior occurrences is more than mere “inadmissible hearsay” or unsubstantiated anecdotal testimony.²¹ In *Babb v. Ford Motor Co.*,²² for example, the plaintiff sought to introduce letters from consumers and others, which had been written to the National Highway Traffic Safety Administration (NHTSA), containing reports of numerous alleged instances of the phenomenon of unintended acceleration in automobiles. While letters evidencing similar prior accidents are ordinarily admissible to show notice, they are not necessarily admissible to prove the truth of the matters stated in the letters. Thus, the trial court properly excluded the disputed reports, which it described as “inadmissible hearsay,” and asserted that they could not be used to show to the jury that the described incidents actually occurred. “To prove those incidents they would need testimony from witnesses who observed them, or equivalent

²⁰ See, e.g.:

Armentrout v. FMC Corp., 819 P.2d 552 (Colo. Ct. App. 1991), *aff'd in part, rev'd in part on other grounds*, 842 P.2d 195 (Colo. 1992). The trial court erred in refusing to admit evidence of prior similar accidents with respect to a crane for the limited purpose of establishing notice. Such reports may not be admitted, however, to prove defect.

Loitz v. Remington Arms Co., 177 Ill. App. 3d 1034, 532 N.E.2d 1091 (1988), *aff'd in part, rev'd in part on other grounds*, 138 Ill. 2d 404 (1990). The following jury instruction with respect to prior accidents was deemed proper: “The fact that other guns have exploded does not, in and of itself, support the existence of a defect or that the manufacturer was negligent.”

²¹ See, e.g.:

Johnson v. Ford Motor Co., 988 F.2d 573 (5th Cir. 1993), applying federal law. Following *Roberts*, cited in the main volume, the trial court properly held that a brief summary of claims and lawsuits which plaintiff sought to introduce in evidence “amounts to nothing more than a summary of allegations by others which constitute hearsay.” *Id.* at 579.

Roberts v. Harnischfeger Corp., 901 F.2d 42 (5th Cir. 1989), applying federal law. The trial judge properly excluded two similar incidents involving “two-blocking” and a crane, because the allegations were hearsay and would inject collateral issues into the case. Their probative value was “slight.”

Cincinnati Ins. Co. v. Volkswagen of Am., Inc., 41 Ohio App. 3d 239, 535 N.E.2d 702 (1987). It was an error to admit hearsay evidence contained in reports of the National Highway Traffic Safety Administration, including lay reports of complaints involving automobiles, and the verdict for the plaintiff was reversed.

²² 41 Ohio App. 3d 174, 535 N.E.2d 676 (1987).