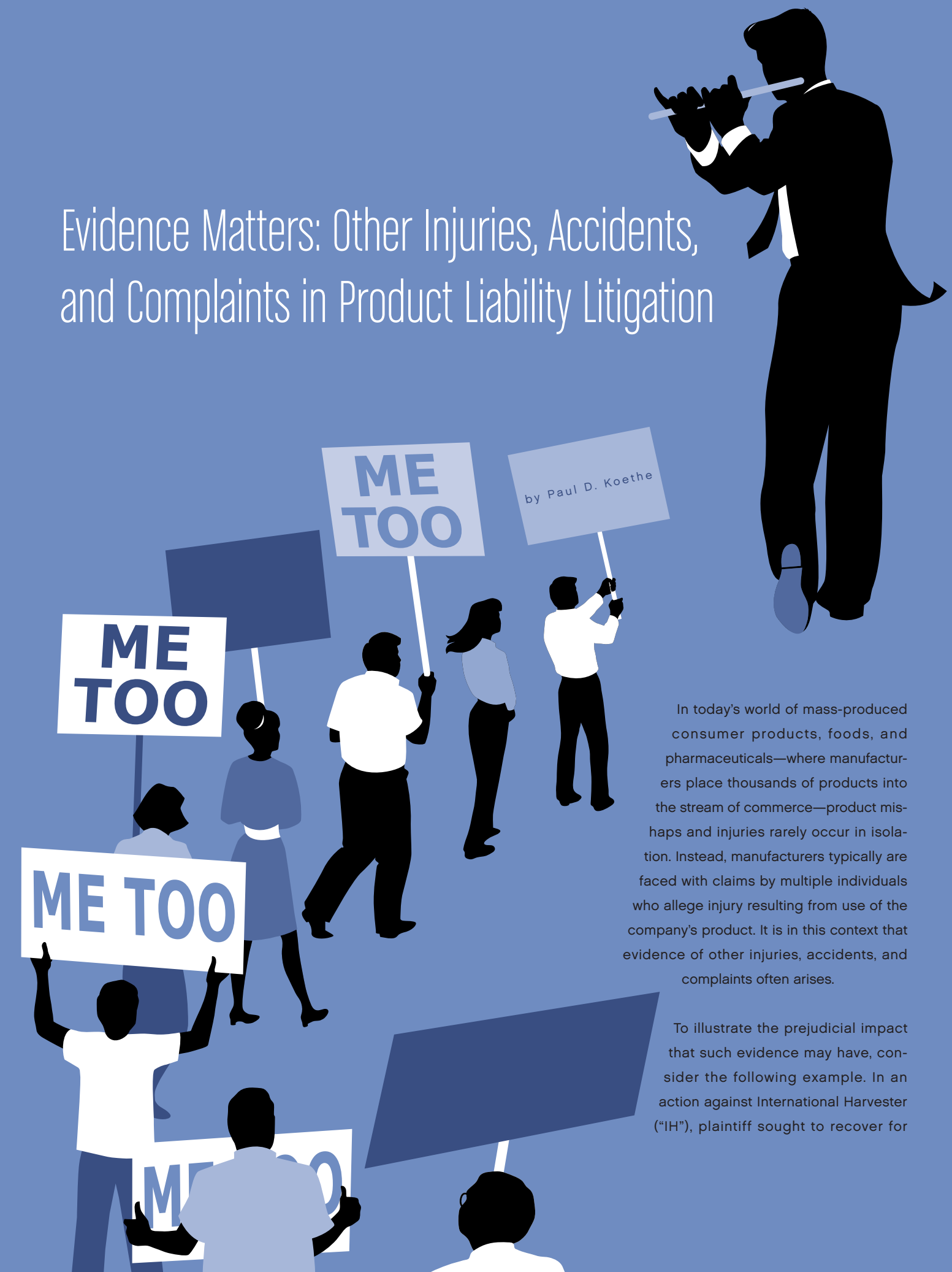
Evidence Matters: Other Injuries, Accidents, and Complaints in Product Liability Litigation

by Paul D. Koethe



In today's world of mass-produced consumer products, foods, and pharmaceuticals—where manufacturers place thousands of products into the stream of commerce—product mishaps and injuries rarely occur in isolation. Instead, manufacturers typically are faced with claims by multiple individuals who allege injury resulting from use of the company's product. It is in this context that evidence of other injuries, accidents, and complaints often arises.

To illustrate the prejudicial impact that such evidence may have, consider the following example. In an action against International Harvester ("IH"), plaintiff sought to recover for

burns sustained when he was sprayed with gasoline that had spurted, or "geysered," from the fuel tank of his tractor. Throughout the trial, plaintiff's counsel offered evidence of many other users of IH tractors who had experienced similar geysering incidents. Counsel was also permitted to "parade" before the jury three "hideously deformed" witnesses who had suffered severe burns in previous unrelated IH tractor accidents. These witnesses testified about their own experiences with IH fuel-cap failures that had resulted in severe burns. During closing argument, plaintiff's counsel vividly reminded the jury of the "ghastly" appearance of the three other burn victims and used their appearance as a basis for inflammatory and prejudicial appeals to the jury. Counsel argued that only a large punitive-damages award would force a change in company behavior. Not surprisingly, the jury rendered a verdict against IH and imposed substantial punitive damages.[1] While this scenario may seem extreme, it highlights the need for counsel in product liability litigation to carefully consider the circumstances under which evidence of other accidents, injuries, and complaints is admissible; the impact that such evidence may have if allowed; and how best to manage the litigation risk presented by such evidence.

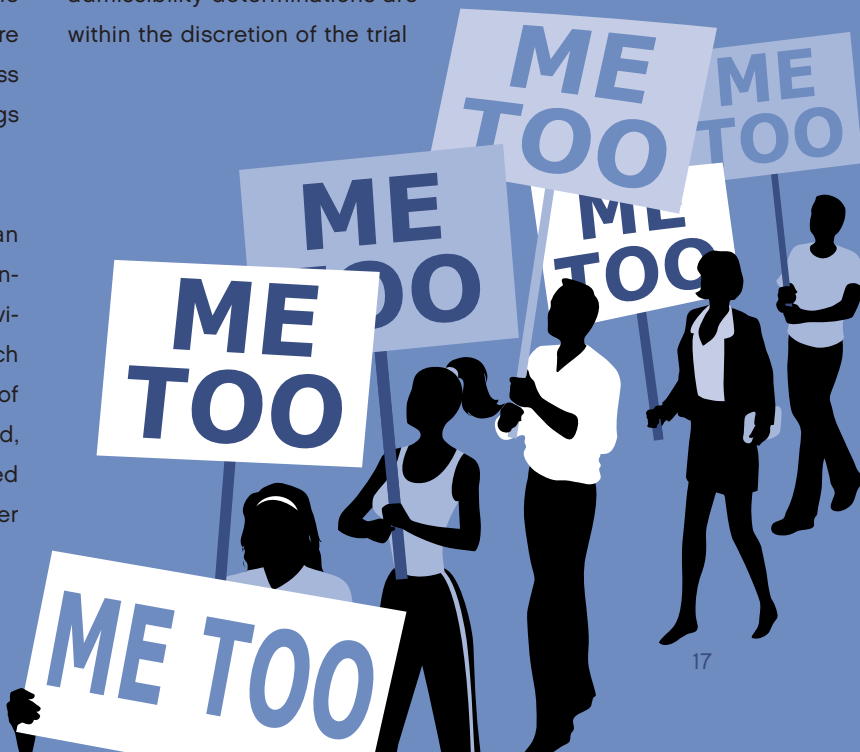
PERMISSIBLE PURPOSES

Typically, plaintiff's counsel will seek to discover and introduce evidence of other complaints, accidents, or injuries to bolster the case. Such evidence usually dovetails with the themes plaintiff will present at trial: that (i) the product was indeed dangerous and defective; (ii) the manufacturer knew of the danger or defect; (iii) the manufacturer knew that others were injured by the product; and (iv) the manufacturer nonetheless kept the product on the market without adequate warnings or design modifications.

Because of the prejudicial impact that such evidence can have, courts typically scrutinize it carefully.[2] Courts have generally recognized four permissible purposes for admitting evidence of other injuries, accidents, and complaints. First, such evidence may be admitted to demonstrate the existence of a defect or dangerous condition in the product.[3] Second, evidence of other injuries or accidents is commonly offered to prove that the manufacturer was on notice of the danger or defect—that it knew or should have known of the danger presented by the product.[4] Third, evidence of other injuries or accidents may be offered to show the extent of the risk or danger created by the product.[5] Fourth, evidence of other injuries or accidents may be used to show that the product defect or dangerous condition caused the injury in question.[6]

STANDARDS FOR ADMISSIBILITY

A party seeking to introduce evidence of other injuries, accidents, or complaints must establish that the other incidents are "substantially similar" to the events at issue in the case for which the party seeks to use the evidence. Only other incidents that are substantially similar to the one in dispute will be admissible in evidence. *Surles v. Greyhound Lines, Inc.*, 474 F.3d 288, 297 (6th Cir. 2007); *Rye v. Black & Decker Mfg. Co.*, 889 F.2d 100, 102 (6th Cir. 1989). Other incidents must be sufficiently similar in time, place, and circumstances to be probative.[7] Minor or immaterial dissimilarities, however, will not usually prevent admissibility. *White v. Ford Motor Co.*, 312 F.3d 998, 1109 (2002), *amended by*, 335 F.3d 833 (9th Cir. 2003). Even if another incident is relevant and substantially similar to the one at issue, the evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion, or waste of time.[8] For example, evidence of other incidents confuses the jury and wastes time if it requires the parties to engage in unnecessary "mini-trials" exploring the possible causes of the other incidents to establish their similarity to the incident at issue.[9] Finally, admissibility determinations are within the discretion of the trial



court and are reviewed under an abuse-of-discretion standard. *Surles*, 474 F.3d at 296.

RECENT EXAMPLES

Counsel for plaintiffs are becoming increasingly creative in the manner in which they seek to inject evidence of other injuries, accidents, and complaints into the litigation process. Several recent cases illustrate this point. In a recent Florida vehicle rollover case against Ford Motor Company, the trial court permitted expert testimony and attorney argument to the effect that Ford had "caused hundreds of injuries and deaths in other rollover accidents" involving the Ford Explorer. Plaintiff's design expert was permitted to testify that he had been involved in many prior incidents where Ford Explorer handling and stability problems had brought about rollover accidents and that he had notified Ford about this problem on at least 150 prior occasions. Plaintiff's counsel argued in closing that, instead of making necessary design modifications once becoming aware of the problem, Ford continued selling the Explorer and made millions of dollars in "blood money" that it should not be allowed to keep. The jury rendered a $60 million verdict against Ford.[10]

In a recent case against Greyhound Bus Lines, plaintiff suffered severe injuries when another passenger attacked the bus driver, causing the bus to crash. During discovery, plaintiff sought all documents and "prior incident" reports generated as a result of any other violent episodes that had occurred on a Greyhound bus during the previous 25-year period. While the trial court placed some limitations on the scope of plaintiff's discovery request, the court permitted the introduction at trial of 42 prior incident reports and allowed plaintiff to present expert testimony concerning the prior incident reports and the need for entry-resistant barriers to protect bus drivers. The jury returned a verdict against Greyhound for $8 million. *Surles*, 474 F.3d 288 (upholding admissibility of expert testimony and prior incident reports for incidents within the preceding four years).

Similarly, in a recent case against Cessna Aircraft Company involving a fatal airplane crash, Cessna sought to prevent plaintiff from introducing numerous service difficulty reports ("SDRs") that described prior incidents of wastegate-elbow malfunctions in other Cessna aircraft. Plaintiff argued, and the court agreed, that such evidence was relevant to prove whether Cessna was on notice of a defect in the wastegate elbow. The court further found that such evidence was probative of whether Cessna was negligent in failing to redesign the wastegate elbow.[11]

The issue of other injuries, accidents, and complaints has also arisen in the context of pharmaceutical litigation. In one early case involving an intrauterine contraceptive device ("IUD"), plaintiff claimed that a defect in the IUD caused her to contract a serious pelvic inflammatory disease, resulting in a complete hysterectomy. At trial, plaintiff was permitted to introduce reports from doctors and company field representatives describing various adverse reactions associated with use of the IUD in other women. The court found that this evidence was relevant to whether the defendant had received sufficient notice of a defect and its possible consequences to require corrective action. Plaintiff obtained a jury award of compensatory and punitive damages. *Worsham v. A.H. Robins Co.*, 734 F.2d 676 (11th Cir. 1984).

In several more recent cases involving alleged adverse drug reactions, plaintiffs have sought to introduce FDA-required "adverse event" reports—together with the investigators' subjective "relatedness assessments" contained in those reports. The adverse event reports are generated whenever a patient taking the drug develops certain health problems, even though the problem may not be causally related to the drug. The clinical investigator is also required to make an assessment—often based on limited evidence—of whether the event was "related" to the drug use. Plaintiffs may seek to offer the relatedness assessments from other patients to bolster their claim that the drug "caused" the injury in dispute. Courts have typically rejected the use of relatedness assessments for this purpose, finding that these subjective assessments from other patients are unreliable indicators of individual causation in a given case. *In re Accutane Prods. Liab. Litig.*, No. 8:04-MD-2523, 2007 WL 2340496 (M.D. Fla. Aug. 15, 2007); *Soldo v. Sandoz Pharm. Corp.*, 244 F. Supp. 2d 434, 546 (W.D. Pa. 2003). In another recent unreported case involving an alleged adverse drug reaction, plaintiff sought to proffer evidence of the side effects experienced by the plaintiff-decedent's sister, who also took the drug at issue, arguing that this evidence was probative of a "genetic component" involved in the decedent's alleged adverse reaction to the drug. *Dobbs v. Wyeth Pharm.*, No. CIV-04-1762-D (W.D. Okla. 2008) (summary judgment granted for defendant prior to ruling on evidentiary issues).

MANAGING LITIGATION RISKS

As the cases above demonstrate, evidence of other injuries, accidents, and complaints can adversely affect the outcome of product liability litigation. There are various ways in which defense counsel can manage and reduce this risk. Just a few will be discussed here.

Discovery. Often, a defendant can properly limit the scope of discovery concerning other injuries, accidents, and complaints if such discovery lacks relevance or is unduly burdensome. When faced with broad, all-encompassing discovery requests of prior incidents, defendants should seek to limit those requests to incidents involving similar circumstances, identical or similar products, similar product use, similar product failures, similar injuries, and nonremote time periods and geographic locations.[12] Likewise, in deposing plaintiff's expert witnesses, it may be possible to obtain admissions regarding the lack of similarity between other incidents and the incident at issue. During an expert deposition, consideration should be given to exploring all material circumstances that help to differentiate the other incidents from the incident in dispute. Concessions from the opposing expert can provide powerful ammunition when seeking to exclude evidence of other incidents at trial.

Motions *in Limine*. Whenever a defendant expects opposing counsel to offer evidence of other injuries, accidents, or complaints, counsel should consider raising the issue with the court during the motion-*in-limine* stage prior to trial. Motions *in limine* provide an opportunity for the defendant to educate the court on the nature of the injury or accident at issue and to highlight potential weaknesses in plaintiff's proof. Motions *in limine* also allow the defendant to spell out in detail the manner in which the other incidents differ from the matter in dispute and to demonstrate the unfair prejudice that would result from the use of prior incident evidence.[13]

Preserving Objections/Limiting Instructions. Although it may seem obvious, defendants must exercise care to preserve any objections when the court permits opposing counsel to introduce evidence of other incidents at trial. In the *International Harvester* case discussed above, defense counsel failed to object to plaintiff's improper closing argument until after counsel had completed his argument and the jury had left the courtroom. In finding that defendant had waived any error, the court noted that the trial judge had "looked at defense counsel six or eight times during plaintiff's argument almost inviting objections," but defense counsel made a conscious decision as a matter of trial strategy not to object. The trial court could have "stopped the improper comments upon defendant's objection and admonished the jury of the impropriety; yet the trial court's stares to counsel inviting objection were met with silence."[14]

If defense counsel is unsuccessful in keeping out evidence of other incidents, consideration should be given to requesting a limiting instruction from the court concerning the evidence. For example, in a case involving liver damage allegedly resulting from the combined exposure to acetaminophen and alcohol, the court admitted into evidence drug experience reports ("DERs") describing other incidents of consumers taking the medication in combination with alcohol. However, the court gave a limiting instruction to the jury that it could consider the DERs only as evidence of notice to the defendant, and not for the truth of the matter contained within them. *Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378, 1385–86 (4th Cir. 1995); *Worsham v. A.H. Robins Co.*, 734 F.2d 676, 686 (11th Cir. 1984). While some harm may inevitably flow from the introduction of evidence concerning other incidents and injuries, a carefully crafted limiting instruction from the court will arm defense counsel with some ability to limit the potential damage caused by such evidence. ■

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[1] *Stambaugh v. International Harvester Co.*, 435 N.E.2d 729 (Ill. App. Ct. 1982) (not-reversible error to permit in-court appearance and testimony of burn victims from unrelated occurrences; defendant waived error committed in closing argument by failing to timely object), *rev'd on other grounds*, 464 N.E.2d 1011 (Ill. 1984) (improper venue).

[2] *Crump v. Versa Products, Inc.*, 400 F.3d 1104 (8th Cir. 2005) (evidence of other injuries may raise extraneous controversial points, lead to confusion of issues, and present undue prejudice disproportionate to its usefulness).

[3] *Burke v. U-Haul Int'l, Inc.*, 2007 U.S. Dist. LEXIS 7539 (W.D. Ky. Jan. 31, 2007), citing *Bush v. Michelin Tire Corp.*, 963 F. Supp. 1436 (W.D. Ky. 1996).

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[4] *Id., citing New York Life Ins. Co. v. Seighman*, 140 F.2d 930 (6th Cir. 1944); *Robinson v. Crown Equip. Corp.*, 2007 U.S. Dist. LEXIS 71772 (E.D. Ark. Sept. 26, 2007).

[5] *Burke*, 2007 U.S. Dist. LEXIS 7539, *citing Rimer v. Rockwell Int'l Corp.*, 641 F.2d 450 (6th Cir. 1981).

[6] *Id., citing Wojciechowski v. Long-Airdox Div. of Marmon Group, Inc.*, 488 F.2d 1111 (3rd Cir. 1973).

[7] *Sheesley v. Cessna Aircraft Co.*, 2006 U.S. Dist. LEXIS 77919 (D.S.D. Oct. 24, 2006).

[8] *Burke*, 2007 U.S. Dist. LEXIS 7539.

[9] *Id.*; *Sheesley*, 2006 U.S. Dist. LEXIS 77919.

[10] *Ford Motor Co. v. Hall-Edwards*, 2007 Fla. App. LEXIS 17738 (Nov. 7, 2007) (jury verdict set aside and remanded for new trial at which plaintiff must lay a sufficient foundation to establish substantial similarity between the evidence relating to other accidents and the accident at issue).

[11] *Sheesley*, 2006 U.S. Dist. LEXIS 77919 (further holding that plaintiff must lay an adequate foundation that the incidents contained in the SDRs were substantially similar to the accident at issue).

[12] *DiPesa v. Home Depot U.S.A.*, Inc., 245 F.R.D. 53 (D. Mass. 2007) (court limited discovery of prior falling-merchandise incidents to those incidents involving falling lumber during the preceding five-year period; court refused to limit discovery to Massachusetts stores and allowed discovery of such incidents in all of defendant's U.S. stores); *Dillard v. Cooper Tire & Rubber Co.*, 2007 Ala. LEXIS 229 (Oct. 26, 2007) (trial court exceeded its discretion in permitting discovery regarding tire failures unrelated to tread separation; however, court permitted discovery of tread-separation failures for all tire models manufactured by defendant during seven-year period before plaintiff's accident).

[13] *Burke v. U-Haul Int'l, Inc.*, 2007 U.S. Dist. LEXIS 7539 (W.D. Ky. 2007) (court excluded testimony of 11 individuals involved in previous accidents while towing dolly manufactured by defendant; jury would be tempted improperly to use the emotionally disturbing testimony to find a product defect); *Crump v. Versa Products, Inc.*, 400 F.3d 1104 (8th Cir. 2005) (court properly excluded evidence of 44 other incidents of ladder-hinge failure where the incidents occurred *after* the date of plaintiff's injury or involved incidents where the ladder was not configured in a straight position).

[14] *Stambaugh v. International Harvester Co.*, 435 N.E.2d 729, 744–45 (Ill. App. Ct. 1982).