IN THIS ISSUE

Featured Articles

- Federal Standard for the Admission or Exclusion of “Other Accident” Evidence in Illinois Product Liability Cases ......................................................... 2
- Causation, the Uncertainty Principle & the Benign Experience Principle ................................................................. 17
- How Much Compliance is Enough Under the Foreign Corrupt Practice Act ......................................................... 19
- Product Liability Case Evaluation and Trial Strategy Considerations ................................................................. 23
- Alabama .................................................................................................................................................................... 31
- Oregon .................................................................................................................................................................... 31
- Virginia .................................................................................................................................................................... 34

Departments

- In the Trenches ...................................................................................................................................................... 36
- Upcoming ALFA International Events .................................................................................................................. 37

NOTES FROM THE EDITORS

“Are you ready for some football?” Fall brings the joy of football, cooler weather and autumn coloring. Unfortunately, it also seems to bring a bevy of new personal injury filings including products cases. As Summer vacationing and Summer Court schedules come to an end, it seems like folks just work harder, calendars get full and all the stress of a busy legal practice comes into full force. That busy practice tugs practitioners and their clients away from all that Fall has to offer. One such offering this year is the November election which most certainly will have lasting effects on the economy and our industry. What better way than to gear up for what it is you love about the Fall Season than to get a jump start on current and pertinent products liability issues by reading our publication? We think this edition of Perspectives will prove worthy of reading during your pre-game festivities.

In this edition of Perspectives we have a discussion on case evaluations and trial strategies to get you going for the rest of this year and into the new year. We also have a piece discussing two important concepts — the Uncertainty Principle and the Benign Experience Principle — that frequently play a large role in failure to warn cases. Additionally, you will find an excellent article on compliance developments under the Foreign Corrupt Practices Act that have an impact on manufacturers doing any business abroad. Don’t miss our other nice piece on the admissibility of “other accident” evidence and case notes from our members in Alabama, Oregon and Virginia covering recent opinions on product issues.

Time to put those bathing suits away, stop putting poison in “the temple,” and get down and dirty in the trenches, just like those football athletes at the High School, College and NFL level have started to do all across America.

Colleen Murnane, Stan Shuler & Jackson Ables
One of the most persuasive forms of evidence that a plaintiff can introduce at trial in a product liability case is the occurrence of other accidents involving the defendant’s products. Likewise, one of the most effective forms of exculpatory evidence that a defendant can introduce at trial is the absence of other accidents involving the product in question. As potentially persuasive as the presence or absence of other accidents can be in the prosecution or defense of a product liability case, such evidence can also pose the potential for unfair prejudice, undue weight, jury confusion and the specter of multiple “trials within a trial,” as other instances of alleged product failure are compared with the facts of the case at bar. This article discusses the evidentiary standards used by federal courts in determining the admissibility of the presence or absence of other accidents in the prosecution or defense of product liability cases.

I. Introduction.

Before examining the cases in which evidence of other accidents (or their absence) was either admitted or refused by federal courts sitting in Illinois, a review of a few preliminary concepts is in order.


While the aforementioned heading may appear self-evident, federal courts frequently preface their rulings about the admission or exclusion of evidence regarding other accidents (or their absence) with a reminder that while federal courts sitting in diversity jurisdiction will apply state law on substantive issues, federal law will be applied to any procedural or evidentiary matters, including federal evidentiary rules concerning the admissibility of the occurrence or non-occurrence of other accidents. See Klonowski v. International Armament Corp., 17 F.3d 992 (7th Cir. 1994); Chlopek v. Federal Inc. Co., 499 F.3d 692 (7th Cir. 2007).

One federal court has gone so far as to dismiss as “inconsequential” the citation of the parties to the admissibility standards under Illinois law concerning evidence of other accidents, “given the maxim that a federal court sitting in diversity looks to federal law to decide evidentiary issues such as this one.” See Dewick v. Maytag Corp., 324 F.Supp.2d 894 (N.D. Ill. 2004), citing Klonowski, supra, at 995.

Federal law concerning the admission or exclusion of “other accident” evidence centers around Rules 401, 402 and 403 of the Federal Rules of Evidence, and the case law thereunder, which define “relevant evidence,” authorizes its admission (generally), and sets forth the circumstances under which such evidence, although relevant and otherwise admissible, can be excluded in the interests of justice. Those rules are discussed, briefly, in Section B below.

The reason for the qualifier (“Usually”) in the heading of this section derives from the fact that despite the federal nature of procedural and evidentiary rules which the Seventh Circuit says are to be applied in federal cases where the admission or exclusion of other accidents is at issue, a number of federal courts, including the Seventh Circuit itself, have nevertheless specifically referenced Illinois evidence law in defining the foundation requirements for the admission or exclusion of evidence regarding the occurrence of other accidents or their absence. See Bilski v. Scientific Atlanta, 964 F.2d 697, 700 (7th Cir. 1992); Van Houten-


The admission or exclusion of evidence regarding the presence or absence of other accidents is grounded, first and foremost, in the rule of relevance, and its collateral concept of refusing the admission of relevant evidence when the interest of justice requires.

“Relevant evidence,” according to Rule 401 of the Federal Rules of Evidence, means “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Federal Rules of Evidence 401 (the Federal Rules of Evidence will hereinafter be referred to by the preface “FRE”). For the proponent of evidence regarding the occurrence of other accidents involving the subject product, this simply means that the occurrence of other accidents makes it more probable that the product on trial, and those involved in similar occurrences, share a common defect, be it in design or manufacture, or that in the case of prior accidents the manufacturer had notice of the defect. Conversely, the absence of other accidents, especially when the product on trial is part of a substantial population of similarly designed, and similarly manufactured products put to similar use, can be persuasive that the challenged design or manufacturing techniques resulted in a reasonably safe product.

While Rule 402 of the Federal Rules of Evidence states that, generally, relevant evidence is admissible while evidence which is not relevant is not admissible, this truism about the admissibility of “[a]ll relevant evidence” is tempered by the phrase: “except as otherwise provided . . . by these rules.” FRE 402. The exceptions that govern the rule are found in Rule 403 of the Federal Rules of Evidence which provides that: “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” FRE 403. As will be seen in the cases discussed later in this article, trial courts have frequently refused the admission of otherwise relevant evidence concerning other accidents because its consideration by the jury could too easily lead to an inference that whatever condition caused a prior accident to occur may very well have caused the subject accident, without the required degree of proof being presented at trial. See, e.g., Nachtsheim v. Beech Aircraft Corp., 847 F.2d 1261, 1269 (7th Cir. 1988); Barrett v. International Armaments, Inc., 1999 U.S. Dist. LEXIS 4708, pp.7-8 (N.D. Ill. 1999); In re: Chicago Flood Litigation, 1995 U.S. Dist. LEXIS 10305, pp.20-21 (N.D. Ill. 1995).

C. Substantial Similarity.

The touchstone for the admission of evidence of other accidents, or the absence of other accidents, is “substantial similarity” (although early cases called this concept “substantial identity”) (see, e.g., Walker v. Trico Mfg. Co., 487 F.2d 595, 599 (7th Cir. 1973) (refusing evidence of the absence of other accidents that were not “substantially identical to the one at issue . . .”) and Schwartz v. American Honda Motor Co., Inc., 710 F.2d 378, 382 (7th Cir. 1983) (admitting evidence of the absence of other accidents involving products “substantially identical” to that which was
involved in the case)) between the product involved in the case at trial and other same or similar products manufactured by the defendant. The same holds true with regard to the issue of substantial similarity between the manner in which the subject product was being used at the time of the accident as compared to the circumstances surrounding the use of the defendant’s other products that were involved in other incidents, the occurrence of which the plaintiff may seek to introduce into evidence at trial.

Federal case law teaches two basic points concerning the concept of “substantial similarity”: First, that it is a range, not a point, and that one trial judge’s view about what is “substantially similar” in design, manufacture or use might not hold true for another judge, and that “the sufficiency of foundation evidence varies from case to case and must be determined by an exercise of the trial court’s discretion;” (see, Walker, 847 F.2d at 599) and second, that the degree of “substantial similarity” required for the admission of “other accident” evidence depends upon the purpose for which the evidence is sought to be introduced.

An early attempt at defining the threshold element of “substantial similarity” regarding other accidents is found in the Seventh Circuit’s decision in the case of Lever Bros. Co. v. Atlas Assurance Co., Ltd., 131 F.2d 770 (7th Cir. 1942), which arose from the rupture of a storage tank that allowed over 6 million pounds of cottonseed oil to spread over the adjacent 5½ acres of land, causing extensive property damage and loss of use of the neighboring parcel. This case was not a product liability action against the manufacturer of the tank, but instead was a dispute between the plaintiff and its insurer regarding whether the rupture of the tank constituted an “explosion” for purposes of insurance coverage for the event. Plaintiff’s expert testified that water had accumulated at the bottom of the tank which turned to steam when heated, thereby expanding the pressure in the tank, causing it to rupture. The insurer contended that the tank ruptured due to mechanical stresses in the tank’s structure unrelated to the accumulating steam in the tank, and therefore there was no “explosion” and hence no coverage. Plaintiff’s expert attempted to testify that when the tank was cleaned out on a previous occasion, water was also found to have accumulated at the bottom of the tank, thereby lending credence to the plaintiff’s “explosion” theory concerning the tank’s failure. The insurer contended that it was error to admit such evidence because conditions were not substantially similar on the event of the prior cleaning of the tank as they were at the time of the rupture. The court examined the concept of “substantial similarity” between the two occasions, discussed the meaning of the term, and set forth standards for the admission or exclusion of evidence concerning conditions that existed at the time of the prior cleaning of the tank. Using what appears to have been a sliding scale of similarity, the court stated:

“There are no hard or fast rules as to what degree of similarity there must be to make the evidence admissible. If there is no similarity of conditions, then the evidence would be inadmissible. If there is some similarity of conditions, the weight of that evidence would be in proportion to the evidence of similarity, the greater weight to be given where there is greater similarity and the lesser weight where the similarity is less. But if there are valid points of similarity, as there were in the case at bar, such as the same tank and equipment, the same kind of oil handled in the same general way, refined in the same process, in
which the same amount of water was used, and pumped through the same pipes... we think the evidence is admissible, and its weight was of course for the jury [to consider] under all circumstances.”  *Id.* at 777.

Thereafter, decisions within the Seventh Circuit discussing the admissibility of other occurrences have declined to require “identical” circumstances, either with regard to the product itself or the manner of its use, in order to admit evidence of other accidents in product liability cases. *See, e.g., Estate of Carey v. Hy-Temp Mfg., Inc.,* 929 F.2d 1229, 1235 n.2 (7th Cir. 1991); *Bastian v. TPI Corp.*, 663 F.Supp. 474 (N.D. Ill. 1987).

As mentioned, the degree of “substantial similarity” required for the introduction of evidence of other accidents depends upon the proponent’s purpose in proffering the evidence. Specifically, if the evidence of other accidents is sought to be introduced as substantive proof of a defect in the product, the degree of substantial similarity required for the admission of such evidence will be greater (as will the degree of the court’s scrutiny of the facts of the occurrences being compared) than would be required if the evidence is sought to be introduced only for the purpose of showing notice on the part of the defendant of the existence of the claimed defect. *See, e.g., Nachtsheim v. Beech Aircraft Corp.,* supra, at 1268-69; *Dewick v. Maytag Corp.,* supra, at 904.

**D. Getting it Right the First Time.**

The importance of obtaining the desired (and correct) ruling by the federal trial court regarding the admission or exclusion of evidence regarding the occurrence or absence of other accidents is underscored by the high degree of difficulty in obtaining a reversal on appeal of the district judge’s decision concerning the admission or exclusion of such evidence. The Seventh Circuit has consistently held that “[t]he appellant carries a heavy burden in challenging a trial court’s evidentiary rulings on appeal because a reviewing court gives special deference to the evidentiary rulings of the trial court [which the Court of Appeals will reverse] only upon a showing that the trial court committed an abuse of discretion.”  *See Klonowski, supra,* at 995, quoting *Ross v. Black & Decker, Inc.*, 977 F.2d 1178, 1183 (7th Cir. 1992).

In determining whether the trial court committed an abuse of discretion in an evidentiary ruling, the Seventh Circuit has stated that:

“The relevant inquiry is not how the reviewing judges would have ruled if they had been considering the case in the first place.... Rather, the abuse of discretion standard is met only when the trial judge’s decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based that decision, or where the unsupported facts are clearly erroneous.”  *Ross, supra,* at 1183, quoting *Wheeler, supra,* at 802.

In addition, under Rule 61 of the *Federal Rules of Civil Procedure*, the review of a federal trial court’s evidentiary ruling is limited to an inquiry of whether an “error in either the admission or exclusion of evidence was made which affected the substantial rights” of a party. *Ross, supra,* at 1183, quoting *Nachtsheim, supra,* at 1266.

When a trial court engages in a balancing test under Rule 403 of the *Federal Rules of Evidence*, weighing the probative value of the proffered evidence against the dangers of
unfair prejudice, confusion of the issues, or considerations of undue delay, waste of time, or the needless presentation of cumulative evidence, its determination as to the admissibility or non-admissibility of the proffered evidence based upon these factors “will be accorded ‘great deference’ on appeal.” See Nightsheim, supra, at 1267, citing United States v. Garner, 837 F.2d 1404, 1416 (7th Cir. 1987) (quoting Davis v. Lane, 814 F.2d 397, 399 (7th Cir. 1987)).

II. Illustrative Federal Cases.

The following cases are illustrative, albeit not exhaustive, of instances in which the federal courts sitting in Illinois have either admitted or refused evidence of the occurrence of other accidents in product liability cases. Also discussed below are those decisions which have either allowed or rejected evidence of the absence of other accidents in such cases.

A. Federal Cases Refusing the Admission of Evidence of Other Accidents.

Perhaps the most frequently cited, and most instructive, Seventh Circuit case concerning the standards for the admission or refusal of evidence of the occurrence of other accidents is Nightsheim v. Beech Aircraft Corp., 847 F.2d 1261 (7th Cir. 1988), which arose from a plane crash that killed the president of a tool company who was piloting a company-owned aircraft. Plaintiff’s theory was that the design of the tail section of the plane was defective because it rendered the aircraft susceptible to icing conditions that could result in a loss of control. Plaintiff attempted to introduce evidence of another plane crash that occurred the previous year involving an identical aircraft, and had occurred one year after the subject crash in similar icing conditions.

After a thorough review of the similarities and differences between the two incidents, the trial court excluded evidence of the subsequent crash, stating that the balancing factors under Rule 403 of the Federal Rules of Evidence weighed against the admission of the proffered evidence since its probative value was trumped by the potential for unfair prejudice. In affirming the exclusion of the evidence, the Seventh Circuit stated a number of often-cited principles concerning the admission or exclusion of “other accident” evidence. The court began by stating the various purposes for which evidence of other accidents is proposed, i.e. to show notice on the part of the defendant concerning the dangerous condition claimed; to demonstrate the actual existence of the dangerous condition; and to illustrate the cause of the accident. Id. at 1268.

Since the other accident occurred after the subject accident, the purpose of the proffered evidence was obviously not to show notice on the part of the defendant of the allegedly dangerous design of the tail section of the aircraft, but instead was to demonstrate the actual defective condition claimed to exist, and its causal role in the crash. In such instances, the threshold standard of “substantial similarity” is heightened, and is subject to greater scrutiny by the trial judge. As the court said:

“The foundation requirement that the proponent of similar accidents evidence must establish substantial similarity before the evidence will be admitted is especially important in cases such as this where the evidence if proffered to show the existence of a dangerous condition or causation. The rationale for this rule is simple. In such cases, the jury is invited to infer from the presence of other accidents (1) that a dangerous
condition existed (2) which caused the accident. (Citation omitted). As the circumstances and conditions of the other accidents become less similar to the accident under consideration, the probative force of such evidence decreases. At the same time, the danger that the evidence will be unfairly prejudicial remains. ‘The jury might infer from evidence of the prior accident alone that ultra-hazardous conditions existed . . . and were the cause of the later accident without those issues ever having been proved.’” Id. at 1268-69, quoting Gardner v. Southern Ry. Sys., 675 F.2d 949, 952 (7th Cir. 1982) (per curiam).

The Seventh Circuit also commented upon other factors considered by the trial court in the Rule 403 balancing test, including the additional costs and time associated with the introduction of evidence of the other crash, and especially the potential for prejudice to the defendant by allowing such evidence, of which the court said:

“Moreover, if the district court had permitted this evidence, the defendant would have had to defend, as a practical matter, not only against the present suit, but also against the [other] crash. The jury would be confronted with additional technical evidence on a collateral issue that would have unnecessarily prolonged the trial and created a risk of confusion on the issues. ‘We cannot ignore . . . that when a claim is made for the showing of [similar] accidents, an element of a trial on collateral issues, sometimes termed a trial within a trial, is introduced with the real possibility of undue delay.’” Id. at 1269, quoting Kelsay v. Consolidated Rail Corp., 749 F.2d 437, 443 (7th Cir. 1984).

Thereafter, these principles were applied in Barrett v. International Armaments, Inc., 1999 U.S. Dist. LEXIS 4708 (N.D. Ill. 1999), which involved a product liability claim against a handgun manufacturer who was sued after a police officer was injured by an accidental discharge of his weapon. The incident was claimed to have been caused by a defective safety mechanism that failed to prevent the gun from firing after it had been dropped with the safety engaged. The plaintiff attempted to introduce evidence of a subsequent accidental shooting involving another police officer whose gun discharged after the car he was driving collided with a truck. Since the other incident occurred after the injury involved in the case at bar, the purpose of the proffered evidence, as in the Nachtsheim case, went to the issue of the existence of the allegedly defective condition and causation, rather than merely to the issue of notice on the part of the manufacturer of the claimed defect, so that a heightened standard of substantial similarity between the two occasions was required. The court determined that the standard was not met, and thereby excluded the evidence of the subsequent shooting. The district court noted that the heightened “substantially similar circumstances requirement recognizes that evidence of similar accidents is hazardous because it: (1) has limited probative value; (2) causes juries to infer that conditions which caused the [other] accident caused the current accident at issue in the litigation despite the evidence presented at trial; and (3) unduly prolongs the trial with protracted arguments and evidence regarding the other accident.” Id. at pp.7-8, citing In re: Chicago Flood Litigation, 1995 U.S. Dist. LEXIS 10305 (N.D. Ill. 1995).

In Weir v. Crown Equip. Corp., 217 F.3d 453 (7th Cir. 2000), the Seventh Circuit affirmed the trial court’s refusal to admit all but 27 of over 1,000 reports of other injuries produced by the defendant in discovery relating to braking
issues associated with its standup forklift trucks. The trial court had personally examined each of the reports and found many of them to be too vague, incomplete or otherwise confusing to meet the standard of substantial similarity. In affirming the exclusion of the vast majority of the accident reports from the jury’s consideration, the Seventh Circuit stated that: “[t]o have dumped all of these hearsay accident reports about various brake problems on the jury would have caused untold juror confusion and possible prejudice. The accident reports that were admitted as being substantially similar to her accident were adequate to make [the plaintiff’s] point.” Id. at 459.

The Seventh Circuit’s decision in Chlopek v. Federal Ins. Co., 499 F.3d 692 (7th Cir. 2007), illustrates the degree of deference that a reviewing court will afford the trial court’s determination of the admission or exclusion of “other accident” evidence in instances in which the trial court individually examines information concerning each of the proffered incidents in order to determine whether the test of substantial similarity has been met. In Chlopek, the plaintiff was using a physician-prescribed cooling pad to lessen the post-surgical pain and swelling in her right big toe. The plaintiff claimed that the manufacturer failed to adequately warn against continuous use of the cooling device after she had sustained a frostbite-like injury following prolonged use of the pad, eventually resulting in amputation of her toe.

Plaintiff offered evidence of ten other injuries involving the same model of the cooling device along with a number of reported injuries involving a similar product made by the same manufacturer. The trial court excluded evidence of all but one of the ten other injuries finding that they “were not similar enough, either because the injury was to another body part, the type of injury was unclear or not the same as [the plaintiff’s], or the nature of the complaint was different . . . .” Id. at 699.

As to evidence of other injuries from use of a similar model device, which the plaintiff claimed was equally capable of producing the same type of injury which she had sustained, the trial court excluded all such incidents, stating that it was inadvisable to put the other model on trial along with the model cooling device that had injured the plaintiff, and the Seventh Circuit affirmed, citing the potential for jury confusion between the two models of the device, and the possibility of unnecessarily prolonging the trial. Id. at 699-700.

Lastly, in Robenhorst v. Dematic Corp., 2008 U.S. Dist. LEXIS 30040 (N.D. Ill. 2008), plaintiff was injured when his leg became caught between two moving components of a material handling system on the assembly line of an automotive stamping plant. Plaintiff claimed that the “bumper” on the device that had crushed his leg was defective since it was intended to stop further movement of the device when it came into contact with a stationary object. Plaintiff attempted to introduce evidence of a prior accident on the same assembly line, and sought to support the admission with eight written statements of co-employees to “help establish the common unsafe condition of the design and causation” (Id. at p.20) as between the two incidents, and also offered a co-employee’s deposition testimony about the other occurrence. The trial court found the deposition testimony of the co-employee about the other accident to be “too vague” to meet the test of substantial similarity (with the testimony of the co-employee including an admission by the deponent that he did not have any idea what had caused the other incident), while the eight written statements about the alleged similarities between the two incidents were excluded as hearsay. Id. at pp.24-27.
B. Federal Cases Admitting Evidence of Other Accidents.

Much of the federal case law regarding the standards for the admission of evidence of other accidents derives from trial court rulings on motions in limine by defendants seeking to exclude such evidence. One such example is Bastian v. TPI Corp., 663 F.Supp. 474 (N.D. Ill. 1987), involving a fire allegedly caused by a baseboard heater manufactured by the defendant. The manufacturer filed a motion in limine to prohibit evidence of allegedly similar occurrences, citing the potential for jury confusion and possible prejudice from the admission of such evidence. Plaintiffs intended to introduce evidence of three other heater fires involving units that were made by the defendant, but which bore different model numbers than the heater in question. The plaintiffs claimed that the differences in the models were largely cosmetic, but that all three other heaters had the same design defect – which allowed electrical arcing between the elements of the heaters – and that all three were therefore substantially similar with regard to the design flaw said to be present in the subject heater. The defendant objected to the first of the three other incidents since the fire there was said to have resulted from negligent installation. The court refused the outright rejection of the evidence, however, saying that the supposed “flaw in the installation need not have made a significant difference in terms of the specific danger which plaintiffs seek to prove existed in the product.” Id. at 477.

Defendant likewise objected to evidence regarding the second of the three other fires that plaintiff sought to introduce, this time on the grounds that the second such fire was found to be caused by arson. Here, the court agreed to the exclusion of evidence of the second fire, stating that: “[w]here the conduct of third parties has significantly altered some of the variables involved, the prior occurrences will no longer be similar enough to be admissible.” Id., citing Johnson v. Amerco, Inc., 87 Ill.App.3d 827 at 848-49, 409 N.E.2d at 315-16 (5th Dist. 1980).

As to the third other heater fire proffered by the plaintiffs, which involved the same model heater as the one in the plaintiffs’ home, defendant objected to its introduction into evidence on grounds that it occurred in 1982 and was therefore arguably irrelevant to the condition of the plaintiffs’ heater which had been manufactured in 1979. The court countered, however, that the timing element that is actually important is the date of the injury, not the date of the product’s manufacture. Since the plaintiffs’ fire did not occur until 11 months after the date of manufacture of the heater involved in the third fire, the court said that the trier of fact could well conclude that since the third fire could have served as notice to the manufacturer of the existence of the alleged causal defect, the failure of the manufacturer to either recall the product, or to warn consumers of the danger prior to the time of the plaintiffs’ fire 11 months later, could serve as the basis of a finding of reckless indifference to public safety on the part of the heater manufacturer. Id. at 478.

In the case of Estate of Carey v. Hy-Temp Mfg., Inc., 929 F.2d 1229 (7th Cir. 1991), the Seventh Circuit again commented on the standard “substantial similarity” for the admission of other accidents. Similar to the state law standard that had been cited in the Bastian case, above, which holds that other accidents “need not have been identical in every respect,” and “need not involve exactly the same chain of events” as the case before the court in order to be admissible, (633 F.Supp. at 477, citing Ballweg v. City of Springfield, 114 Ill.2d 107 at 114-15, 499 N.E.2d 1373 at 1376 (1986)), the federal standard for substantial
similarity, according to the Seventh Circuit in Carey, does not equate “substantially similar” with “identical.” 929 F.2d at 1235. “The range between similar and identical is a matter to be addressed on cross-examination,” and “[t]his range is especially broadened when the similar events are offered to show notice to the manufacturer as opposed to showing a defect in the product.” Id. at fn.2, citing Kelsay v. Consolidated Rail Corp., 749 F.2d 437, 450-51 (7th Cir. 1984) (Posner, J., dissenting) and Nachtsheim at 1268 n.9 (7th Cir. 1988).

The horrendous crash landing of United Airlines flight 232 at the Sioux City, Iowa airport on July 19, 1989 that killed 112 of the 296 passengers aboard gave rise to multiple lawsuits in which the plaintiffs attempted to introduce evidence of five prior airborne and ground incidents principally involving airliners manufactured by defendant McDonnell Douglas. The case of In re: Air Crash Disaster at Sioux City, Iowa, 1991 U.S. Dist LEXIS 18644 (N.D. Ill. 1991), involved a consolidated hearing on a motion in limine brought by the aircraft manufacturer to exclude evidence of other incidents on the basis that they were irrelevant and therefore inadmissible under F.R.E. 402, or in the alternative, that their admission would be unduly prejudicial under F.R.E. 403.

While rejecting evidence of four of the other five incidents on grounds ranging from factual dissimilarity to remoteness in time, the court’s ruling allowing evidence of one of the prior crashes, involving a Japan Airlines Boeing 747 in 1985, is informative in two respects. First, despite the dissimilarities between the three-engine McDonnell Douglas DC10 and the four-engine Boeing 747, there was a common element between the two aircraft, based upon the plaintiffs’ theory of the case, which posed the hazard of a catastrophic loss of control in the event that the hydraulic lines, which were closely concentrated in the tail sections of both planes, became severed. Rather than focusing on the dissimilarities between the two aircraft, the court conducted its “substantial similarity” test by focusing on the plaintiffs’ theory of the case. The plaintiffs cited the vulnerability of both aircraft to a catastrophic control loss in the event of the simultaneous severance of the closely concentrated hydraulic lines (which was due to an engine explosion in the DC10 crash, and was due to a structural failure in the Boeing 747 incident) and stated that this commonality presented sufficient similarity between the two aircraft so as to allow admission of the Japan Airlines crash. Secondly, despite the fact that the two aircraft were designed and built by different manufacturers, the court said that the knowledge of defendant McDonnell Douglas of the response by Boeing to the Japan Airlines crash (i.e. the installation of devices to contain hydraulic fluid loss in the event of a line severance) was relevant to the case, and that:

“Although the designs of the DC-10 and the Boeing 747 differ, they are both wide-bodied planes that require hydraulic power to manipulate the flight controls. Accordingly, both the DC-10 and the Boeing 747 are rendered ineffectual by a total loss of hydraulic power. McDonnell Douglas’ knowledge of available means taken by an industry competitor to correct a potentially serious problem that in theory might strike its own aircraft is therefore central to the question of its liability for the Sioux City accident. In this critical respect, the Japan Airlines and Sioux City accidents meet the substantial similarity requirement.” Id. at pp.9-10.

In Ross v. Black & Decker, Inc., 977 F.2d 1178 (7th Cir. 1992), the defendant objected to the plaintiff’s introduction of two other
accidents involving the same model miter saw and similar injuries to their users. The basis of the defendant’s objection was not that the two other accidents were not substantially similar to the facts of the case on trial, but instead stemmed from the fact that the two other accidents occurred after that of the plaintiff. While the timing of the two other accidents may have posed a problem if the proposed purpose for their admission was to show notice on the part of the manufacturer of the existence of an allegedly dangerous condition, the court ruled that since the other accidents were proffered to show a common design defect in the three saws in question, “[t]he fact that the [other two] accidents occurred after [plaintiff’s] injury does not make evidence concerning them any less probative of the unreasonably dangerous design and condition of the saw or the cause of the accident.” Id. at 1185, citing Nachtsheim at 1268.

The different purposes for which evidence of other accidents may be offered was again the subject of a ruling on a motion in limine in the case of Bramlette v. Hyundai Motor Co., 1992 U.S. Dist. LEXIS 17959 (N.D. Ill. 1992), in which a car manufactured by the defendant was struck from behind while stopped at a stoplight, causing the fuel tank to detach and spill gasoline on the pavement. The gas ignited, starting a fire that resulted in the death of the driver. The defendant sought to bar the plaintiff’s introduction of another accident that involved weld separations which caused the collapse of the driver’s seat following a rear-end impact, but did not result in a fuel tank separation or fire. The plaintiff advised the trial court that one of the theories in the case was that the welds on the defendant’s cars could not withstand rear-end impact, and that this was the common thread between the two occurrences. More importantly, the plaintiff made it clear to the trial court that the evidence would only be introduced in rebuttal of the defendant’s claim concerning the absence of other weld failures. The court stated that just as in the case of evidence of other accidents introduced for the purpose of showing notice on the part of the manufacturer, “the standard for admitting such evidence is somewhat more lenient when offered in rebuttal.” Id. at p.14, citing Schaffner v. Chicago & North Western Transportation Co., 129 Ill.2d 1 at 40-41, 541 N.E.2d 643 at 659-60 (1989).

Dewick v. Maytag Corp., 324 F.Supp.2d 894 (N.D. Ill. 2004), involved a ten-month-old child who was injured when he climbed into the broiler compartment of a kitchen range manufactured by the defendant. Plaintiff sought to introduce, over defendant’s objection, evidence of two other claims of injuries to children from the broiler doors of the defendant’s ranges of the same model. Defendant contended that the children in the two other instances were older than the one injured in the case at bar, and therefore had corresponding developmental differences that precluded a finding of substantial similarity. The trial court rejected the manufacturer’s argument since the common thread arising from the cases was the defect in the design of the broiler door that allowed access to a dangerous area of the range by children, and that this factor linked the three cases, stating that “it is the defect or danger alleged by a plaintiff that defines the degree of commonality required to find incidents substantially similar.” Id. at 904.

Moreover, the court said, in commenting upon the standards for substantial similarity: “‘Substantially similar’ does not equate to ‘identical’ – that is, properly comparable incidents need not be carbon copies of [the subject] accident to warrant admissibility [citations omitted]. Moreover, the foundation requirement of substantial similarity is relaxed even further when prior accidents are introduced only to show that a defendant had notice of a
condition and not as substantive evidence that the presence of the condition created liability.” *Id.*, citing *Nachtsheim* 847 F.2d at 1269 n.9. See also *Wallis v. Townsend Vision, Inc.*, 2009 U.S. Dist. LEXIS 82007 (N.D. Ill. 2009); *Gray v. DeGussa Corp.*, 2007 U.S. Dist. LEXIS 54984 (N.D. Ill. 2007).

The case of *Yow v. Cottrell, Inc.*, 2006 U.S. Dist. LEXIS 68937 (N.D. Ill. 2006), involved the type of tractor trailer used to haul multiple cars or similar vehicles. The trailer used by the plaintiff required heavy loading skids to be manually pulled out of place from their storage position in the body of the trailer during loading or unloading of cars from the trailer. Plaintiff sustained a back injury while pushing one of the skids back into its storage position. Plaintiff claimed that the manual method of pulling and pushing the loading skids into position posed an unreasonably dangerous condition for the drivers, and that other trailer manufacturers had begun manufacturing trailers in which the skids deployed and retracted automatically. Plaintiff proffered evidence of another injury to a driver using the same rig as he was using at the time of his incident, but the trailer was equipped with different skids, made by a different manufacturer, than those being used by the plaintiff at the time of his injury. Again, the court focused on the plaintiff’s theory of liability to establish the perimeters of substantial similarity, saying that “[w]hile, as Defendant contends, it may be true that the skids on the rig were of a different make and manufacturer at the time [plaintiff] was injured [as compared with the skids that were on the rig at the time the other accident occurred], the evidence goes to substantiate Plaintiff’s theory that the rig itself is inherently defective in design for using a manual rear-loading skid rather than a hydraulic one.” *Id.* at pp.19-20.

C. Federal Cases Denying the Admission of the Absence of Other Accidents.

One of the earlier cases in the Seventh Circuit to consider the admissibility of the absence of other accidents is *Walker v. Trico Mfg. Co.*, 847 F.2d 595 (7th Cir. 1993), which involved an injury to the plaintiff’s left hand allegedly caused by a defectively designed safety device in a molding machine manufactured by the defendant. Plaintiff claimed that the safety device, a limit switch, was located in such a position as to allow inadvertent activation of the die plates which had closed on plaintiff’s hand. The manufacturer introduced evidence at trial that it had sold approximately 45 other molding machines that had been used without incident. There was no evidence from the defendant, however, as to whether the limit switches on the other machines were located in the same position as that of the subject machine; no evidence of the frequency or other circumstances concerning the use of the other machines; and no testimony as to whether or not there were any other material differences between the machine involved in the plaintiff’s accident and the other 45 molding machines sold by the defendant.

In describing the error that was said to have been committed by the trial court in allowing the defendant to introduce the evidence of absence of other accidents without first laying a proper foundation for such evidence, the Seventh Circuit said that such evidence is admissible only if “the absence of prior accidents took place with respect to machines substantially identical to the one at issue and used in settings and circumstances sufficiently similar to those surrounding the machine at the time of the accident to allow the jury to connect past experience with the accident sued upon.”
The case of *Klonowski v. International Armament Corp.*, 17 F.3d 992 (7th Cir. 1994), while originating in the Western District of Wisconsin, demonstrated the standards for the admission or exclusion of evidence concerning the absence of other accidents in product liability cases throughout the Seventh Circuit.

The *Klonowski* case involved a hunting accident in which the plaintiff was injured when her husband’s shotgun allegedly misfired when he fell with the gun in his hand, causing it to discharge, even though the safety was allegedly engaged. Plaintiff claimed that a post-accident investigation had revealed that the trigger mechanism of the shotgun was defectively designed because the pivot point of the safety mechanism was made of insufficiently hardened steel, thereby allowing the pin to bend, and the safety mechanism to malfunction, when the shotgun was dropped. The defendant’s representative sought to introduce evidence that the defendant-seller of the subject shotgun had imported and sold approximately 50,000 such guns of the same name brand as that which had been sold to the plaintiff’s husband, and had never received a complaint of any of those shotguns having accidentally fired.

The Seventh Circuit upheld the trial court’s exclusion of such evidence on the grounds that the defendant-seller had failed to lay a proper foundation for such evidence since it had not established that the trigger mechanisms of the other guns were, in the words of the court, “substantially identical” to that of the gun in question. *Id.* at 996.

Lastly, *Wallis v. Townsend Vision, Inc.*, 648 F.Supp.2d 1075 (C.D. Ill. 2009), involved a product liability action by a worker in a meat processing plant whose gloved hand was injured when it became caught in a skinning machine. The manufacturer had advised the purchasers of the machine that if their employees were going to wear gloves while operating the skinning machine, they should be of a specific type that the manufacturer recommended. The plaintiff was wearing another type of glove which became caught in the mechanism of the skinning machine and complained that the manufacturer had failed to post a warning on the machine itself about what type of glove to wear while operating it. Plaintiff also alleged that the defendant had likewise failed to adequately warn the users of the machine of the potential danger of working the skinner while wearing gloves of a type different than that which the manufacturer had recommended in the manual that accompanied the machine. The manufacturer sought to introduce evidence of a very low accident frequency history regarding the use of its skinning machines (less than one injury per 4.7 million operations). The defendant’s proposed evidence was based upon its expert’s figures about the number of pork pieces skinned per year, and statistics regarding accidents on skinning machines that the expert had gathered in his capacity as the safety director of a trade association affiliated with the meat processing industry.

The district court began its analysis of whether the low accident frequency evidence would be admitted by citing language from the *Klonowski v. International Armament Corp.* case, *supra*, that the “introduction of negative evidence concerning the lack of . . . similar . . . accidents is generally held to be inadmissible because of its insignificant probative qualities and its tendency to introduce a multitude of collateral issues.” *Id.* 648 F.Supp.2d at 1082.

The court concluded that the statistical evidence proffered by the manufacturer was not bolstered with adequate foundation evidence that
the other skinning machines that had formed the basis for the statistics cited were substantially similar to the one involved in the accident, noting that: “[n]one of those exhibits [which contained the statistical information used in support of the proposed admission of evidence regarding the low accident frequency rate] includes information about how the skinning machine at the center of this case compares to the other skinning machines which are used to skin the approximately 471,800,800 pieces to which [the defendant’s expert] refers.” *Id.* at 1085.

Absent such foundation testimony, the defendant’s evidence about the low accident frequency rate associated with its skinning machines was refused.

**D. Federal Cases Admitting Evidence of the Absence of Other Accidents.**

A decade after the *Walker v. Trico* case discussed in Section C, above, the Seventh Circuit appeared to have taken a somewhat more liberal view toward the admission of evidence regarding the absence of other accidents. In *Schwartz v. Honda Motor Co.*, 710 F.2d 378 (7th Cir. 1983), the plaintiff was driving a small motorcycle manufactured by the defendant when he lost control and was involved in an accident in which his foot became lodged between the hot muffler of the motorcycle and the spokes of the rear wheel, severely injuring his foot. Plaintiff’s theory was that if the motorcycle had rear baskets mounted above the muffler as standard equipment, as opposed to the optional, post-sale add-ons sold by the defendant, the plaintiff could not have gotten his foot caught against the hot muffler. The trial court allowed the manufacturer to introduce evidence that it had sold over 200,000 of the small motorcycles throughout the United States with no knowledge of any claims or incidents like the one at issue in the case. The defendant’s representative conceded that he could not testify whether all of the other 200,000 motorcycles were “substantially identical” (the terminology used in the *Walker v. Trico* case, *supra*) to that owned by the plaintiff, in terms of the presence or absence of rear baskets, but from his observations of such motorcycles that he had seen on the road, most were not so equipped. He also testified that despite certain differences between the plaintiff’s motorcycle and other small motorcycles sold by the defendant, all of the exhaust pipe and rear-wheel designs on the other motorcycles were substantially identical to the one that the plaintiff owned. In reviewing the sufficiency of the foundation for the defendant’s introduction of evidence regarding the absence of other accidents, the Seventh Circuit said that while the foundation “might not be ideal,” the defendant’s expert’s testimony that other models were “substantially identical” in design to that of the plaintiff’s motorcycle “rendered the evidence of absence of similar accidents sufficiently probative to be admitted into evidence.” *Id.* at 382-83.

The court went on to caution, however, that “a witness cannot transform inadmissible evidence into admissible evidence simply by describing the items or situations to be compared as being ‘substantially identical.’ That conclusion must be supported by sufficient evidence . . . .” *Id.* at 383.

The *Schwartz* case was followed nine years later by *Bilski v. Scientific Atlanta*, 964 F.2d 697 (7th Cir. 1992), which involved an injury to a workman while he was cleaning snow and ice off of a large satellite dish. The plaintiff had one foot on a ladder and the other on the satellite dish when his foot slipped from the dish, causing him to fall and sustain a fractured arm. He alleged that the satellite dish was unreasonably dangerous because it came with no instructions on how to clean it, and no warnings stay off of the surface of the dish while doing so.
The satellite dish manufacturer sought to introduce evidence that it had sold approximately 4,000 satellite dishes of the type involved in the plaintiff’s injury with no knowledge of any prior occurrences similar to that of the plaintiff. Given the fixed position of the satellite dish while in use, and the similarity of the dishes sold by the defendant, the court allowed the defendant’s evidence of the absence of prior accidents, saying that “[g]iven the rather limited function of a satellite dish, it is reasonable to assume that a substantial number of the 4,000 dishes were used under circumstances similar to those at [the plaintiff’s place of business where the accident occurred].” Id. at 700.

While not a product liability case itself, Van Houten-Maynard v. ANR Pipeline Co., 1995 U.S. Dist. LEXIS 6751 (N.D. Ill. 1995), cited a number of Illinois product liability decisions, both state and federal, in discussing the court’s ruling that admitted evidence of the absence of other accidents at the location where a truck being driven by the plaintiff’s decedent left the roadway and struck the defendant’s above-ground natural gas pipeline, causing the pipeline to rupture. The ensuing fire engulfed the truck, killing the driver. Citing a string of product liability cases, as well as an acknowledged text authority on evidence law, the court said that generally “the absence of prior accidents may be admissible to show: (1) absence of the defect or other condition alleged, (2) the lack of a causal relationship between the injury and the defect or condition charged, and (3) the non-existence of an underlying dangerous situation.” Id. at p.3, citing McCormick, Evidence, § 200 at pp.850-51.

The court ruled that to the extent that the defendant can meet the foundational requirements at trial, i.e. “establish that the absence of prior accidents at the subject location took place under conditions substantially similar to those surrounding the accident being sued upon,” (Id. at p.5) the defendant would be allowed to introduce evidence of the absence of other accidents at the place where the defendant had located its pipeline.

The afore-cited language demonstrates a conceptual problem with which some courts have struggled in determining whether or not to admit evidence of the absence of other accidents. Under the substantial similarity standard relevant to the admission of evidence concerning the presence of other accidents, it is relatively easy to explain whether or not factual similarity exists between the accident which forms the subject matter of the trial and other occurrences involving the same or similar products. It is much more difficult to assess the substantial similarity between the accident that is the subject of the lawsuit and other accidents that have never occurred. In other words, in the context of the Van Houten-Maynard case it would be difficult, if not impossible, for the jury to assess the defendant’s liability for placing its gas lines where it did based upon the substantial similarity of non-occurrences, i.e. the absence of any prior accidents.

This concern was partially addressed in First American Bank v. Western DuPage Landscaping, Inc., 2005 U.S. Dist. LEXIS 20729 (N.D. Ill. 2005), which involved a vehicle fire in a GM medium-duty truck which had its fuel tank mounted outside of the frame rails. A post-collision fuel fire that killed the plaintiff’s decedent had erupted following a frontal impact between the truck and another vehicle. The manufacturer, GM, sought to introduce evidence that it had sold approximately 100,000 medium-duty trucks, all of which had the fuel tanks mounted outside of the frame rails of the vehicles, and that only 20 incidents of post-collision fuel fires had been reported regarding these vehicles, inferring that the other 99,980
trucks had been incident-free, and therefore reasonably safe in their design. The plaintiff pointed to a number of claimed deficiencies about the proffered non-occurrence evidence, including insufficient gathering, review and analysis of data concerning the trucks that had not been involved in fuel fires as well as mere reliance on the recollection of a retired GM engineer, which was unsupported by any written records concerning the details of post-collision fuel fires. Citing the Schwartz case, the court held that foundation evidence regarding the absence of prior accidents need not be ideal, nor “satisfy some high threshold of data accumulation and review before the requisite foundation can be established,” and that any claimed deficiencies in to the collection and review of the data regarding the occurrence or absence of post-collision truck fires go to the “weight of the testimony, not its admissibility.” Id. at pp.19-21.

III. Conclusion.

Federal trial judges are granted broad discretion in deciding evidentiary matters such as those involving the admission or exclusion of evidence concerning either the presence or absence of other accidents, and their determinations regarding the admissibility of such evidence will not be overturned absent a clear abuse of discretion.

In determining the threshold issue of substantial similarity between the design and use of the product on trial and that of other products designed and sold by the defendant, the courts will focus first on whether commonality exists between the theory of liability espoused by the plaintiff and those asserted in the other claims or cases. The courts will examine the facts of the case at bar and compare them with those of the proffered other occurrences, and the degree of the court’s scrutiny, as well as the height of the bar “substantial similarity,” will depend upon the purpose for which the evidence is proffered. If the plaintiff seeks to introduce evidence of other accidents as substantive proof of the existence of the claimed defect, or its causal connection to the accident, a higher degree of substantial similarity between the case at bar and the other occurrences will be required in order to make the “other accident” evidence admissible. Conversely, if the plaintiff seeks to introduce evidence of other accidents simply to demonstrate notice on the part of the manufacturer of the claimed condition a more relaxed standard for admission of the evidence will apply. Once the balancing test under F.R.E. 403 has been undertaken, and a decision is made to either admit or refuse the evidence of other accidents, the trial court’s determination is granted significant deference, and will rarely be overturned on appeal.

Mr. Beatty has practiced product liability defense for over 30 years and is a member of the State Bars of Illinois, Arizona and Colorado, as well as the bars of numerous federal courts.

William G. Beatty, Esq.
Johnson & Bell, Ltd.
33 West Monroe St., Suite 2700
Chicago, IL  60603
(312) 372-0770
beattyw@jbltd.com

CAUSATION, THE UNCERTAINTY PRINCIPLE &
THE BENIGN EXPERIENCE PRINCIPLE

By: William “Skip” Martin

I. Causation

In order to prevail in a failure to warn case, plaintiff must prove that the inadequate or missing warning was a substantial factor or proximate cause of plaintiff’s injuries. In other words, had there been an adequate warning plaintiff would have altered his conduct, thereby
avoiding the incident which gave rise to the lawsuit.

In many cases, plaintiff's ability to establish causation can be an almost insurmountable hurdle. While the law varies from state to state and from state court to federal court, there are cases that hold that a plaintiff may not testify to what he would have done if there had been an adequate warning because such testimony is self-serving and speculative. *Kloepfer v. Honda Motor Co., Ltd.*, 10th Circuit 1990, 898 F.2d 1952; *Washington v. Department of Transportation*, 5th Circuit 1993, 8 F.3d 296; *Nevada Power Company v. Monshato Company*, 9th Circuit 1995, 891 F. Supp. 1406; *Beatty v. Michelin Tire Corp.*, 2nd Circuit 1999, 1999 U.S. Dist. LEXIS 21970; *Magoffe v. JLG Indus*, 10th Circuit 2008, 2008 U.S. Dist. LEXIS 99080; *Federal Rules of Evidence* § 701. Recognizing the difficulty of plaintiff's ability to prove causation, some states have adopted the "Heeding Presumption." This rebuttable presumption instructs the jury to presume that, had an adequate warning been given, plaintiff would have "heeded" or followed it. In effect, it establishes causation by presuming an adequate warning would have altered plaintiff’s conduct.

But, if the plaintiff is precluded from testifying to what he would have done, plaintiff may use a human factors or warnings expert to provide the needed evidence on the causation issue. When challenged, however, most warnings experts fail to present any competent evidence on this issue.

Human factors experts will usually agree that the following five steps must be part of the process used to create a proper warning for use in the “real world”:

1. Learn about the product;
2. Identify the users of the product;
3. Determine how the product is being used (foreseeable use and foreseeable misuse);
4. Prepare a warning; and
5. Evaluate the effectiveness of the warning.

If asked for his opinions, plaintiff's expert will almost always have one on each of these five categories. Thus, instead of asking the warnings expert for his opinion, he should be required to demonstrate what work he actually performed with regard to each topic. Answers revealing that he (1) only examined the product once or read the Owner's Manual, (2) is unfamiliar with the typical users of the product, (3) has not investigated how the product is used, (4) has not prepared an alternative warning, and (5) has not done anything to determine if an alternate warning would have altered plaintiff’s conduct, will undermine the credibility and admissibility of his opinions.

In other words, asking the proper questions can effectively establish that the human factors/warnings expert has criticized the existing warning or the lack of a warning, but has done little or nothing more.

The failure of plaintiff’s expert to have investigated the five categories in a meaningful way substantially undermines any opinion he has concerning causation and may even be grounds to strike his testimony, especially under the *Daubert* and *Kumo Tire* decisions. But what happens when plaintiff gets beyond summary judgment and the jury is going to hear his failure to warn theory? This is when the doctrines of “Uncertainty” and “Benign Experience” become relevant. Both doctrines deal directly with the causation issue.

For more information, please contact ALFA International at (312) 642-ALFA or visit our website at www.alfainternational.com
II. The Uncertainty Principle

This principle is actually known in human factor circles as the Familiarity Principle, but the author personally believes that a better name is the Uncertainty Principle as it is broader in its concept. By whatever name it is called, this principle is best described by comparing the following examples:

Scenario 1: A person opens a box containing a new hair dryer. Because of that person’s familiarity with hair dryers, he immediately plugs it in and begins to use it. No attempt is made to read any warnings or instructions because of that familiarity. There is no uncertainty in the mind of the user about how to use the product.

Scenario 2: A person opens a container of toxic weed killer. Because of the person’s unfamiliarity with that product, he is more apt to review the written materials which contain warnings or instructions. The uncertainty of how to handle that material makes the person more apt to look for information.

“Uncertainty” is a better term because it can describe the situation where a plaintiff does not seek information even when that person is not familiar with the product. For example, two novice ATV riders are riding their vehicles over very rough terrain. When approaching a steep hill the first rider is able to climb it while the second rider becomes stuck at the bottom. A decision is made literally within a matter of seconds to attach a tow strap between the two ATVs and have the ATV on top of the hill tow the second ATV up the hill. The method of attaching the tow strap to the ATV on top of the hill causes the ATV to flip over, paralyzing the plaintiff. Since the two individuals are novice ATV riders, they are not familiar with the product, but there was no uncertainty in their actions, having taken just seconds to make their decision. Applying the human factors principle of “uncertainty,” a warning would not have altered the conduct of the plaintiff; therefore, an inadequate warning or the absence of a warning was not a cause of plaintiff’s injuries.

III. The Benign Experience Principle

When a person’s previous conduct or experience with a set of circumstances has not resulted in an incident causing injury, the Benign Experience Principle suggests that a subsequent warning would be unlikely to alter plaintiff’s conduct. The concept of Benign Experience is best illustrated by the following example:

For six months, a mother allows her young child to stand in the grocery cart when shopping at the grocery store. The child never falls out. Because the mother’s prior history of letting her child stand in the cart has not resulted in any incident, her benign experience with this situation would likely cause her to ignore, or at least not follow, a subsequent written warning which states that children should not stand in a grocery cart. Hence, the failure to provide an adequate warning would not be a cause of the child’s injury; under the doctrine of Benign Experience such a warning would likely not have altered the mother’s conduct.

IV. Conclusion

Generally speaking, “familiarity” or “uncertainty” generally applies to a situation involving a product, while “benign experience” generally applies to a person's conduct when exposed to a set of circumstances. These two concepts center on the conduct of the plaintiff as opposed to the speculative and self-serving testimony that a plaintiff would like to provide. It is, therefore, important when deposing the plaintiff in a failure to warn case to solicit factual testimony that supports the application of
the Uncertainty Principle or the Benign Experience Principle. While these two concepts are really just “plain old common sense,” past experience teaches that a jury is interested in hearing expert human factor testimony about these issues. It is also easy for a jury to relate these human factor concepts to their own, everyday experience. The result will hopefully be that, whether by judicial ruling or by jury finding, plaintiff is unable to demonstrate that an “adequate warning” would have altered his or her conduct.

The author thanks Dr. Paul Frantz, Dr. Timothy Rhoades and Steve Hall at Applied Safety and Ergonomics for introducing him to these concepts over the years.

William “Skip” Martin
Haight Brown & Bonesteel LLP
555 South Flower Street #45
Los Angeles, California 90071
(213) 542-8000
Wmartin@hbblaw.com

HOW MUCH COMPLIANCE IS ENOUGH UNDER THE FOREIGN CORRUPT PRACTICE ACT?

By: Colleen Murnane and Lindsey Carr Siegler

As product manufacturers doing business abroad are acutely aware, the United States' enforcement of the Foreign Corrupt Practices Act (FCPA) has recently reached unprecedented levels. In a nutshell, the FCPA's anti-bribery provision, 15 U.S.C. §§ 78dd-1, et seq., prohibits a company from bribing a foreign official to obtain or retain business. Its "books and records" provision, 15 U.S.C. § 78m et seq., requires companies whose securities are listed in the United States to "(a) make and keep books and records that accurately and fairly reflect the transactions of the corporation and (b) devise and maintain an adequate system of internal accounting controls." Dept. of Justice, "Foreign Corrupt Practices Act, An Overview." While the concepts are simple, what businesses have to do to comply with the statute is not.

In November 2011, Assistant Attorney General Lanny Breuer announced that in 2012 the DOJ hopes to “release detailed new guidance on the [FCPA's] criminal and civil enforcement provisions.” Over the past several months, government officials have been engaged in discussions with both businesses and public interest groups, all of whom are concerned about the content of the guidance. As recently as last April, members of the DOJ, SEC and Department of Commerce met with the U.S. Chamber of Commerce’s Institute for Legal Reform, along with representatives from several trade groups.

In the meantime, as the business community eagerly awaits this guidance, and because there is little case law in this area, practitioners must look to actions and decisions of federal enforcement agencies – specifically, the release of Deferred Prosecution Agreements (DPAs), Non-Prosecution Agreements (NPAs) and the DOJ’s Opinion Releases – to create and maintain effective compliance programs and ensure employees are adhering to the law.

I. Developments in the Compliance Arena

In the January 2012 Special Edition of Product Liability Perspectives, we outlined the compliance framework that has begun to evolve from the SEC’s "Cooperation Initiative" launched in 2010 and the compliance procedures the Department of Justice ordered in the DPAs with Panalpina and Johnson & Johnson. While the DOJ and SEC have still not crafted bright line parameters for "enforcement proof" compliance programs, they continue to provide glimpses of "dos" and "don'ts" in their DPAs and Non Prosecution Agreements with other companies.
Most recently, Data Systems & Solutions LLC (DS&S) of Virginia settled with the DOJ in June 2012 to pay a criminal penalty of $8.82 million and entered into a two-year DPA to resolve FCPA offenses. DS&S, which is based in Virginia and provides design, installation, maintenance and other services at nuclear and fossil fuel power plants, bribed officials employed by a state-owned nuclear power plant in Lithuania, to win contracts to perform services for the plant. According to the DOJ, the bribes were “funneled through several subcontractors located in the United States and abroad.” DS&S has since fired the individuals responsible for the bribes and put in place additional FCPA training and a more stringent due diligence protocol for agents and subcontractors.

Most notable about the DS&S case is the Corporate Compliance Program set forth in Schedule C to the DPA. In addition to the standard items in every DPA since Panalpina, the DS&S program includes two additional requirements specifically aimed at mergers and acquisitions:

13. DS&S will develop and implement policies and procedures for mergers and acquisitions requiring that DS&S conduct appropriate risk-based due diligence on potential new business entities, including appropriate FCPA and anti-corruption due diligence by legal, accounting, and compliance personnel. If DS&S discovers any corrupt payments or inadequate internal controls as part of its due diligence of newly acquired entities or entities merged with DS&S, it shall report such conduct to the Department as required in Appendix B of this Agreement.

14. DS&S will ensure that DS&S’s policies and procedures regarding the anticorruption laws apply as quickly as is practicable to newly acquired businesses or entities merged with DS&S and will promptly:

   a. Train directors, officers, employees, agents, consultants, representatives, distributors, joint venture partners, and relevant employees thereof, who present corruption risk to DS&S, on the anti-corruption laws and DS&S's policies and procedures regarding anticorruption laws.

   b. Conduct an FCPA-specific audit of all newly acquired or merged businesses as quickly as practicable.

This language provides specific, concrete guidance to practitioners whose clients are engaged in mergers and acquisitions. Given the potential FCPA liability for such transactions, companies can and should take these steps, both pre- and post-acquisition to gather all pertinent information and minimize risks.

II. Morgan Stanley: The Benefits of Proactive Compliance

The government’s recent dealings with Morgan Stanley and its rogue employee who pled guilty to violating the FCPA in activities involving a Chinese official demonstrate that effective, proactive compliance can actually serve as a shield against criminal and civil prosecution.

On April 25, 2012, Garth R. Peterson, a managing director in Morgan Stanley’s real estate investment and fund advisory business in China, pled guilty to conspiring to evade the FCPA’s internal accounting controls. He faces
up to five years in prison and a fine of up to $250,000. The SEC also charged Peterson for FCPA offenses and violations of investment advisor rules. According to the government, Peterson “had a personal friendship and secret business relationship” with a Chinese state-owned entity “with influence over the success of Morgan Stanley’s real estate business in Shanghai.” The SEC alleges that Peterson secretly arranged to have at least $1.8 million – disguised as finder’s fees – paid to himself and a Chinese official.

Despite Peterson’s conduct, both the DOJ and SEC announced that, in light of its strong compliance program, they would not prosecute or charge his employer, Morgan Stanley. In its release, the DOJ said: “After considering all the available facts and circumstances, including that Morgan Stanley constructed and maintained a system of internal controls, which provided reasonable assurances that its employees were not bribing government officials, the Department of Justice declined to bring any enforcement action against Morgan Stanley related to Peterson’s conduct. The company voluntarily disclosed this matter and has cooperated throughout the department’s investigation.”

Exactly what was so noteworthy about Morgan Stanley’s conduct? In 2008, upon learning of Peterson’s conduct, Morgan Stanley terminated Peterson, retained counsel and conducted a nine-month internal investigation. It also voluntarily disclosed its findings to the SEC and DOJ, notified shareholders of the potential problems, took steps to reaffirm and enhance its preexisting compliance program, and cooperated with the government’s investigation, which lasted for several years. Ultimately, Morgan Stanley was able to demonstrate: (1) it had a pre-existing, comprehensive and effective compliance program; (2) Peterson, a single rogue employee, acted on his own, in direct defiance of those policies; and (3) the corporate entity did not profit from the bribes.

The government not only announced its decision not to prosecute, but it also publicly commended Morgan Stanley’s compliance program “which provided reasonable assurances that its employees were not bribing government officials.” The DOJ specifically noted that Morgan Stanley regularly updated its policies, conducted frequent training, and maintained robust due diligence and transaction-monitoring procedures. In addition, while employing more than 500 dedicated compliance officers, Morgan Stanley “trained Peterson on anti-corruption policies and the FCPA at least seven times” and distributed to him written materials describing compliance with the FCPA. Between 2000 and 2008, it held “at least 54 training programs for various groups of Asia-based employees on anti-corruption policies, including the FCPA.” The government also found that “a Morgan Stanley compliance officer specifically informed Peterson in 2004 that employees of Yongye, a Chinese state-owned entity, were government officials for purposes of the FCPA. Peterson also received at least 35 FCPA compliance reminders from Morgan Stanley, but nonetheless committed the FCPA violations.”

III. Lessons for Clients:

In stark contrast to Morgan Stanley, there are now dozens of companies like Panalpina, Johnson and Johnson, and DS&S, operating under DPAs which require stronger, more effective compliance programs. Wal-Mart will likely be next. Only in response to claims by the New York Times that Wal-Mart executives in Mexico paid more than $24 million in bribes to speed construction of new stores, did the world’s largest retailer finally create a global compliance officer. According to Wal-Mart, the officer will be based at the Arkansas headquarters and will oversee compliance directors in five global
A thorough, proactive compliance program provides companies with significant benefits, both external and internal. As a result of Morgan Stanley, it is now clear that the government expressly considers whether a company maintains a strong compliance program in determining whether to bring criminal charges for violations of the FCPA. In addition, effective compliance programs:

- Allow companies to minimize the impact of current FCPA violations by bringing them to light as soon as reasonably possible;
- Assist companies in mitigating the damages resulting from FCPA violations;
- Enable companies to deter and prevent future FCPA violations; and
- Encourage internal communication and collaboration by requiring that employees are educated with respect to relevant risks.

The absence of bright line rules from the government on compliance programs leaves manufacturers and other businesses doing business abroad with questions about how much compliance activity is enough. Although the forthcoming guidance is likely to answer some questions, there will never be a "one size fits all" program that is "enforcement-proof." In fact, even the U.S. Federal Sentencing Guidelines recognize that although "small organizations shall demonstrate the same degree of commitment to ethical conduct and compliance with the law as large organizations,"

they may do so with “less formality and fewer resources than would be expected of large organizations.” 2011 U.S. Federal Sentencing Guidelines, Chapter 8, Part B, Effective Compliance and Ethics Program, Commentary Application Note 2 (c) (iii): The type and depth of an effective compliance program will vary based upon the size of a company, its resources, and the locations in which it or its agents or intermediaries do business, among other things.

One thing that is clear: Companies of all sizes must develop, implement, enforce and update their compliance programs. As former U.S. Attorney General Alberto Gonzalez recently predicted: “The circumstances suggest that, at least in the near term, the focus [on FCPA enforcement] will shift from seeking to convict individuals to resolving matters by way of negotiated resolutions with corporations. . . . Corporations engaged in international commerce would be wise to take heed of these developments, and understand that they will be the ones in the line of fire when the government refocuses its sights.” Alberto Gonzalez, Richard Westling, and William Athanas, “Forecasting the Future of FCPA Enforcement; see also From the Experts: How Recent Setbacks Will Affect the Government’s Approach to Foreign Bribery Prosecutions” Law.com, Corporate Counsel, May 9, 2012. A manufacturer doing business abroad with no compliance program in place will face stiff penalties and little leniency if it runs afoul of the FCPA.

Colleen C. Murnane, Esq.
Lindsey Carr Siegler, Esq.
Frantz Ward LLP
2500 Key Tower
127 Public Square
Cleveland, Ohio 44114
(216) 515-1660
cmurnane@frantzward.com
lcarrsiegler@frantzward.com
PRODUCT LIABILITY CASE EVALUATION AND TRIAL STRATEGY CONSIDERATIONS

By: Charles P. Rantis

The process of case evaluation and formulation of trial strategy and tactics is ongoing throughout the life of a product liability lawsuit. As defense counsel, a great deal of time is spent assessing the significance of evidence obtained during the course of oral fact discovery and oral expert discovery. There are a multitude of factors which defense counsel must analyze and consider when providing the client with the final comprehensive evaluation and assessment of the case in advance of trial. This article provides a framework for defense counsel’s evaluation of the potential jury verdict exposure and a practical discussion of several trial strategies which impact the evaluation of the potential jury verdict exposure:

1. Plaintiff’s contributory fault.
2. The sole proximate cause defense.
3. Admitting liability and defending the case on damages only.

I. Framework for Case Evaluation for Product Liability Trial

Well in advance of trial, defense counsel should prepare a comprehensive evaluation and analysis of the product liability case. A clear and concise analysis of the strengths and weaknesses of the plaintiff’s theories of liability as well as the strengths and weaknesses of the theories of defense should be addressed in the evaluation. The evaluation and assessment of the potential jury verdict exposure is a two-fold methodology: first, a mathematical methodology must be employed as part of defense counsel’s comprehensive analysis. The mathematical methodology provides a road map as to how defense counsel estimated the exposure and arrived at the proposed figures. The mathematical methodology is as follows:

1. Gross verdict potential – Before any consideration of liability is made, what is the injury or death worth given the plaintiff’s demographic data and the particular venue.

2. Net verdict potential – The gross verdict potential is multiplied by the factor of 100% minus the percentage of plaintiff’s comparative fault to ascertain the net verdict potential.

3. Likelihood of defense verdict – What are the percentage chances of the defense winning the case based on the evidence and strengths and weaknesses of the contentions of the parties.

4. Relative culpability of the parties – In a multiple defendant product liability lawsuit, the client will want to know what its specific percentage of the exposure is compared to the other defendants and the third-party defendant.

5. Settlement value – The ranges obtained from the net verdict potential and the likelihood of a defense verdict serve as the lower limit and upper limit of the settlement range using the mathematical methodology.

However, there is a second aspect to this analysis. Other intangible factors must be considered as part of the evaluation of the potential verdict exposure and the settlement recommendations, for instance:

1. Analysis of the applicable substantive law.
2. Admissibility of certain evidence.
3. Research of similar cases (verdicts and settlements).

4. Jury pool in a given venue.

5. Publicity surrounding accident or lawsuit.

6. Is there any bias against the defendant (e.g., utility companies, foreign manufacturers, insurance companies)?

7. Whether the plaintiff or the estate will evoke sympathy?

8. Whether plaintiff or defendant are likeable and have jury appeal?

9. Is the plaintiff a malingerer?

10. Facts of occurrence – do the facts and circumstances of the accident defy ordinary common sense?

11. Relative strengths and weaknesses of expert witnesses.

12. Relative strengths and weaknesses of plaintiff’s theories of liability.

13. Relative strengths and weaknesses of your theories of defense.


15. Political climate and current events.


There are a multitude of factors which must be considered but are not quantifiable. Consideration of these intangible factors are just as important as the mathematical methodology.

In addition to utilization of the mathematical methodology and consideration of the intangible factors of a given case, formulation of trial strategy and tactics will also impact defense counsel’s comprehensive evaluation and assessment of the case in preparation for trial.

II. Trial Strategy: Defense Based on Plaintiff’s Contributory Fault

The extent to which plaintiff’s conduct and interaction with the product at issue may have contributed to or caused the accident is a significant liability issue in most product liability cases. The facts and circumstances in which a plaintiff’s conduct may have caused or contributed to a given accident usually includes a list of the following:

1. Failure to follow warnings and instructions for safe use in operation recommended by the manufacturer.

2. Failure to utilize or removal of safety devices recommended by the manufacturer.

3. Failure to follow safety procedures recommended by the manufacturer or the plaintiff’s employer.

4. Use of the product for a purpose not intended by nor reasonably foreseen by the manufacturer.

5. Use of the product to perform a function different from the function intended by the manufacturer.

6. Inadvertence, carelessness, or inattention in the plaintiff’s use of the product.

7. Substantial alteration in the condition of the product by the plaintiff or some
other third-party.

The evidence used to establish a particular defense based on the plaintiff’s conduct and the nomenclature used to describe that conduct is of critical importance. Some defenses based on plaintiff’s culpable conduct do not apply to all theories of liability. In the Illinois Supreme Court case of Simpson v. Gen. Motors Corp., 108 Ill. 2d 146, 483 N.E. 2d 1 (1985), the Court held that plaintiff’s contributory negligence is not a defense when such negligence consists merely in a failure to discover the defect in the product or to guard against the possibility of its existence. Id. at 152. Further, the court stated that a consumer’s unobservant, inattentive, ignorant, or awkward failure to discover or guard against a defect should not be considered as a damage reducing factor. Id. After Simpson v. General Motors, only assumption of the risk of injury and unforeseeable misuse are valid damage reducing factors in a product liability action based on strict liability in tort. Id.

In 1986, the Illinois Legislature enacted modified comparative fault in tort actions. See 735 Ill. Comp. Stat. 5/2-1116 (1986). The modified comparative fault statute provides that plaintiff’s recovery is reduced by the plaintiff’s contributory fault unless the plaintiff is more than 50% at fault for causing his own damages. If the plaintiff’s fault is more than 50%, then judgment is entered in favor of the defendant. Id.

A. Assumption of the risk

To establish the defense of assumption of the risk of injury in a product liability action based on strict liability in tort, defense counsel must establish the following:

1. That the plaintiff knew of the danger and appreciated the risk of injury presented by the product.

2. That the plaintiff voluntarily and unreasonably proceeded to encounter the known danger presented by the product.

3. That the plaintiff’s decision to use the product was unreasonable.

(See Cleveringa v. J.I. Case Co., 230 Ill.App.3d 831, 595 N.E. 2d 1193, 1208 (1st Dist. 1992). Given that the test for assumption of the risk of injury is subjective, some plaintiffs will attempt to overcome the defense by asserting that they had no knowledge of the defect or had not discovered the exact defect presented by the product. However, determination of whether plaintiff assumed the risk of injury is not made solely based on the plaintiff’s own self-serving statements, but rather an assessment of all of the facts including the plaintiff’s age, experience, knowledge, and understanding in addition to the obviousness of the defect and the danger it posed. If there is some evidence from which a jury might infer the plaintiff’s assumption of the risk, then it is within the province of the jury to determine that issue. 595 N.E. 2d at 1208-1209. See also, Boland v. Kawasaki Motors Mfg. Corp., 309 Ill.App.3d 645, 722 N.E. 2d 1234, 1241-1242 (4th Dist. 2000).

B. Unforeseeable misuse

The second recognized affirmative defense which serves as a damage reducing factor against any adverse verdict is unforeseeable misuse. It must be emphasized that foreseeable misuse is not a defense or damage reducing factor in a product liability action based on strict liability in tort. Misuse of a product occurs when it is used for a purpose neither intended nor reasonably foreseeable by the defendant based on an objective standard. Further, the manner in which the particular purpose was being accomplished is not an issue under a

There is little doubt that the affirmative defense of unforeseeable misuse is seldom discussed in Illinois appellate decisions because if the plaintiff is misusing the product, he is likely using the product in an unintended manner, not for an unintended purpose. Likewise, given the fact that assumption of the risk requires proof that the plaintiff had actual knowledge of the danger in the product, it may be difficult to establish because a plaintiff will seldom admit to having actual knowledge of a particular danger.

In the vast majority of cases with which Johnson & Bell has defended manufacturers and others in the chain of distribution, plaintiffs have moved *in limine* to exclude any evidence of plaintiff’s assumption of the risk of injury and contributory negligence. Further, a plaintiff may be able to rebut the assumption of the risk argument by asserting that his employer left him no alternative but to accept the risk posed by his employment in order to exercise and protect the plaintiff’s right and privilege to perform his job. See *Varilek v. Mitchell Eng’g Co.*, 200 Ill.App.3d 649, 558 N.E.2d 365, 374-75 (1st Dist. 1990). Therefore, it may be difficult to persuade a jury that a plaintiff unreasonably assumed the risk of injury which may have been a requirement of his job. If there are blue-collar jurors, then these working class jurors may be disinclined to accept the notion that a plaintiff who was injured in the course of employment assumed the risk of injury.

Another strategic problem presented by Illinois law is a jury instruction which the court must give when the plaintiff’s contributory fault is at issue. Section 2-1107.1 of the Illinois Code of Civil Procedure requires that the court notify the jury of the effect of its determination of apportionment of contributory fault. Specifically, the jury is told that if it finds that the contributory fault of the plaintiff is more than 50% of the proximate cause of the damages for which recovery is sought, then the defendant shall be found not liable. See 735 Ill. Comp. Stat. 5/2-1107.1 (“Jury Instruction in Tort Actions”).

The benefit of focusing the theory of defense based on plaintiff’s conduct is to highlight for the jury that the plaintiff’s use of and interaction with the product was unsafe, but the product was reasonably safe. Proof of the plaintiff’s conduct characterized as assumption of the risk of injury or unforeseeable misuse in strict liability in tort cases or contributory negligence in negligence based product liability actions forces the jury to evaluate the condition of the product within the context of the plaintiff’s interaction with the product. Obtaining admissions from the plaintiff at the plaintiff’s discovery deposition is of critical importance in establishing sufficient evidence to satisfy the subjective test of assumption of the risk of injury.

On the other hand, the difficulty with the trial strategy focused on the affirmative defenses of assumption of the risk or even unforeseeable misuse is that jurors are provided with the opportunity to reach a compromise verdict. If the plaintiff has some jury appeal or is otherwise sympathetic, jurors may find in favor of the plaintiff and award a significant amount of damages, but reduce those damages by some percentage at or below 50%.

### III. Trial Strategy: Withdrawal of Affirmative Defenses and Focus on Sole Proximate Cause.

Irrespective of whether the plaintiff’s conduct is characterized as assumption of the risk of injury or unforeseeable misuse or even contributory negligence, the defendant
manufacturer may assert that the sole proximate cause of the plaintiff’s accident was the plaintiff’s own conduct or the plaintiff’s employer’s conduct.

A. Plaintiff’s conduct or plaintiff’s employer’s conduct as sole proximate cause of accident

The conduct of the plaintiff is relevant to the issue of proximate cause in a product liability action based on either strict liability in tort or negligence. In the case of Korando v. Uniroyal Goodrich Tire Co., 159 Ill.2d 335, 637 N.E.2d 1020 (1994), the plaintiff’s decedents were killed in a one car motor vehicle accident after the tread and top belt of the right rear steel belted radial tire separated from the belt. The decedents’ automobile skidded and went off the roadway, where it collided with a tree, vaulted into the air, and landed upside down in a creek. The plaintiff’s decedents died as a result of the injuries sustained in the accident.

The sole theory of recovery was based on strict liability in tort. The defendant manufacturer denied the plaintiff’s allegations and raised three (3) affirmative defenses: misuse, assumption of the risk of injury, and contributory negligence. Subsequently, the defendant tire manufacturer withdrew its affirmative defenses. As such, these defenses were not presented to the jury for consideration. However, the tire manufacturer through expert testimony presented evidence of the driver’s speed, braking, and steering as the proximate cause of the accident. One of the issues on appeal was whether evidence of the decedent driver’s conduct was admissible in a strict liability in tort action without being pled as an affirmative defense. Id. at 1025. The Korando court held that evidence of plaintiff’s conduct is directly relative to the issue of proximate cause. The Korando court concluded:

In this case, the defendant’s evidence with respect to [the decedent driver’s] speed, braking and steering relates to the defendant’s denial that its tire’s alleged defect was the proximate cause of the injuries suffered by the plaintiff’s decedents. We find that the conduct of a plaintiff or a third party is relevant to the issue of proximate cause in a strict products liability case. Although a plaintiff’s negligence is generally not an issue in a strict products liability case, evidence relating to the plaintiff’s conduct is admissible to establish a defendant’s theory of defense that the product was not the proximate cause of the plaintiff’s injuries. Id. at 1025.

The Korando court further stated that evidence of the decedent driver’s speed, braking, steering, and the substantial alteration of the tire were all relevant to the defendant’s denial of the plaintiff’s claim, and therefore properly admitted. Id. at 1026.

B. Third person’s conduct need not be negligent conduct

It is important to note that a defense based on sole proximate cause does not require that a defendant demonstrate that the third person’s conduct was negligent or fault-based. See McDonnell v. McPartlin, 192 Ill.2d 505, 736 N.E. 2d 1074 (2000). The Illinois Supreme Court in McDonnell stated that the sole proximate cause jury instruction does not require that a defendant demonstrate that a third person’s conduct was negligent in addition to
The benefit of the sole proximate cause otherwise known as the “empty chair defense” is clear: the jury is not provided with the opportunity to find in favor of the plaintiff but still reduce the verdict by some percentage of fault. The affirmative defenses of the assumption of the risk of injury and unforeseeable misuse are not complete bars to plaintiff’s recovery. They are damage reducing factors only.

The sole proximate cause defense is an all-or-nothing proposition. The defendant manufacturer must successfully argue that another entity’s conduct was the sole cause of the plaintiff’s injuries. For example, Johnson & Bell successfully defended a case for a fire equipment manufacturer based on the “empty chair defense”. The plaintiff was severely injured in an accident in which the plaintiff’s conduct was neither a cause nor contributing factor to the accident. Johnson & Bell argued at trial that the sole proximate cause of the accident was the plaintiff’s employer’s failure to follow warnings and instructions provided with the fire equipment. Further, Johnson & Bell introduced post-accident remedial measures of the non-party employer to demonstrate that the manufacturer’s conduct was not a proximate cause of the plaintiff’s accident. (For a discussion of post-accident remedial measures, see Zavala v. St. Regis Paper Co., 256 Ill. App.3d 736, 628 N.E. 2d 405 (1st Dist. 1993); McLaughlin v. Rush-Presbyterian St. Luke’s Med. Ctr., 68 Ill. App.3d 546, 386 N.E. 2d 334 (1st Dist. 1979).

In another case successfully defended by Johnson & Bell, a ladder manufacturer received a defense verdict in a case involving a severely brain injured plaintiff who was rendered an incomplete quadriplegic and confined to a long term nursing facility following the accident. The plaintiff was determined to be incompetent to testify. There was no evidence at all of any subjective knowledge on the part of the plaintiff such that he knew of a specific prior defect, understood the defect, and appreciated the risk of injury from that defect but used the product any way. No such evidence existed in the case. Therefore, it would have been an ill-advised trial strategy to attempt to demonstrate subjective knowledge of the defect on the part of the plaintiff at trial. The defense decided to withdraw its affirmative defenses of assumption of the risk of injury and unforeseeable misuse. The defendant ladder manufacturer argued that the sole proximate cause of the accident was the plaintiff’s conduct. The jury rendered its verdict in favor of Johnson & Bell’s client, the defendant ladder manufacturer.

d. IPI 12.04 and IPI 12.05

In Illinois, when proceeding on a theory of defense based on sole proximate cause, defense counsel will tender Illinois Pattern Jury Instruction (IPI) 12.04 (“Concurrent Negligence Other Than Defendant’s”). The long form version of IPI 12.04 applies where a plaintiff’s injury is caused by some person other than the defendant. A similar version of this jury instruction is at IPI 12.05 (“Negligence – Intervention Of Outside Agency”) which applies where a plaintiff’s injury is caused by something other than the conduct of the defendant. (See IPI Civil 3d nos. 12.04 and 12.05).

It is important to note that in order to be successful, the defendant manufacturer must contend that another person’s or entity’s conduct...
was the sole cause of the injuries. It is insufficient to argue that another person’s or entity’s conduct combined with that of the defendants in order to cause the injury. The sole proximate cause defense will fail under these circumstances. Further, in all likelihood, the court would likely reject any tender by the defense of IPI 12.04.

IV. Trial Strategy: Admitting Liability.

In the previous sections of this article, the discussion focused on enhancing a defendant’s likelihood of success by focusing on liability factors. On the other hand, there are cases with unfavorable facts and totally lacking in credible theories of defense. Under those circumstances, contesting liability at trial would expose the defendant to a risk of an aggravated verdict.

Generally speaking, an aggravated verdict could be the result of one or more of the following factors:

1. Lack of credible evidence and liability arguments.
2. Conduct of the defendants.
3. Conduct of counsel.
4. Aggravating factors inherent in the facts of a given case.

It is well-established under Illinois law that once a defendant admits liability, evidence of facts relating to issues of liability are irrelevant. In Bullard v. Barnes, 102 Ill. 2d 505, 468 N.E. 2d 1228 (1984), the Illinois Supreme Court held that once liability is admitted, facts of the accident are irrelevant. If a defendant admits liability, then liability matters are not in controversy. Moreover, a defendant’s liability is not relevant to the issue of damages when defendant admits fault and proximate cause for the accident. The facts and circumstances of an accident should not be presented to the jury when liability is admitted. See Pleasance v. City of Chicago, 396 Ill. App.3d 821, 920 N.E.2d 572 (1st Dist. 2009). Finally, the issue of when the defendant admits liability is irrelevant to the consideration before the jury which is what represents fair and reasonable compensation to be awarded to the plaintiff. See Balzekas v. Looking Elk, 254 Ill. App.3d 527, 627 N.E.2d 84 (1st Dist. 1993).

The strategy of admitting liability focuses the case on what is fair and reasonable compensation. Admitting liability will maximize the defendant’s credibility with the jury. In addition, the defense should attempt to portray the plaintiff’s attorney or the plaintiff as greedy in an admitted liability case.

When the credibility of the defendant and defense counsel is enhanced by admitting liability (both negligence and proximate cause), there is a great likelihood that the jury will be receptive to the defense arguments. In contrast, litigating liability issues with underlying bad facts with little to no likelihood of a defense verdict will likely cause the jurors to view all defense arguments with skepticism. Liability factors tend to drive up damages and damages tend to drive up liability factors. Unless the defendant admits liability under those circumstances, the recipe for disaster in the form of an aggravated verdict is all but certain.

The ultimate goal of admitting liability is to minimize or even eliminate the likelihood of an excess verdict and to bring the jury verdict within or below a certain range.

In an admitted liability trial, the plaintiff will attempt to exploit the sympathy factor with the jury. In contrast, the defense must make every effort to minimize the sympathy factor by exercising common sense and humility in front
of the jury. The defense must present damages experts who will provide a realistic and more “down to earth” presentation of the damages compared to plaintiff’s stratospheric presentation of damages.

V. Conclusion

Case evaluation and assessment begins with the initial investigation and analysis of the case and continues through trial preparation. Eliciting admissions from the plaintiff at his deposition is required to establish the evidence necessary to support the affirmative defenses of assumption of the risk and, to the extent applicable, unforeseeable misuse, in a product liability action based on strict liability in tort. In cases where such evidence is lacking, withdrawal of affirmative defenses and proceeding on a sole proximate cause defense can be very successful. On the other hand, without credible liability defenses, admitting liability – as difficult as it may be – will likely minimize or eliminate the likelihood of a verdict in the upper range of the gross jury verdict potential of a case. Defense counsel should provide a realistic case evaluation and assessment of the exposure as well as the likelihood of success well in advance of trial. The foundation for a successful trial strategy is often the result of careful, deliberate, and insightful analysis of the case.

Mr. Rantis is a shareholder at the Chicago, IL ALFA firm of Johnson & Bell, Ltd. And concentrates his practice in product liability and construction negligence. He would like to thank law student Katherine Lyons for her research in the preparation of this article.

Charles P. Rantis, Esq.
Johnson & Bell, Ltd.
33 West Monroe St., Suite 2700
Chicago, IL  60603
(312) 984-0231
rantisc@jbltd.com

In a 4-3 decision, the Alabama Supreme Court reversed a trial court’s grant of judgment as a matter of law in favor of defendants on plaintiffs’ wantonness claim in a products liability action. Plaintiffs sued manufacturer, distributor, and seller of a two-passenger, off-road utility vehicle based on injuries suffered in a rollover that occurred while one of the plaintiffs was driving the vehicle. Plaintiffs asserted a claim under the Alabama Extended Manufacturer’s Liability Doctrine (“AEMLD”) and claims for negligence, wantonness, and breach-of-warranty. At the close of the evidence, plaintiffs withdrew their breach-of-warranty claim and the court granted defendants’ motion for judgment as a matter of law as to the negligence and wantonness claims. The jury returned a verdict in favor of defendants as to the AEMLD claim. Plaintiffs appealed the judgment with respect to the negligence and wantonness claims. The Supreme Court upheld the judgment as to the negligence claim, but reversed the judgment as to the wantonness claim. Stating that knowledge of the defendant is the sine qua non of wantonness, the Court determined that substantial evidence demonstrated defendants had specific knowledge of the risk of injuries attendant with rollovers in the vehicle and that defendants wantonly failed to address the risk in a timely matter.

Summer Austin Davis
Bradley Arant Boult & Cummings LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2119
Telephone  (205) 521-8916
Email  sdavis@babc.com


In a 4-3 decision, the Alabama Supreme Court reversed a trial court’s grant of judgment as a matter of law in favor of defendants on plaintiffs’ wantonness claim in a products liability action. Plaintiffs sued manufacturer, distributor, and seller of a two-passenger, off-road utility vehicle based on injuries suffered in a rollover that occurred while one of the plaintiffs was driving the vehicle. Plaintiffs asserted a claim under the Alabama Extended Manufacturer’s Liability Doctrine (“AEMLD”) and claims for negligence, wantonness, and breach-of-warranty. At the close of the evidence, plaintiffs withdrew their breach-of-warranty claim and the court granted defendants’ motion for judgment as a matter of law as to the negligence and wantonness claims. The jury returned a verdict in favor of defendants as to the AEMLD claim. Plaintiffs appealed the judgment with respect to the negligence and wantonness claims. The Supreme Court upheld the judgment as to the negligence claim, but reversed the judgment as to the wantonness claim. Stating that knowledge of the defendant is the sine qua non of wantonness, the Court determined that substantial evidence demonstrated defendants had specific knowledge of the risk of injuries attendant with rollovers in the vehicle and that defendants wantonly failed to address the risk in a timely matter.

Summer Austin Davis
Bradley Arant Boult & Cummings LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2119
Telephone  (205) 521-8916
Email  sdavis@babc.com

For more information, please contact ALFA International at (312) 642-ALFA or visit our website at www.alfainternational.com
of commerce is consistent with the Due Process Clause, and no showing of additional conduct by
the defendant is required. Id. at 116-17. Justice O’Connor, also writing for four Justices,
disagreed and concluded that the mere placement of a product into the stream of
commerce is insufficient. Id. at 112.

Nearly twenty-five years later in Nicastro, a
four Justice plurality authored by Justice Kennedy rejected Justice Brennan’s
“foreseeability/stream-of-commerce” test in Asahi, concluding that a foreign defendant must
“purposefully avail” itself of the forum state in a
way that goes beyond simply placing its
products into the stream of commerce. Nicastro,
131 S. Ct. at 2788-90. In the plurality’s view, a
court can exercise jurisdiction only based on
evidence that the out-of-state manufacturer had
“targeted” the forum state in some way. Id. at
2788.

In a dissenting opinion authored by Justice
Ginsburg, three Justices concluded that when the
foreign manufacturer “dealt with the United
States as a single market” and sought to have its
products distributed throughout the nation, due
process did not prevent the state where the injury
had occurred from holding the manufacturer accountable. Id. at 2801 (Ginsburg, J.,
dissenting).

Two Justices – Justices Breyer and Alito –
would have decided Nicastro on a narrower
ground. They reasoned that the Court’s existing
decisions stand for the proposition that “a single
sale of a product in a State does not constitute an
adequate basis for asserting jurisdiction over an
out-of-state defendant, even if that defendant
places his goods in the stream of commerce,
fully aware (and hoping) that such a sale will
take place.” Id. at 2792 (Breyer, J., concurring
in the judgment). Because the record in
Nicastro revealed that only one product
manufactured by the defendant found its way to
New Jersey, these Justices concluded that New
Jersey did not have jurisdiction over the
manufacturer. See id. (“the relevant facts found
by the New Jersey Supreme Court show no
‘regular ... flow’ or ‘regular course’ of sales in
New Jersey; and there is no ‘something more,’
such as special state-related design, advertising,
advice, marketing, or anything else”). Justices
Breyer and Alito further believed that Nicastro
was not the proper case to announce a broader
proposition of law on personal jurisdiction,
because the case did not implicate “modern
concerns” and the “factual record left open
many questions.” Id. at 2792-93.

II. Willemsen

Willemsen arose out of a house fire alleged
caused by a faulty electric wheelchair battery
charger manufactured by CTE Tech Corp., a
Taiwanese corporation (CTE). CTE sold battery
chargers to Invacare Corp., the manufacturer of
the electric wheelchair, who in turn sold them
throughout the United States through a network
distributors. The Oregon Supreme Court
framed the issue before it as follows:

“The issue in this case arises from the
fact that CTE sold its battery chargers to
Invacare in Ohio with the expectation that
Invacare would sell its wheelchairs
together with CTE's battery chargers
nationwide. CTE contends that, because
Invacare (and not CTE) is the one that
targeted Oregon, CTE has not
purposefully availed itself of the privilege
of doing business in Oregon and, as a
result, the Oregon courts may not assert
jurisdiction over it. CTE reasons that,
under Nicastro, the mere fact that it may
have expected that its battery chargers
might end up in Oregon is not sufficient to
give Oregon courts specific jurisdiction
over it.”

Willemsen, 352 Or. at *4.
In deciding *Willemsen*, instead of undertaking the purposeful availment analysis articulated in the *Nicastro* plurality opinion, the Oregon Supreme Court determined that the “holding” of *Nicastro* came from Justice Breyer’s concurrence. The court reasoned:

“When, as in this case, ‘a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds....’ Applying that rule, we look to Justice Breyer's opinion concurring in the judgment for the ‘holding’ in *Nicastro* that guides our resolution of this case; that is, Justice Breyer's rationale was narrower than the plurality's and, as a result, controls our resolution of this case on remand.”

*Id.* (internal citations omitted).

The Oregon Supreme Court then found that CTE met the “regular flow/regular course” test articulated by Justice Breyer:

“With that understanding of *Nicastro* in mind, we turn to the facts of this case. The trial court reasonably could have found that CTE understood that Invacare would sell its wheelchairs and CTE's battery chargers throughout the United States. CTE agreed to manufacture the battery chargers to Invacare's specifications and in compliance with federal, state, and local requirements. To be sure, nationwide distribution of a foreign manufacturer's products is not sufficient to establish jurisdiction over the manufacturer when that effort results in only a single sale in the forum state. In this case, however, the record shows that, over a two-year period, Invacare sold 1,102 motorized wheelchairs with CTE battery chargers in Oregon. In our view, the sale of over 1,100 CTE battery chargers within Oregon over a two-year period shows a regular ... flow or regular course of sales in Oregon.”

*Id.* at *6 (internal citations and quotations omitted).

The most interesting aspect of *Willemsen* is the Oregon Supreme Court’s suggestion that if the *Nicastro* plurality’s “purposeful availment” test was controlling, the plaintiffs likely would not have made that showing. *See id.* (“CTE relies primarily on the reasoning in the plurality opinion in *Nicastro*. If that opinion were controlling, it might be difficult for plaintiff to show [purposeful availment] on this record.”). Based on the Oregon Supreme Court’s rationale in deciding *Willemsen*, the case may well return to the United States Supreme Court. Under the “Rule of Four,” only four votes are needed to grant a Petition for *Certiorari*, and the four Justices in the *Nicastro* plurality may well wish to do just that.

Author’s Note: As of the time of publication, CTE is preparing, but has not yet filed its Petition for *Certiorari*.

Nicholas E. Wheeler, Esq.
Cosgrave Vergeer Kester LLP
500 Pioneer Tower
888 SW Fifth Avenue
Portland, Oregon
(503) 323-9000
www.cosgravelaw.com

Proving a successful products liability claim in Virginia can sometimes be difficult. Contributory negligence is a complete defense to a negligence claim, as is product misuse to a warranty claim. The Commonwealth does not recognize strict liability. Recently, though, the Supreme Court of Virginia handed plaintiffs a significant victory that should make it easier for a plaintiff to prove failure to warn claims in products liability cases.

Funkhouser v. Ford Motor Co., 726 S.E.2d 302 (Va. 2012) arose from an unfortunate accident and death. Three-year-old Emily Funkhouser and her infant brother were playing in their parents’ minivan while left temporarily unsupervised. The van was off and the key was not in the ignition. Somehow the van caught fire with Emily in the passenger seat and her brother behind the wheel. Emily sustained burns to over 80% of her body and died as a result of her injuries.

The estate’s fire expert identified the fire’s origin in the instrument panel in the vicinity of the wiring harness and cigarette lighter, and the cause of the fire as the ignition of combustible materials. The estate did not allege any design or manufacturing defects in the van and, instead, proceeded on a failure to warn theory, claiming that Ford failed to warn the Funkhousers despite knowing or having reason to know of the possibility of a “key-off dash area electrical fire.”

The Funkhouser appeal turned on the admissibility of seven other van fires that were allegedly similar. Under established Virginia law, evidence of other occurrences is admissible to prove notice to the manufacturer of a defective condition as long as the other occurrences occurred under substantially the same circumstances and were caused by the same or similar defects and dangers. The estate could not identify a design or manufacturing defect in the van that caused the fires. Consequently, it was unable to show that the purported defect in the Funkhouser van was the same or similar to the defect that caused the seven other fires. The trial court excluded evidence of the seven other fires, resulting in dismissal of the case.

The Supreme Court reversed. The trial court erred when it concluded that the issue was whether Ford “should be charged with notice and knowledge of a defective condition requiring warning of that condition.” Instead, according to the Supreme Court, the issue was whether Ford had a duty to warn of the “potential for key-off electrical dashboard fires” because it had received notice of similar such events. The plaintiff did not have to allege a mechanical or design defect to establish the similarity of the other fires. The Supreme Court then concluded that four of the seven other fires were sufficiently similar to be admissible into evidence.

The Supreme Court went on to hold that the three fires that were not similar could, nevertheless, play a role in the case. Funkhouser’s experts were excluded from testifying about the three other fires only during their direct examinations. The experts could rely on the three excluded fires to support their theories. Ford was entitled to cross-examine the experts, if it wanted to do so, regarding their reliance on those three other fires. Thus, the three other occurrences...
that the Supreme Court held were not similar could, nevertheless, be used to prove that Ford had notice.

Ford has requested a rehearing based on the potential for this case to expand liability under Virginia law on failure to warn theories. Both the Virginia Association of Defense Attorneys in an amicus filing and Funkhouser’s lawyer, as quoted in a legal newspaper, agreed on one point: Virginia failure to warn law has possibly undergone an expansion. Unless the Supreme Court reverses itself, failure to warn claims in Virginia will be easier to prove and harder to dismiss as long as there is some evidence of similar occurrences in the past.

Michael R. Ward
Morris & Morris, P.C.
11 South 12th Street, 5th Floor
Richmond, VA 23219
(804) 344-8300
mward@morrismorris.com
**Favorable Verdict for ALFA Clients in Mississippi**

David Strickland obtained summary judgment for his client in a product liability case pending in the United States District Court for the Southern District of Mississippi (*Taylor v. Otis Elevator Company*, Cause No. 3:11-CV-587-CWR-LRA), arising out of an elevator incident. In discovery, Plaintiff failed to designate an expert to support her Mississippi Products Liability cause; nor did she provide any evidence of actual negligence to support her negligent maintenance claim. Defendants argued an expert was necessary and plaintiff could not show negligence. The Court agreed, and simultaneously denied plaintiff’s motion for extension of time since plaintiff failed to show good cause for the extension.

**David P. Strickland, III, Esq.**  
Daniel Coker Horton & Bell, P.A.  
Jackson, Mississippi  
(601) 914-5253  
dstrickland@danielcoker.com

In a products liability claim brought against an Asian manufacturer over a fire loss, Jackson Ables secured for his client a dismissal with prejudice of plaintiffs’ claims, at plaintiffs’ cost, in the U.S. District Court on the condition that Ables' client would not pursue plaintiffs or their non-resident counsel for attorneys’ fees and expenses of litigation. Ables further required plaintiffs to stipulate that the manufacturer he defended had never been adjudicated to be the actual manufacturer of the product plaintiffs had claimed caused the fire.

**Jackson H. Ables, III, Esq.**  
Daniel Coker Horton & Bell, P.A.  
Jackson, Mississippi  
(601) 914-5221  
jables@danielcoker.com
## Upcoming ALFA International Events

<table>
<thead>
<tr>
<th>Event</th>
<th>Date</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>2012 ALFA International Business Litigation Practice Group Seminar</strong></td>
<td>September 13-14, 2012</td>
<td>The Four Seasons Hotel, 120 East Delaware, Chicago, Illinois</td>
</tr>
<tr>
<td><strong>2012 ALFA International Workers’ Compensation Seminar</strong></td>
<td>September 26-28, 2012</td>
<td>The Fairmont Copley Plaza, 138 James Avenue, Boston, Massachusetts</td>
</tr>
<tr>
<td><strong>Eastern Great Lakes Regional Conference</strong></td>
<td>October 9-10, 2012</td>
<td>Renaissance Cleveland ~ Cleveland, Ohio</td>
</tr>
<tr>
<td><strong>2012 ALFA International Annual Business Meeting</strong></td>
<td>October 18-20, 2012</td>
<td>Westin Copley Place, 10 Huntington Avenue, Boston, Massachusetts</td>
</tr>
<tr>
<td><strong>2012 ALFA International Hospitality Practice Group Seminar</strong></td>
<td>November 1-3, 2012</td>
<td>The Breakers, One South County Road, Palm Beach, Florida</td>
</tr>
<tr>
<td><strong>National Workers’ Compensation Disability Conference</strong></td>
<td>November 7-9, 2012</td>
<td>Las Vegas Convention Center ~ Las Vegas, Nevada</td>
</tr>
<tr>
<td><strong>International Law Practice Group Seminar</strong></td>
<td>November 15-17, 2012</td>
<td>The Ritz-Carlton Santiago ~ Santiago Chili</td>
</tr>
<tr>
<td><strong>March 7-10, 2013</strong></td>
<td></td>
<td><strong>International Client Seminar</strong></td>
</tr>
<tr>
<td><strong>May 8-10, 2013</strong></td>
<td></td>
<td><strong>Transportation Practice Group Seminar</strong></td>
</tr>
<tr>
<td>For more information, please contact ALFA International at (312) 642-ALFA or visit our website at <a href="http://www.alfainternational.com">www.alfainternational.com</a></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
The materials contained in this newsletter have been prepared by ALFA International member firms for information purposes only. The information contained is general in nature, and may not apply to particular factual or legal circumstances. In any event, the materials do not constitute legal advice or opinions and should not be relied upon as such. Distribution of the information is not intended to create, and receipt does not constitute, an attorney-client relationship. Readers should not act upon any information in this newsletter without seeking professional counsel.

ALFA International makes no representations or warranties with respect to any information, materials or graphics in this newsletter, all of which is provided on a strictly “as is” basis, without warranty of any kind. ALFA International hereby expressly disclaims all warranties with regard to any information, materials or graphics in this newsletter, including all implied warranties of merchantability, fitness for a particular purpose and non-infringement.