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A WOLF IN WOLF'S CLOTHING—OTHER INCIDENT EVIDENCE IN AVIATION LITIGATION

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INTRODUCTION

THERE IS NOTHING stealth or secret about the devastating effect of "other incident" evidence.¹ It is the most dangerous evidence a jury will hear.² It has been called a "tactical nuclear weapon,"³ "the most powerful weapon in the plaintiff attorney's arsenal,"⁴ and "vital"⁵ to persuading a jury that a product is defective. It can change the verdict calculus and lay the foundation for a punitive damages award.

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¹ Robert A. Sachs, "Other Accident" Evidence in Product Liability Actions: *Highly Probative or an Accident Waiting to Happen?*, 49 OKLA. L. REV. 257, 257-58 (1996) (stating that other incident evidence "has the potential to affect significantly the outcome of the case").

² See, e.g., *Four Corners Helicopters, Inc. v. Turbomeca, S.A.*, 979 F.2d 1434, 1440 (10th Cir. 1992) (acknowledging that "the occurrence of similar accidents or failures involving the same product has great impact on a jury").

³ Michael Hoenig, *Products Liability: Evidence of Other Accidents-Part II*, 218 N.Y.L.J. 3, 3 (1997).

⁴ Tab Turner, *Proving Design Defects With Other Similar Incidents Evidence*, TRIAL, Mar. 1999, at 42.

⁵ Francis H. Hare, Jr., *Admissibility of Evidence Concerning Other Similar Incidents in a Defective Design Product Case: Courts Should Determine "Similarity" by Reference to the Defect Involved*, 21 AM. J. TRIAL ADVOC. 491, 494, 504, 522 (1998) (stating that other incident evidence "is arguably the single most important category of evidence available to the plaintiff in a defective design product case," "the strongest evidence the plaintiff can adduce," and is often "vital" to the plaintiff's case).

*Ford Motor Co. v. Hall-Edwards*⁶ is illustrative of the power of “other incident” evidence. There, a Florida district court allowed the plaintiff, Hall-Edwards, to introduce “widespread” evidence of other accidents to bolster her claim that the design of a 1996 Ford Explorer was defective.⁷ Hall-Edward’s son, a passenger in the Explorer, died after the driver of the Explorer fell asleep at the wheel and lost control.⁸ At trial, the jury heard testimony on numerous other accidents, including “comment to the effect that Ford caused ‘hundreds’ of injuries and deaths in other rollover accidents involving the Ford Explorer.”⁹ After hearing this and other evidence, the jury returned a run-away verdict of \$60 million against Ford.¹⁰ On November 7, 2007, the appellate court reversed the verdict in *Hall-Edwards*, finding that evidence of other accidents had become an improper “feature of the case,” that the evidence was admitted without the necessary legal foundation, and that the trial court had failed to take the proper precautions when admitting the evidence.¹¹

This survey article examines the proper foundational requirements for, and the use of, other accidents involving other product failures (“other incidents”) in aviation litigation. Part I reviews the discovery of this evidence, while Part II discusses the admissibility of other incident evidence at trial and catalogs the purposes for which it may be admitted. Part III examines key evidentiary considerations.

PART I: THE DISCOVERY OF OTHER INCIDENT EVIDENCE

The scope of discovery, while broad, is not unlimited.¹² “[D]iscovery, like all matters of procedure, has ultimate and necessary boundaries.”¹³ Courts rightfully refuse to compel responses to document requests and interrogatories when the propounding party has asked for irrelevant materials and information, failed to limit the discovery sought to an appropri-

⁶ 971 So. 2d 854 (Fla. Dist. Ct. App. 2007).

⁷ *Id.* at 859.

⁸ *Id.* at 856.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 856, 860.

¹² *Axson v. Nat'l Surety Corp.*, 327 S.E.2d 732, 733 (Ga. 1985).

¹³ *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

ate temporal period, or made overly broad and unduly burdensome requests.¹⁴

Filtering out irrelevant and overly broad discovery ensures that the “discovery process [does not] acquire wings and fly into remote and unconnected areas.”¹⁵ While courts allow the discovery of material and information that may not be admissible at trial,¹⁶ they restrict discovery, when justice demands, to prevent fishing expeditions.¹⁷

In the context of other incident evidence, the touchstone of relevance is “substantial similarity.”¹⁸ “Without a showing of substantial similarity, the evidence is irrelevant as a matter of law.”¹⁹ Although the standard is given a more rigorous application at trial, many courts tend to relax the test during discovery because of the perceived complexity of aircraft engineering, the expensive nature of aviation litigation, and the felt inequality resulting from certain aviation defendants’ exclusive access to all or most of the technical data.²⁰ Either way, the object of other incident

¹⁴ See, e.g., *Rose v. Figgie Int’l, Inc.*, 495 S.E.2d 77, 82 (Ga. Ct. App. 1997) (limiting scope of relevance to “the existence of the defect in goods produced at the same plant at around the same time”); *West v. Nodvin*, 397 S.E.2d 567, 570 (Ga. Ct. App. 1990), *overruled on other grounds by* *Teklewold v. Taylor*, 610 S.E.2d 617, 619 n.3 (Ga. Ct. App. 2005) (“[N]o court should impose upon the opposite party the onerous task of producing great quantities of records which have no relevancy.”).

¹⁵ *Frey v. Chrysler Corp.*, 41 F.R.D. 174, 176 (W.D. Pa. 1966); *accord Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1370 (11th Cir. 1997).

¹⁶ See, e.g., FED. R. CIV. P. 26(b)(1).

¹⁷ *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir. 1992); *Piacenti v. Gen. Motors Corp.*, 173 F.R.D. 221, 224 (N.D. Ill. 1997).

¹⁸ *Gen. Motors Corp. v. Moseley*, 447 S.E.2d 302, 306 (Ga. Ct. App. 1994), *abrogated in part on other grounds by* *Webster v. Boyett*, 469 S.E.2d 459, 462, 464 (Ga. 1998). See also *In re Aircrash Disaster Near Roselawn, Ind.* Oct. 31, 1994, 172 F.R.D. 295, 302 (N.D. Ill. 1997) for a good discussion of the discovery of other incident evidence.

¹⁹ *Moseley*, 447 S.E.2d at 306.

²⁰ See, e.g., *Kramer v. Boeing Co.*, 126 F.R.D. 690, 693 (D. Minn. 1989) (explaining that aircraft engineering is “highly technical and sophisticated” and “[o]versimplification of the limits of discovery in highly technical products liability matters is quite sure to deprive plaintiffs of necessary avenues of proof”); *Schuyler v. United Air Lines, Inc.*, 10 F.R.D. 111, 113 (M.D. Pa. 1950) (stating that the complex and expensive nature of aviation litigation required liberal interpretation of rules relating to production of documents); *cf. Melvin v. United States*, 14 Cl. Ct. 236, 238 (1988) (Without discovery of two F-16 Avionic Systems Manuals, plaintiff was “stymied from adequately supporting his claim because defendant control[led] exclusively the access to technical data that would assist plaintiff.”).

discovery “must have some evidentiary value.”²¹ Or, stated another way, “[s]ome threshold showing of relevance must be made before parties are required to open wide the doors of discovery and to produce a variety of information which does not reasonably bear upon the issues in the case.”²²

In most jurisdictions, the discovery of other incidents, including the discovery of information and materials relating to other products or predecessor models of a product, may be allowed if the other accidents and/or products are highly similar or “sufficiently similar” to the accident and/or accident-causing product.²³ In *Prashker v. Beech Aircraft Corp.*,²⁴ for example, the court permitted discovery of three model years preceding the model at issue, but denied discovery as to a still earlier model, finding that it was too dissimilar.²⁵ The party propounding the discovery bears the burden of proof on the issue of similarity,²⁶ and courts carefully evaluate the proof offered to determine the similarities and dissimilarities.²⁷ “Conclusory statements of alleged similarity are not enough.”²⁸

*Piacenti v. Gen. Motors Corp.*²⁹ is illustrative. There, the driver of a 1991 Geo Tracker brought product liability claims against General Motors Corporation (“GM”) and Suzuki Motor Company, the manufacturers of the Tracker.³⁰ At least one set of the plaintiff’s discovery sought test results and other information about the Suzuki Samurai, a different model sport utility vehicle.³¹ After GM and Suzuki objected to the discovery, the plaintiff moved to compel.³²

The court initially denied the motion but invited the plaintiff to re-file her motion with an expert opinion verifying that the Tracker and Samurai were “sufficiently similar.”³³ The plaintiff later renewed the motion, submitting the affidavits of two ex-

²¹ *Piacenti*, 173 F.R.D. at 223.

²² *Hofer*, 981 F.2d at 380.

²³ *Fine v. Facet Aerospace Prods. Co.*, 133 F.R.D. 439, 441 (S.D.N.Y. 1990).

²⁴ 258 F.2d 602 (3d Cir. 1958).

²⁵ *Id.* at 608.

²⁶ *See, e.g., Barcenas v. Ford Motor Co.*, No. C 03-04644RMWE, 2004 WL 2827249, at *3 (N.D. Cal. Dec. 9, 2004); *Fine*, 133 F.R.D. at 442.

²⁷ *Hofer*, 981 F.2d at 380–81.

²⁸ *Gibson v. Ford Motor Co.*, 510 F. Supp. 2d 1116, 1120 (N.D. Ga. 2007).

²⁹ 173 F.R.D. 221 (N.D. Ill. 1997).

³⁰ *Id.* at 222.

³¹ *Id.*

³² *Id.*

³³ *Id.*

perts, both of whom asserted that the test results and other information about the Samurai were relevant to proving the Tracker's alleged defects.³⁴ The experts merely alleged, however, "in conclusory fashion," that the discovery was needed because the vehicles shared many of the same characteristics.³⁵ In response, GM and Suzuki "refute[d]" the conclusory allegations by producing the declaration of an expert "familiar with the design" of both vehicles.³⁶ In his declaration, the expert specified, in detail, numerous differences in the design, manufacture, configuration, and production timeline for the Tracker and the Samurai.³⁷

Criticizing the plaintiff's arguments and lack of substantiating facts, the court denied her motion to compel, holding that the discovery was not relevant because the Tracker and Samurai had different suspension systems, different engines, different centers of gravity, different wheelbases, different tracks, different lengths, and different widths.³⁸ These differences made "comparison between the two [vehicles] equivalent to comparing apples and oranges."³⁹ The court explained that "[t]he legal tenet that relevancy in the discovery context is broader than in the context of admissibility should not be misapplied so as to allow fishing expeditions in discovery."⁴⁰

It is clear from *Piacenti* and other decisions that the burden of proof requires a specific factual showing of similarity, but the showing does not necessarily rise and fall on the support of competent expert testimony.⁴¹ Rather, courts "look to the state of the record as a whole," analyzing the documentary evidence for common product history and shared component characteristics, together with the affidavits adduced on the subject.⁴² Courts view this evidence against the claims alleged in the litigation.⁴³ For the discovery to be allowed, the other products must share with the accident-causing product those characteristics relevant

³⁴ *Id.* at 223.

³⁵ *Id.* at 225.

³⁶ *Id.* at 223, 225.

³⁷ *Id.* at 223.

³⁸ *Id.* at 225.

³⁹ *Id.*

⁴⁰ *Id.* at 224.

⁴¹ See, e.g., *Gibson v. Ford Motor Co.*, 510 F. Supp. 2d 1116, 1120 (N.D. Ga. 2007) ("What is required is a specific factual showing of substantial similarity.").

⁴² *In re Aircrash Disaster Near Roselawn, Ind.* Oct. 31, 1994, 172 F.R.D. 295, 305 (N.D. Ill. 1997).

⁴³ *Fine v. Facet Aerospace Prods. Co.*, 133 F.R.D. 439, 441 (S.D.N.Y. 1990).

to the legal issues in the case.⁴⁴ The products must share "pertinent" characteristics relevant to the accident.⁴⁵

In *Fine v. Facet Aerospace Products Co.*,⁴⁶ a personal injury action filed after a Cessna 150F "plunged to earth," Fine, the plaintiff, alleged "that the crash was caused by the presence of water in the aircraft's [metal] fuel [system]."⁴⁷ Fine sued the manufacturer, Cessna Aircraft Company, on theories of negligence and strict liability.⁴⁸ In discovery, Fine sought production of Cessna memoranda addressing the history of the problem of water in two different fuel systems—rubber bladder fuel tanks and wet-wing fuel systems.⁴⁹ Cessna opposed the discovery, and Fine moved to compel.⁵⁰ The court denied the motion, finding that the record contained no evidence and that Fine had made no showing that bladder tanks and wet-wing fuel systems were similar to, or potential substitutes for, metal tanks in the 150F.⁵¹

At the other end of the proof spectrum is *In re Aircrash Disaster Near Roselawn, Ind. Oct. 31, 1994*.⁵² In that case, sixty-eight people died when an ATR-72 aircraft crashed near Roselawn, Indiana.⁵³ The NTSB found that the probable cause of the crash was "the loss of control, attributed to a sudden and unexpected aileron hinge moment reversal."⁵⁴ In discovery, the plaintiffs sought production of materials and information about the ATR-42.⁵⁵ This model aircraft was relevant, the plaintiffs claimed, because the ATR-72 was "nothing more than a 'stretch version' of the ATR-42."⁵⁶ The defendants opposed the discovery and motions practice ensued.⁵⁷ In support of their motion, the plaintiffs did not produce an expert affidavit attesting to any similarities; rather, they attached numerous exhibits showing significant similarities in the design, performance, and operating experience of the ATR-42 and ATR-72 aircraft, including evi-

⁴⁴ *Id.*

⁴⁵ *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 381 (8th Cir. 1992).

⁴⁶ 133 F.R.D. 439 (S.D.N.Y. 1990).

⁴⁷ *Id.* at 440.

⁴⁸ *Id.*

⁴⁹ *Id.* at 441.

⁵⁰ *Id.*

⁵¹ *Id.* at 443.

⁵² 172 F.R.D. 295 (N.D. Ill. 1997).

⁵³ *Id.* at 295, 298.

⁵⁴ *Id.* at 298.

⁵⁵ *Id.* at 297.

⁵⁶ *Id.*

⁵⁷ *Id.* at 297-98.

dence of numerous shared components, the single type certificate shared between the planes, the NTSB factual report finding five ATR-42 incidents relevant to the agency's determination of probable cause and, among other items, an FAA bulletin relating to both aircraft, which was issued after the crash.⁵⁸ In response, the defendants steadfastly argued that the ATR-42 was not "even marginally relevant" and produced a declaration attesting to the lack of similarities between the aircraft.⁵⁹

Relying on their defense expert's declaration, the defendants in *Roselawn* urged the court to deny the plaintiffs' discovery motion because they had failed to substantiate their position with expert testimony and, thus, the defendants claimed, the defense declaration "trump[ed]" any allegation of similarity.⁶⁰ The court rejected this argument, finding that the declaration was "unworthy," that it was "at odds" with other sworn statements previously made by the declarant, and that the "record as a whole" was "replete with reliable evidence showing substantial similarities" between the aircraft.⁶¹ Accordingly, the court ordered full and complete discovery of the ATR-42.⁶²

PART II: THE ADMISSIBILITY AND USE OF OTHER INCIDENT EVIDENCE

Although there is no mechanical test applicable to every case in every jurisdiction, other incident evidence is not admissible at trial without a prior showing of substantial similarity.⁶³ The doctrine rests on the concern that dissimilar accidents lack the requisite relevance,⁶⁴ and recognizes the inherent prejudice that

⁵⁸ *Id.* at 298–306.

⁵⁹ *Id.* at 302–03.

⁶⁰ *Id.* at 303, 305.

⁶¹ *Id.* at 304–06.

⁶² *Id.* at 311.

⁶³ *Gen. Motors Corp. v. Moseley*, 447 S.E.2d 302, 306 (Ga. Ct. App. 1994) ("Without a showing of substantial similarity, the evidence is irrelevant as a matter of law."), *abrogated in part on other grounds by Webster v. Boyett*, 469 S.E.2d 459, 462, 464 (Ga. 1998).

⁶⁴ *Cooper v. Firestone Tire & Rubber Co.*, 945 F.2d 1103, 1105 (9th Cir. 1991). Two exceptions are noteworthy. First, courts are split as to whether evidence of dissimilar incidents is admissible for purposes of impeachment. *Compare Wheeler v. John Deere Co.*, 862 F.2d 1404, 1409 (10th Cir. 1988) (finding the evidence inadmissible), *with Hale v. Firestone Tire & Rubber Co.*, 820 F.2d 928, 934–35 (8th Cir. 1987) (allowing the evidence), *and Cooper*, 945 F.2d at 1105 (admitting the evidence). Second, the doctrine of substantial similarity does not apply to evidence of dissimilar products involved in similar accidents if offered to illustrate the physical principles behind the accident. *See, e.g., Heath v. Suzuki Motor*

results, or can result, from the admission of "similar act"-type evidence.⁶⁵ For example, "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."⁶⁶

To limit the prejudice that inures to a party from the admission of past occurrences or accidents involving other products, nearly every jurisdiction has developed some version of the substantial similarity test.⁶⁷ Federal courts apply the federal doctrine, while state courts apply state law.⁶⁸ In general, the doctrine teaches that where evidence of other accidents involving a product is concerned, the party seeking to introduce that evidence must first show that the other accidents occurred under "substantially similar circumstances" and involved "substantially similar" products.⁶⁹ Typically, the doctrine operates to protect the defendant at trial, but it may be used to safeguard a plaintiff where the defendant seeks to offer an out-of-court simulation of actual events,⁷⁰ proffers statistical evidence purporting to show comparative product safety,⁷¹ or introduces evidence of a plaintiff's past mishaps to bolster the defense of contributory negligence.⁷²

Corp., 126 F.3d 1391, 1396-97 (11th Cir. 1997) (admitting evidence of dissimilar rollovers to "explain how rollovers occur"); *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1278 (7th Cir. 1988) (admitting evidence of videotape of test flight even though aircraft was dissimilar because tape was offered to explain certain in-flight physical principles).

⁶⁵ *Colp v. Ford Motor Co.*, 630 S.E.2d 886, 887 (Ga. Ct. App. 2006).

⁶⁶ *Gardner v. Southern Ry. Sys.*, 675 F.2d 949, 952 (7th Cir. 1982).

⁶⁷ In fact, the authors have not found a jurisdiction that does not apply the doctrine.

⁶⁸ The admissibility of evidence is a distinctly procedural matter. *Heath*, 126 F.3d at 1396 (holding that in the Eleventh Circuit, the admission of other incidents is generally governed by the federal substantial similarity doctrine, not state law).

⁶⁹ *Held v. Mitsubishi Aircraft Int'l, Inc.*, 672 F. Supp. 369, 390 (D. Minn. 1987).

⁷⁰ *Four Corners Helicopters, Inc. v. Turbomeca, S.A.*, 979 F.2d 1434, 1442 (10th Cir. 1992) (excluding defendant's out-of-court experiment and stating that "[e]xperiments purporting to simulate actual events may be admissible if made under conditions which are substantially similar to those which are the subject of the litigation").

⁷¹ *Jaramillo v. Ford Motor Co.*, 116 Fed. Appx. 76, 78-79 (9th Cir. 2004).

⁷² *Heath*, 126 F.3d at 1396 n.11.

The proponent of this evidence carries the burden of proof,⁷³ and the evidence's admissibility turns on the theory of the case, the sufficiency of the evidence, and the purpose for which it is offered:

The [proponent] bears the burden of establishing sufficient similarity between the prior incidents and his own theory of how the accident occurred, so that admitting the prior evidence "will make the existence of any fact that is of consequence to the determination of the action more probable" than it would be without the evidence.⁷⁴

The court's inquiry necessarily begins with the proponent's theory of the case (*e.g.*, theory of defect) since "the definition of the defect itself will influence the resolution of substantial similarity."⁷⁵ The proponent, however, "cannot define a . . . defect so broadly that all products . . . are by definition 'substantially similar.'"⁷⁶ Common sense requires some scrutiny by the court or "almost all prior occurrence evidence would be admissible in products liability cases."⁷⁷

To satisfy the court that the other incidents are "sufficiently" substantially similar, the proponent must establish that the other incidents share a common design, common defect, and common causation with the subject accident and accident-causing product.⁷⁸ In *Nachtsheim v. Beech Aircraft Corp.*,⁷⁹ the court affirmed the exclusion of a prior air-crash because "too few *established facts*" supported a determination that the prior incident and the subject crash were substantially similar.⁸⁰ In general,

⁷³ *Sheesley v. Cessna Aircraft Co.*, Civ. Nos. 02-4185-KES, 03-5011-KES, 03-5063-KES, 2006 WL 3042793, at *11 (D.S.D. Oct. 24, 2006) (Order Regarding Motions *In Limine*).

⁷⁴ *Stecyk v. Bell Helicopter Textron, Inc.*, No. CIV. A. 94-CV-1818, 1998 WL 744087, at *4 (E.D. Pa. Oct. 23, 1998) (quoting FED. R. EVID. 401).

⁷⁵ *Christ v. Int'l Bus. Machs. Corp.*, 20 Phila. Co. Rptr. 610, 634 (Pa. Com. Pl. 1984); *accord In re Air Crash Disaster at Sioux City, Iowa*, on July 19, 1989, Nos. MDL-817, 89 C 8082, 1991 WL 279005, at *2 (N.D. Ill. Dec. 26, 1991) ("The focus of an inquiry into the substantial similarity of a prior accident to the accident at issue is a function of the theory of the case advanced by the proponent of the prior accident evidence.").

⁷⁶ *Colp v. Ford Motor Co.*, 630 S.E.2d 886, 890 (Ga. Ct. App. 2006).

⁷⁷ *Cooper Tire & Rubber Co. v. Crosby*, 543 S.E.2d 21, 24 (Ga. 2001).

⁷⁸ *Id.* at 23.

⁷⁹ 847 F.2d 1261 (7th Cir. 1988).

⁸⁰ *Id.* at 1269. Of primary concern to the appellate court was that the plaintiff had failed to present any evidence that the alleged defect in the subject air-crash—a frozen elevator—was involved in the prior incident. *Id.*; *see also* *Julander v. Ford Motor Co.*, 488 F.2d 839, 846–47 (10th Cir. 1973) (finding the required

"while the relevant factors in each case will change, changes in place, remoteness of time, changes in circumstances, and/or changes in the product or area itself are the factors most frequently considered in deciding whether other incidents are 'substantially similar.'" ⁸¹

Knowing the law of the jurisdiction in which the case is pending is key since the proof requirement changes from court to court. For example, some courts require a showing of causation,⁸² while others do not. Some courts screen for temporal proximity (excluding the prior incidents they deem "too remote in time"),⁸³ while others do not.⁸⁴

The degree of exactness and the level of scrutiny applied by the court also vary by jurisdiction. Some courts set the same hurdle for all prior incidents,⁸⁵ while others apply a continuum such that the degree of similarity needed to satisfy the doctrine turns on the purpose for which the other incident evidence is offered.⁸⁶ Likewise, what is an approved purpose in one jurisdiction may find rejection in another. For example, federal courts admit other incident evidence to prove myriad purposes, including direct proof of negligence,⁸⁷ propriety of punitive dam-

level of substantial similarity "singularly lacking" despite the proponent's proffer of other incidents involving the same product with the same alleged defect).

⁸¹ *Christ v. Int'l Bus. Machs. Corp.*, 20 Phila. Co. Rptr. 610, 632 (Pa. Com. Pl. 1984).

⁸² *Colp v. Ford Motor Co.*, 630 S.E.2d 886, 887 (Ga. Ct. App. 2006) ("The showing of substantial similarity must include a showing of similarity as to causation."); *see also Moe v. Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917, 935 (10th Cir. 1984) (affirming the exclusion of other air crashes because a "similarity of proof of causation was lacking").

⁸³ *Ford Motor Co. v. Hall-Edwards*, 971 So. 2d 854, 859 (Fla. Dist. Ct. App. 2007) (identifying temporal proximity as one element of the Florida test); *see In re Air Crash Disaster at Sioux City, Iowa*, on July 19, 1989, Nos. MDL-817, 89 C 8082, 1991 WL 279005, at *6 (N.D. Ill. Dec. 26, 1991) (excluding two prior incidents because, among other reasons, they occurred more than fifteen years before the air crash at issue).

⁸⁴ *See, e.g., Lopez v. Three Rivers Elec. Coop., Inc.*, 26 S.W.3d 151, 160 (Mo. 2000) ("A prior accident that meets the requirements of similarity, even though remote, may be highly material. Remoteness of time goes to weight of the evidence in most circumstances, not to its admissibility.").

⁸⁵ *See, e.g., Moseley v. Gen. Motors Corp.*, 447 S.E.2d 302, 307 (Ga. Ct. App. 1994), *abrogated on other grounds by Webster v. Boyett*, 496 S.E.2d 459 (Ga. 1998); *Buckman v. Bombardier Corp.*, 893 F. Supp. 547, 552 (E.D.N.C. 1995).

⁸⁶ *See, e.g., In re Air Crash Disaster at Sioux City*, 1991 WL 279005, at *6 (relaxing the test when other incident evidence is offered for certain purposes); *accord Four Corners Helicopters, Inc. v. Turbomeca, S.A.*, 979 F.2d 1434, 1442 (10th Cir. 1992).

⁸⁷ *Cooper v. Firestone Tire & Rubber Co.*, 945 F.2d 1103, 1105 (9th Cir. 1991).

ages,⁸⁸ as well as notice, magnitude of the danger involved, defect, the ability to correct a known defect, the lack of safety for intended uses, strength of the product, the standard of care and causation,⁸⁹ and to refute a defense.⁹⁰ Courts in Louisiana, on the other hand, only admit other incidents “for the limited purpose” of showing notice of defects or dangerous conditions.⁹¹

The more common purposes are discussed below.

A. CAUSATION

When other incident evidence is offered to prove causation, courts typically require a “high” or heightened degree of similarity.⁹² “The rationale . . . 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.”⁹³ In other words, the jury is asked to infer liability from evidence of the prior accident alone without the issue of liability having been proved in the pending litigation.⁹⁴ For admission of other incidents to prove causation, the proponent of the evidence must show: “(1) a similar product; (2) a similar defect; (3) causation related to the defect in other accidents; and (4) exclusion of all reasonable secondary explanations as to the cause of th[e] crash.”⁹⁵

This high hurdle has led one Pennsylvania court to conclude:

It is possible, in theory, to prove causation of one accident through evidence of other accidents. However, we have found no Pennsylvania authority for this proposition.

. . . .

⁸⁸ *John McShain, Inc. v. Cessna Aircraft Co.*, 563 F.2d 632, 635–36 (3d Cir. 1977); *Bemer Aviation, Inc. v. Hughes Helicopter, Inc.*, 621 F. Supp. 290, 302 (E.D. Penn. 1985); *see also Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635, 639–40 (Ga. 1993).

⁸⁹ *Jones v. Otis Elevator Co.*, 861 F.2d 655, 661 (11th Cir. 1988) (identifying notice, magnitude of the danger involved, defect, the ability to correct a known defect, the lack of safety for intended uses, strength of the product, the standard of care, and causation as acceptable purposes).

⁹⁰ *Four Corners Helicopters*, 979 F.2d at 1439.

⁹¹ *Bertrand v. Air Logistics, Inc.*, 820 So. 2d 1228, 1238 (La. Ct. App. 2002).

⁹² *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1246–47 (10th Cir. 2000); *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1269 (7th Cir. 1988).

⁹³ *Nachtsheim*, 847 F.2d at 1268–69.

⁹⁴ *Id.*

⁹⁵ *Christ v. Int’l Bus. Machs. Corp.*, 20 Phila. Co. Rptr. 610, 630–31 (Pa. Com. Pl. 1984); *see also Buckman v. Bombardier Corp.*, 893 F. Supp. 547, 552 (E.D.N.C. 1995).

. . . [W]e agree . . . that [the] use of other accidents to prove causation is purely a theoretical basis for admitting other accident evidence.⁹⁶

For example, *Nachtsheim v. Beech Aircraft Corp.* involved the crash of a Beech Baron 58P.⁹⁷ At trial, the plaintiff alleged that the airplane's design rendered it unsafe for flight because it permitted ice to accumulate on the horizontal stabilizer, thereby freezing the elevator.⁹⁸ The federal appellate court affirmed the exclusion of a prior air-crash of the same model because the cause of the prior crash had never been determined.⁹⁹ "Our primary concern is that the plaintiffs have not presented any evidence that the alleged dangerous condition—a frozen elevator—was in any way involved in the [prior] accident."¹⁰⁰

The court thus concluded that admission of the prior accident would have led the jury to infer that the prior crash was caused by the same factors as the crash at issue.¹⁰¹ The defendant would then have had to unfairly litigate, as a practical matter, both accidents.¹⁰²

B. DEFECT OR DANGEROUS CONDITION

As with the issue of causation, evidence offered to illustrate the existence of a defect or dangerous condition necessitates a high degree of similarity because "it weighs directly on the ultimate issue to be decided by the jury."¹⁰³ In *Four Corners Helicopters, Inc. v. Turbomeca, S.A.*, the plaintiffs filed suit against the manufacturer of the turbine engine in an Aerospatiale SA 315 B "Lama" helicopter.¹⁰⁴ The case arose from the crash of the Lama and the death of its pilot.¹⁰⁵ At trial, the plaintiffs alleged that the crash was the result of engine failure which was caused "when a loose labyrinth housing screw backed out of position and contacted the rear face of the compressor impeller."¹⁰⁶

⁹⁶ *Christ*, 20 Phila. Co. Rptr. at 629–30.

⁹⁷ *Nachtsheim*, 847 F.2d at 1264.

⁹⁸ *Id.*

⁹⁹ *Id.* at 1266–69.

¹⁰⁰ *Id.* at 1269.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Four Corner Helicopters, Inc. v. Turbomeca, S.A.*, 979 F.2d 1434, 1440 (10th Cir. 1992).

¹⁰⁴ *Id.* at 1435.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1436.

The plaintiffs introduced, and the court admitted, evidence of sixteen prior reports of loose labyrinth screws.¹⁰⁷ The prior incidents were offered to show a design defect, negligence, and among other things, causation.¹⁰⁸ After hearing this and other evidence, the jury returned a verdict against the engine manufacturer for \$1,266,130.¹⁰⁹ On appeal, the manufacturer argued that the other incidents were not substantially similar to the subject crash because, among other reasons, none of the other incidents involved an in-flight engine failure; none of the other incidents involved accidents, but instead concerned mechanical problems identified on the ground; and, in some of the reports the compressor impeller was made of aluminum, a softer material than the titanium used on other impellers.¹¹⁰ The appellate court disagreed, affirming the admission of all sixteen prior incidents.¹¹¹ After reiterating the black letter rule that evidence proffered to illustrate the existence of a defect or dangerous condition necessitates a high degree of similarity, the court, without critical analysis, held that “[t]he incidents, though not identical, were substantially similar and were therefore admissible to indicate the existence of a defect” and “for all purposes offered by the plaintiffs.”¹¹²

C. NOTICE

To be admissible on the theory of notice, the other incidents must have alerted the party against whom they are offered of the problem or danger at issue. “If there is no dispute as to the existence of a hazard or danger, there is no reason for a jury to hear about other accidents to ‘prove’ knowledge of that hazard or danger, and such evidence is irrelevant.”¹¹³ When considering which other incidents to admit for purposes of notice, courts typically look at whether the other incidents preceded the accident at issue,¹¹⁴ and whether “sufficient time” has elapsed “so as

¹⁰⁷ *Id.* at 1439.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1437.

¹¹⁰ *Id.* at 1440.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Sachs, *supra* note 1, at 279.

¹¹⁴ *Christ v. Int'l Bus. Machs. Corp.*, 20 Phila. Co. Rptr. 610, 628 (Pa. Com. Pl. 1984) (“Obviously, in order to prove a defendant’s notice of a defect, the other accidents must occur prior to the accident in question in order to be admissible.”).

to raise the question of constructive notice.”¹¹⁵ Prior incidents that are too remote in time may risk exclusion,¹¹⁶ while subsequent accidents, in most cases, are not admissible.¹¹⁷ Courts routinely limit the type and extent of the “notice” evidence admitted since the issue is notice itself, not notice of the details.¹¹⁸

Finally, some jurisdictions relax the similarity test when other incidents are offered to show notice,¹¹⁹ while others do not.¹²⁰ Georgia, for example, has specifically rejected any suggestion of a reduced burden. In *Moseley v. General Motors Corp.*,¹²¹ the Georgia Court of Appeals posed this rhetorical question: “If the relative defects are not similar, how can one be notice of the other?”¹²² But not all courts share this sentiment. In *In re Air Crash Disaster at Sioux City, Iowa, on July 19, 1989*, a federal court

¹¹⁵ *Id.* at 633.

¹¹⁶ Compare *In re Air Crash Disaster at Sioux City, Iowa, on July 19, 1989*, Nos. MDL-817, 89 C 8082, 1991 WL 279005, at *6 (N.D. Ill. Dec. 26, 1991) (holding that accidents occurring fifteen and seventeen years before the subject accident were too remote in time), with *Lopez v. Three Rivers Elec. Coop., Inc.*, 26 S.W.3d 151, 159 (Mo. 2000) (“A prior accident that meets the requirements of similarity, even though remote, may be highly material. Remoteness of time goes to the weight of the evidence in most circumstances, not to its admissibility.”).

¹¹⁷ Compare *Julander v. Ford Motor Co.*, 488 F.2d 839, 846 (10th Cir. 1973) (holding evidence of subsequent incident inadmissible to show notice of defect), with *Elsworth v. Beech Aircraft Corp.*, 691 P.2d 630, 640 n.13 (Cal. 1984) (admitting twenty other incidents for notice despite that seven occurred after the subject accident; the court held that the introduction of these later-occurring accidents was not overly prejudicial in light of the number of other incidents already admitted).

¹¹⁸ *Wilson v. Bradlees of New Eng., Inc.*, No. Civ. 93-47-JD, 1999 WL 816817, at *6 (D.N.H. Feb. 3, 1999) (holding that “plaintiffs will not be permitted to introduce any evidence of the specific details of other accidents, injuries, causes, complaints, or cases to show notice”).

¹¹⁹ *Four Corners Helicopters, Inc. v. Turbomeca, S.A.*, 979 F.2d 1434, 1440 (10th Cir. 1992); *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1269 n.9 (7th Cir. 1988); accord, *McLeod v. Era Aviation, Inc.*, Civ. A. No. 93-294, 1996 WL 109302, at *2-*3 (E.D. La. Mar. 12, 1996) (requiring the proponent to show “reasonable similarity” when other incidents are proposed to show notice); *In re Air Crash Disaster at Sioux City*, 1991 WL 279005, at *2 (noting a “relaxed” similarity requirement for other incidents introduced to prove notice); *Elsworth*, 691 P.2d at 639 (holding that “all that is required . . . is that the previous injury should be such as to attract the defendant’s attention to the dangerous situation”).

¹²⁰ *Colp v. Ford Motor Co.*, 630 S.E.2d 886, 891 (Ga. Ct. App. 2006); accord *Buckman v. Bombardier Corp.*, 893 F. Supp. 547, 552 (E.D.N.C. 1995) (“Evidence of other accidents is highly prejudicial.”).

¹²¹ 447 S.E.2d 302 (Ga. Ct. App. 1994), *abrogated on other grounds by Webster v. Boyett*, 496 S.E.2d 459 (Ga. 1998).

¹²² *Id.* at 307.

in Illinois relaxed the similarity test to admit a prior accident involving a different type of aircraft produced by a different manufacturer with a different, allegedly defective hydraulic system.¹²³ That case arose from the crash of United Airlines Flight 232 following a total loss of the hydraulic powered flight controls in a McDonnell Douglas DC-10.¹²⁴ Prior to trial, McDonnell Douglas moved *in limine* to exclude evidence of the 1985 crash of a Japan Airlines Boeing 747.¹²⁵ The differences in the two planes were substantial, including the design and configuration of the engines and their hydraulic systems.¹²⁶ Despite these and other differences, the court in *Sioux City* held that the other incident was relevant to show "McDonnell Douglas' knowledge of available measures taken by an industry competitor to correct a potentially serious problem that *in theory* might strike its own aircraft [and] is therefore central to the question of its liability for the Sioux City accident."¹²⁷

The court stated that the differences between the two accidents "lay outside the substantial similarity determination" and that the different triggering events that caused the total loss of hydraulic power went to the weight, not the admissibility, of the evidence.¹²⁸

D. PROPRIETY OF PUNITIVE DAMAGES

Evidence of other incidents may establish or bolster a claim for punitive damages because prior incidents arguably show that the defendant was on notice of a defect and failed to cure it.¹²⁹ This type of "conscious indifference to consequences" is the touchstone of the punitive damages standard. In *Mack Trucks, Inc. v. Conkle*,¹³⁰ the plaintiff, the driver of a Mack tractor trailer truck, alleged that he was injured when the truck overturned due to a fatigue crack in the truck's right frame rail.¹³¹ At trial, the driver offered, and the court admitted, evidence that Mack

¹²³ *In re Air Crash Disaster at Sioux City*, 1991 WL 279005, at *9.

¹²⁴ *Id.* at *1.

¹²⁵ *Id.*

¹²⁶ *Id.* at *2-*4.

¹²⁷ *Id.* at *4 (emphasis added).

¹²⁸ *Id.*

¹²⁹ See, e.g., *Bemer Aviation, Inc. v. Hughes Helicopter, Inc.*, 621 F. Supp. 290, 299 (E.D. Pa. 1985) (affirming the award of punitive damages because Hughes Helicopter conducted a "woefully insufficient investigation" in the face of over fifty similar incidents).

¹³⁰ 436 S.E.2d 635 (Ga. 1993).

¹³¹ *Id.* at 636.

Trucks "had received numerous complaints about cracks in the frame rails" of other similar Mack trailer trucks.¹³² After considering this and other evidence, "[t]he jury returned a verdict for compensatory damages in the amount of \$184,082, and an award of punitive damages . . . in the amount of \$2 million."¹³³

The appellate court affirmed the admission of the other incident evidence, holding that the prior incidents were substantially similar to the subject accident and that the record was "replete with evidence showing that, for four years prior to the incident," the marketing division of Mack Trucks ignored or rejected internal recommendations to "reinforce the frames . . . at a cost of \$103."¹³⁴ "We conclude that this evidence, along with other evidence in the record, shows a 'conscious indifference to consequences,'" and therefore meets the punitive standard in Georgia.¹³⁵

E. REFUTING A DEFENSE

Other incident evidence may be used to refute a defense that the accident was caused by a maintenance problem,¹³⁶ or, among other things, that the alleged defect could have not existed in the product.¹³⁷

For example, in *Joy v. Bell Helicopter Textron, Inc.*, the plaintiff alleged improper manufacture of the spur adapter gearshaft ("SAG") in the Allison engine of a Bell helicopter.¹³⁸ At trial, the plaintiffs offered evidence of SAG failures in two prior incidents to refute the engine manufacturer's suggestion that the SAG at issue "could not have been defective because it was manufactured according to specifications."¹³⁹ The plaintiffs offered to withdraw the evidence if the manufacturer would stipulate that parts can fail despite meeting specifications, but the manufacturer refused.¹⁴⁰ The trial court admitted the prior incidents, even though the other incidents resulted from severe wear rather than a metallurgical defect.¹⁴¹

¹³² *Id.* at 639-40.

¹³³ *Id.* at 636-37.

¹³⁴ *Id.* at 640.

¹³⁵ *Id.*

¹³⁶ See *Four Corners Helicopters, Inc. v. Turbomeca, S.A.*, 979 F.2d 1434, 1439 (10th Cir. 1992).

¹³⁷ See *Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 555 (D.C. Cir. 1993).

¹³⁸ *Id.* at 553.

¹³⁹ *Id.* at 554-55.

¹⁴⁰ *Id.* at 555.

¹⁴¹ *Id.* at 554.

After finding that the “issue is close,” the appellate court affirmed the admission of the other incidents because the other SAGs “broke in precisely the same location” as the SAG in the subject helicopter and “all three failures occurred well before the end of the estimated useful life of the SAGs involved.”¹⁴² “Notably, we have not required that accidents occur in precisely the same manner” to qualify under the doctrine.¹⁴³

PART III: KEY EVIDENTIARY CONSIDERATIONS

A court “has broad discretion to determine the relevance of proffered evidence,”¹⁴⁴ and evidentiary rulings ordinarily are deferred until the time of trial.¹⁴⁵ In the context of other incident evidence, the court “must satisfy itself that the rule of substantial similarity has been met.”¹⁴⁶ This typically requires a hearing or “mini-trial” outside the presence of the jury so that the court may critically assess the foundation for, and relevance of, other incident evidence, including any prejudice that would result from the admission thereof.¹⁴⁷

When arguing for or opposing the admission of other incident evidence, the following considerations are key.

A. PREJUDICE

Even when the proponent carries his burden outside the presence of the jury, the admissibility of other incident evidence lies within the sound discretion of the trial judge, “who must weigh the dangers of unfairness, confusion, and undue expenditure of time . . . against the factors favoring admissibility.”¹⁴⁸ “[A]dmission of other incidents is tempered by judicial concern

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *In re Air Crash Disaster at Sioux City, Iowa*, on July 19, 1989, Nos. MDL-817, 89 C 8082, 1991 WL 279005, at *2 (N.D. Ill. Dec. 26, 1991).

¹⁴⁵ *Id.*; see *Bemer Aviation, Inc. v. Hughes Helicopter, Inc.*, 621 F. Supp. 290, 301 (E.D. Pa. 1985) (declining to rule “abstractly” on a motion *in limine* to exclude evidence of other incidents).

¹⁴⁶ *Colp v. Ford Motor Co.*, 630 S.E.2d 886, 887 (Ga. Ct. App. 2006).

¹⁴⁷ See, e.g., *Wheeler v. John Deere Co.*, 862 F.2d 1404, 1407 (10th Cir. 1988) (stating that the preferable method of determining “substantial similarity” is through a hearing out of the presence of a jury at trial); *Olson v. Ford Motor Co.*, 410 F. Supp. 2d 855, 868 (D.N.D. 2006) (requiring the plaintiff to identify other incidents in advance of a hearing that “will then be held *outside the presence of the jury* at which time the plaintiff must demonstrate that the evidence to be offered is relevant, substantially similar, and admissible under Rule 403”).

¹⁴⁸ *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1269 (7th Cir. 1988).

that the evidence may raise collateral issues which confuse both the real issue and the jury."¹⁴⁹

In *Moe v. Avions Marcel Dassault-Breguet Aviation*,¹⁵⁰ the court affirmed the exclusion of other flight incidents because they would require "a mini-trial within a trial, resulting in undue delay, waste of time, and needless presentation of cumulative evidence."¹⁵¹

Similarly, in *Farley v. Cessna Aircraft Co.*,¹⁵² a federal court in Pennsylvania heard a full day of testimony and argument regarding the admissibility of certain evidence showing that undrainable water in the fuel system of other Cessna 140 aircraft allegedly caused nine other accidents.¹⁵³ Recognizing the inherent complexity of the presentation of this evidence at trial, the court stated:

[Admission of this evidence at trial] would have necessitated at least nine mini-trials on the issue of whether each accident was caused by undrainable water in the fuel system, as opposed to causes due to weather, pilot error, flight conditions, whether there were improper maintenance and pre-flight examinations, other suspected mechanical failures, or a host of similar factors concerning the other accidents. These mini-trials would have taken weeks to complete. The jury would have . . . been subjected to at least two adverse expert opinions for each of the mini-trials, that would in turn have to be measured against many fact witnesses offered in each of those mini-trials.¹⁵⁴

The court then refused to reconsider its prior evidentiary ruling excluding this evidence under Federal Rule of Evidence 403.¹⁵⁵

B. DOCUMENTARY EVIDENCE

Customer complaints, lawsuits, and other out-of-court documents that allege or summarize other incidents are generally not admissible when offered to prove the truth of the matter

¹⁴⁹ *Christ v. Int'l Bus. Machs. Corp.*, 20 Phila. Co. Rptr. 610, 619 (Pa. Com. Pl. 1989) (internal quotations omitted).

¹⁵⁰ 727 F.2d 917 (10th Cir. 1984).

¹⁵¹ *Id.* at 935.

¹⁵² Civ. A. No. 93-6948, 1996 WL 37823 (E.D. Pa. Jan. 25, 1996).

¹⁵³ *Id.* at *5.

¹⁵⁴ *Id.* at *6.

¹⁵⁵ *Id.*

asserted.¹⁵⁶ In *Nissan Motor Co. v. Armstrong*,¹⁵⁷ the court observed:

Complaint letters in a manufacturer's files may be true, but they also may be accusatory and self-serving; they are rarely under oath and never subject to cross-examination. As they are necessarily out-of-court statements, they are hearsay if offered to prove the truth of the assertions therein—that the incidents complained of occurred as reported.¹⁵⁸

In *Olson v. Ford Motor Co.*,¹⁵⁹ a federal court in North Dakota excluded numerous customer complaints that the plaintiff intended to offer “to show brake ineffectiveness, relative dangerousness of condition, negligence, and defective condition” because, in each instance, the plaintiff was relying on the truth of the underlying assertion (that is, that the brakes failed and the driver was placed in harm's way).¹⁶⁰ The court did admit several of the complaints, however, to show notice of the allegations after satisfying itself that the underlying facts were substantially similar to the accident at issue.¹⁶¹ But the court held that the “specific details” of each customer complaint could not be introduced and gave the jury “a limiting instruction to the effect that such evidence is admissible only for the purpose of establishing Ford's notice and cannot be used as evidence of a defect or for any other purpose.”¹⁶²

In *Sheesley v. Cessna Aircraft Co.*,¹⁶³ the court took a slightly different approach. There, the plaintiffs sought to introduce five Service Difficulty Reports (“SDRs”) discussing alleged wastegate elbow malfunctions in certain Cessna aircraft.¹⁶⁴ Prior to trial, the court overruled Cessna's hearsay objections, holding that

¹⁵⁶ See *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1273–74 (7th Cir. 1988) (holding that a service bulletin warning foresters not to fly airplanes into known icing conditions was properly excluded because plaintiff was unable to provide information about the author of the bulletin, such as his qualifications, source of knowledge, and accuracy of information); *John McShain, Inc. v. Cessna Aircraft Co.*, 563 F.2d 632, 635–36 (3d Cir. 1977) (holding that thirty accident reports submitted to NTSB were properly excluded on the issue of defective design because the reports were hearsay).

¹⁵⁷ 145 S.W.3d 131 (Tex. 2004).

¹⁵⁸ *Id.* at 139–40.

¹⁵⁹ 410 F. Supp. 2d 855 (D.N.D. 2006).

¹⁶⁰ *Id.* at 861.

¹⁶¹ *Id.* at 862–64.

¹⁶² *Id.* at 864.

¹⁶³ Civ. Nos. 02-4185-KES, 03-5011-KES, 03-5063-KES, 2006 WL 3042793 (D.S.D. Oct. 24, 2006).

¹⁶⁴ *Id.* at *10.

"[t]he veracity of the underlying complaints has no effect on Cessna's notice, and thus, the SDRs are not offered to prove the truth of the matter asserted."¹⁶⁵ Finding that the plaintiffs had failed to establish substantial similarity "from the short factual summaries contained within the SDRs," the court nonetheless decided that the plaintiffs "should have the opportunity" to lay the proper foundation at trial.¹⁶⁶

C. WITNESSES

Although the testimony of injured plaintiffs in other cases or the testimony of eyewitnesses from other crashes is very powerful evidence, courts often exclude this type of testimony from trial.¹⁶⁷ More commonly, the proponent relies on expert testimony.

While an expert may rely upon evidence not otherwise admissible to form his opinion,¹⁶⁸ he may not act as a mere conduit for inadmissible facts, nor should he be able to off-load prior accidents as the basis for his opinions if those accidents were independently excluded by the court.¹⁶⁹ In *Nachtsheim v. Beech Aircraft Corp.*,¹⁷⁰ the Seventh Circuit affirmed the trial court's exclusion of evidence of a prior air-crash.¹⁷¹ The plaintiffs then attempted to introduce the excluded evidence through the testimony of an expert witness who had relied on the prior crash in forming an opinion about the causes of the air-crash at issue.¹⁷² The trial court permitted the expert to state his opinions based

¹⁶⁵ *Id.* at *11.

¹⁶⁶ *Id.*

¹⁶⁷ *See, e.g., Olson*, 410 F. Supp. 2d at 868 (excluding witnesses from other accidents). *But see* *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1271 (7th Cir. 1988) (affirming the plaintiff's reading in to the record the deposition testimony of another pilot who had allegedly experienced the same problem as had plaintiffs in the present litigation).

¹⁶⁸ *See* FED. R. EVID. 703.

¹⁶⁹ *In re Air Crash Disaster at Sioux City, Iowa*, on July 19, 1989, Nos. MDL-817, 89 C 8082, 1991 WL 279005, at *8 (N.D. Ill. Dec. 26, 1991). *But see* *Lawhon v. Ayres Corp.*, 992 S.W.2d 162, 165-66 (Ark. Ct. App. 1999) (permitting expert to relay to the jury otherwise hearsay information concerning other incidents of structural wing failure because "an expert must be allowed to disclose to the trier of fact the factual basis for his opinion because the opinion would otherwise be left unsupported, and the trier of fact would be left with little if any means of evaluating its correctness;" and also finding a lack of prejudice, as such evidence was cumulative of the expert's testimony).

¹⁷⁰ 847 F.2d 1261 (7th Cir. 1988).

¹⁷¹ *Id.* at 1269-70.

¹⁷² *Id.* at 1270.

on the excluded evidence but disallowed testimony in which the expert spoke directly of the excluded prior crash evidence.¹⁷³ The Seventh Circuit affirmed the trial court's ruling, holding that expert testimony may be based on inadmissible materials but that does not mean that information independently excluded by reason of another rule of evidence (*e.g.*, Federal Rule of Evidence 403) will automatically be admitted under Federal Rule of Evidence 703.¹⁷⁴

D. OTHER CONSIDERATIONS

The admission of other incidents at trial raises a number of concerns for the party against whom the evidence is offered. The first is how best to minimize the effect of this evidence. While the party has the choice of cross-examining the proponent's witnesses to emphasize a prior incident's dissimilarities,¹⁷⁵ such is often "no choice at all: either not cross-examine so as to minimize the impact of th[e] evidence; or cross-examine and risk confusing the jury and further prejudice their case."¹⁷⁶ The same is true of limiting instructions. Some instructions do more harm than good. For example, in *Soden v. Freightliner Corp.*,¹⁷⁷ the court allowed the plaintiff to introduce numerous lawsuits and informal complaints as evidence of other incidents during the cross-examination of the defendant's expert.¹⁷⁸ Immediately after this testimony, the court gave a repetitive eight-sentence, 300-word limiting instruction that did nothing but reemphasize the other incidents and their notice to Freightliner of alleged design problems with the subject product.¹⁷⁹

Second, as demonstrated in *Soden*, courts also allow the proponent to impeach the other party's witnesses using other incident evidence, demonstrating the need to carefully plan direct testimony. For example, if a defendant asserts that the accident simply could not have occurred as the plaintiff alleged, other

¹⁷³ *Id.* at 1270–71.

¹⁷⁴ *Id.*; see *In re Air Crash Disaster at Sioux City*, 1991 WL 279005, at *8 ("Rule 703 should not be regarded as a general exception to otherwise applicable evidentiary limitations.").

¹⁷⁵ See *Four Corners Helicopters, Inc. v. Turbomeca, S.A.*, 979 F.2d 1434, 1439 (10th Cir. 1992).

¹⁷⁶ *Christ v. Int'l Bus. Machs. Corp.*, 20 Phila. Co. Rptr. 610, 636 (Pa. Com. Pl. 1984) (holding that "the fact that it may not have been possible to minimize the impact of [the other incident] evidence was no reason to exclude it").

¹⁷⁷ 714 F.2d 498 (5th Cir. 1983).

¹⁷⁸ *Id.* at 507.

¹⁷⁹ *Id.*

incidents become relevant and should be admitted to impeach the witness or rebut a defense.¹⁸⁰ For the same reason, litigants should be wary of “opening the door” to the admission of other incident evidence. For example, in *Bemer Aviation, Inc. v. Hughes Helicopter, Inc.*,¹⁸¹ a federal trial court upheld its earlier decision to admit evidence of other incidents after the defendant opened the door by cross-examining the plaintiff’s expert as to thirty-six service reports of mechanical problems encountered by other operators of Hughes helicopters.¹⁸² “Defense counsel made a strategic decision to explore the substance of the [reports]. Once the defendant examined the witness on each [report], he opened the door for the plaintiff to pursue the [reports] on redirect.”¹⁸³

Finally, the party against whom the other incident evidence is offered at trial must make timely and appropriate objections when the evidence falls outside the proponent’s original proffer of substantial similarity, particularly with regard to expert testimony.¹⁸⁴ In *Christ v. International Business Machines Corp.*,¹⁸⁵ the court admitted seven prior incidents of alleged switchover shock, primarily through the testimony of the plaintiff’s expert.¹⁸⁶ The defendants argued in post-trial motions that the evidence presented as to the seven incidents failed to conform to the plaintiff’s offer of proof made at the beginning of trial.¹⁸⁷ The trial court found that the defendants had waived the issue because they had failed to timely object to the evidence.¹⁸⁸

¹⁸⁰ Sachs, *supra* note 1, at 272; *see discussion supra* note 64 (discussing whether other incident evidence may be admitted to impeach an expert without first proving substantial similarity).

¹⁸¹ 621 F. Supp. 290 (E.D. Pa. 1985).

¹⁸² *Id.* at 301.

¹⁸³ *Id.*

¹⁸⁴ *See Walker v. Messerschmitt Bolkow Blohm GmbH*, 844 F.2d 237, 245 n.3 (5th Cir. 1988).

¹⁸⁵ 20 Phila. Co. Rptr. 610, 627 (Pa. Com. Pl. 1984).

¹⁸⁶ *Id.* at 626.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*; *see also Ford Motor Co. v. Hall-Edwards*, 971 So. 2d 854, 860 (Fla. Dist. Ct. App. 2007) (reversing judgment against manufacturer where plaintiffs and their experts repeatedly referred to other incidents in direct and cross-examination without showing substantial similarity).