

The Admissibility of Other Incidents in Aviation Products Liability Cases

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I. Introduction

Typical law school evidence courses include only a cursory examination of the admissibility of “other acts”,¹ and even then, it is usually in the context of criminal cases under FED R. EVID. 404(b). And, indeed, the federal rules and case law are well-established when dealing with the government’s efforts to use evidence of other acts against a criminal defendant. But in civil matters—products liability cases in particular—the rules are less clear. So it is worth harkening back to the criminal law roots of Rule 404(b) as a guidepost.

The use of “other act” evidence in criminal cases is based on the assumption that a defendant’s prior crimes are so influential that they may preclude any real focus on whether the defendant was guilty of the acts for which he is charged in this particular case. The explicit objective of Rule 404(b) is to prevent admission of evidence bearing on a defendant’s “propensity.” Or as my law school evidence professor described it: “We don’t want a jury to say that just because the defendant is a crimey guy, he must have committed the crime with which he is now charged.” While I have found no court that has explicitly applied Rule 404(b) in the products liability context, the propensity argument that is the rule’s foundation would apply equally well in the civil context. With this in mind, I’ll turn to the current federal case law on the use of “other acts” in product liability cases and suggest how it might be improved.

II. The “Substantial Similarity Doctrine”

The threshold inquiry in any dispute over the admissibility of evidence is whether the evidence is relevant; that is, whether the evidence “tends to make the existence of a fact of consequence to the action before the court more or less probable.” FED R. EVID. 403. Every circuit that has examined this issue has adopted some version of the so-called “substantial similarity” test which requires that other acts be substantially similar to the case

¹ I prefer the term “other acts” to the terms “subsequent” or “bad” acts as the former term is broader and more accurate.

being litigated to be admissible.² The reasoning behind this doctrine is that accidents bearing substantial similarity to the case before the court make the existence of a fact of consequence to the action before the court more or less probable, while dissimilar accidents do not.

The Tenth Circuit, which has developed the most extensive body of case law on the “substantial similarity” doctrine, has held that the precise degree of similarity required to ensure the relevance of another accident depends on the purpose for which the evidence is offered. See *Four Corners Helicopters, Inc. v. Turbomeca, S.A.*, 979 F.2d 1434, 1440 (10th Cir. 1992); and *Ponder v. Warren Tool Corp.*, 834 F.2d 1553, 1560 (10th Cir. 1987). A high degree of similarity is required when a plaintiff offers other accident evidence to prove **causation**, or **product defect** but a lesser degree of similarity is allowed when evidence of other accidents is offered to show the defendant

had **notice of potential defects** in its product. *Wheeler v. John Deere Co.*, 862 F.2d 1404, 1407 (10th Cir. 1988); *Ponder*, 834 F.2d at 1559. The rationale offered for this distinction is that in the former instances, “a jury is asked to infer from the presence of other accidents (1) that a dangerous condition existed (2) which caused the accident.” *Nachtsheim v. Beech*

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² **3rd Circuit:** *Barker v. Deere & Co.*, 60 F.3d 162 (3d Cir. 1995).

5th Circuit: *Jones & Laughlin Steel Corp. v. Matherne*, 348 F.2d 394, 400 (5th Cir. 1965).

6th Circuit: *Kich v. Gorrilla*, 552 F.2d 1170 (6th Cir. 1977).

8th Circuit: *McKnight v. Johnson Controls, Inc.*, 36 F.3d 1396 (8th Cir. 1994) (“For other accident evidence to be admissible, the proponent of the evidence must show that facts and circumstances of the other incidents are substantially similar to the case at bar.”); *Drabik v. Stanley -Bostich, Inc.*, 997 F.2d 496 (8th Cir. 1993); *Hicks v. Six Flags Over Mid-Am.*, 821 F.2d 1311, 1315-16 (8th Cir. 1987).

9th Circuit: *Tomkins v. Medtronic*, 17 F.3d 396 (9th Cir. 1994)

11th Circuit: *Hessen v. Jaguar Cars, Inc.*, 915 F.2d 641, 649-50 (11th Cir. 1990); *Jones v. Otis Elevator Co.*, 861 F.2d 655, 661-62 (11th Cir. 1988).

Aircraft Corp., 847 F.2d 1261, 1269 (7th Cir. 1988).

The problem with this test is that it is intensely factual and highly subjective. One court's view of "similarity" will never square precisely with that of another leaving parties to guess when an incident is sufficiently similar to the facts at bar to be admissible. A few examples illustrate the point.

In *Nachtsheim*, the plaintiff alleged that the defendant's elevator design was defective and lead to a catastrophic failure in flight. *Id.* at 1264. The plaintiff sought to introduce evidence of a later accident involving the same model aircraft and offered the following similarities between the two crashes:

- The aircraft were identical models;
- Both pilots were instrument rated;
- Both flights happened in instrument conditions;
- Both flights occurred in "icing conditions;"
- In both cases, there were reports of icing from the pilots;
- Both aircraft were in icing conditions for only a short period of time before crashing.

Id. at 1267. Nevertheless, the court would not allow evidence of the other crash to be introduced into evidence ruling that there were not enough established facts about the other accident from which to draw a comparison. *Id.*

In re Air Crash Disaster at Sioux City, 1991 WL 279005 at *1 (N.D. Ill. Dec. 26, 1991) involved the crash of a DC-10 after a complete hydraulic failure. *Id.* at *2. The failure occurred when a metallurgic flaw in one of the engine's disc fans cut all three hydraulic hoses that controlled the aircraft's navigation system.³ *Id.* The plaintiffs alleged faulty design of the hydraulic system and sought to introduce evidence of several other prior crashes. *Id.* Applying the "substantial similarity" test, the court excluded several of the other crashes but allowed in evidence of the 1985 Japan Airlines Crash. *Id.* at *9. The court found that the degree of similarity required should be "relaxed" when offered to prove notice as opposed to what it called "existence of a dangerous condition." *Id.* at *2.

What is particularly interesting about this case, however, is that the court did not adhere to a rigid quantitative comparison of similarities to determine admissibility; rather, it engaged in a substantive examination of causation between the crash at bar and the others offered as proof. In doing so the court actually excluded crashes involving the same or similar aircraft, but allowed the plaintiff to present evidence about the Japan Airlines Crash

³ Remarkably, only 111 of 296 people on the aircraft died due to a series of fortuitous and heroic events. Dennis E. Fitch, a DC-10 flight instructor happened to be dead-heading as a passenger on the flight and assisted the pilots in landing the plane in a corn field. They did so by manipulating the left and right engine throttles. http://en.wikipedia.org/wiki/United_Airlines_Flight_232. It is hard to imagine that any accident will ever be "substantially similar" to this one.

even though that crash involved a completely different aircraft and manufacturer—a Boeing 747.⁴ The court’s rationale was that the actual cause of the Japan Airlines Crash was well-established and was virtually identical to the cause the plaintiffs were alleging in the case at bar:

The Japanese Airlines accident occurred when an aft pressure bulkhead failed, causing the depressurization of the cabin in the vertical tail of the aircraft. The loss of the pressure in the plane’s vertical tail led to a structural failure in the tail and a resulting loss of all four of the aircraft’s hydraulic systems that ran through the tail.

Id. at *3. The Court also noted that Boeing subsequently changed the design of the 747 hydraulic system in response to this accident. *Id.*

Finally, *Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549 (D.C. Cir. 1993) involved a helicopter crash. The parties agreed that a critical part called the “spur adapter gearshaft” (“SAG”) had failed. *Id.* at 553. They disagreed, however, as to why. The plaintiffs claimed the SAG failed due to a metallurgical defect whereas the manufacturer of the SAG alleged that the failure was due to improper overhaul and maintenance by a third party. *Id.* They also disputed whether pilot error—namely an improper autorotation—had contributed to the crash. *Id.* at 554.

The other incidents the plaintiffs wished to introduce involved SAG failures at precisely the same location on the gearshaft as in the plaintiff’s helicopter; however, those failures had resulted from “severe wear” rather than a metallurgical defect. *Id.* Both the case at bar and the extraneous incidents involved failures well within the useful life of the SAGs involved. *Id.* The court noted that the plaintiff was offering the other incidents to show that the SAGs could fail “despite meeting manufacturing specifications.” *Id.* at 555. The court found that this theory was more akin to proving that the product was inherently dangerous as opposed to proving notice, for which it acknowledged a “relaxed” version of the substantial similarity test would apply. *Id.* Even under the stricter standard, and notwithstanding the apparently divergent causal issues, the court found the other accidents admissible. *Id.*⁵

As you can see from these three aviation cases examining other act evidence, the term “similarity” has a wide ambit and offers the practitioner little predictability. The problem, of course, is that there is a fundamental difference between the quantum of certitude relating to “other acts” in products liability cases versus other cases. To return to our touchstone, in criminal matters, the question of “guilt” in extraneous criminal incidents is

⁴ Boeing and McDonnell Douglas did not merge until July 23, 1997.

⁵ The *Joy* court also rejected the defendant’s Rule 403 argument for exclusion.

usually clear cut, or at least easy to prove. Those “other acts” will have the finality of judgment by plea, a jury verdict, or at the very least an eyewitness who can testify to them. In aviation products liability cases, at best, one is dealing with the NTSB’s investigative findings of fact, or at worst with administrative or customer complaints. In other words “similarity” in the products liability context serves as a proxy for a determination that the same cause exists both in the case at bar and in the other incidents.

To illustrate, suppose a plaintiff alleges that a defective carburetor caused an interruption in fuel which, in turn, led to a fatal crash. If the plaintiff can establish that there was indeed a defect in the same carburetor in a different incident, whether or not the pilots acted in the same manner, the weather conditions were the same, *etc.* should have no bearing on the admissibility of the other incident—the mere fact of a similar defect is relevant. This is true even if, as is almost invariably the case, there are multiple other contributing factors to the accident. Conversely, no matter how identical the incidents, if the component part in the extraneous event was not actually the cause of the crash, that event simply has no relevance to the one at issue and should not be admissible.

One can see this clearly in the three cases described above. In *In re Air Crash Disaster at Sioux City*, the court correctly (though tacitly) sidestepped the rigid question of similarity in favor of the more critical threshold question: Can the actual cause of the “other acts” be determined within a reasonable degree of judicial certainty regardless of how similar they are to the case at bar? The court answered in the affirmative and allowed the evidence on that basis. In essence, the court was saying that since the “other” crash was caused by an explosion that severed critical hydraulic throttle lines, regardless of the attendant circumstances, any manufacturer should have subsequently been on notice that in-flight explosions put closely bunched hydraulic throttle lines at risk and should modify their designs accordingly.

Joy and *Nachtsheim* illustrate well the uncertainty courts encounter when attempting to use strict similarity as a standard. In *Nachtsheim*, there were multiple points of similarity but the court excluded other act evidence. Whereas in *Joy*, in spite of a dearth of points of

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similarity, other incidents were allowed. This seeming contradiction can be resolved only if one focuses on the predicate issue of cause in the other incidents.

III. Impeachment of Experts

Another issue to be aware of is the use of other incidents to impeach an expert witness. Under current law, if an expert offers an opinion that a product is “safe” or “poses no safety hazard,” an opposing party may impeach that expert’s opinion by use of other incidents. *Wheeler v. John Deere Co.*, 862 F.2d 1404, 1410 (10th Cir.1988). The circuits differ, however, on whether substantial similarity must be established to use other incidents to impeach an expert witnesses. The Tenth Circuit holds that the “substantial similarity” doctrine applies regardless of the purpose for which the evidence is being used. *Id.* But the Eighth and Ninth Circuits have explicitly held that an expert may be impeached using even dissimilar incidents. *See, Cooper v. Firestone Tire and Rubber Co.*, 945 F.2d 1103, 1105 (9th Cir. 1991); *and Hale v. Firestone Tire & Rubber Co.*, 820 F.2d 928, 934-5 (8th Cir. 1987).

IV. Methods of Proof

A) Case Law

Reported cases in which a defect has been found offer one method of proving other acts. They are judicially noticeable and present little potential for wasting trial time.

B) NTSB Reports

NTSB reports offer another method of proof but with a significant limitation. While Title 49, U.S.C. § 1154(b) provides that “[n]o part of a report of the Board, related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report,” this seemingly broad language has been interpreted narrowly by the NTSB through its regulations and the courts to pertain only to the probable cause determination. The statute itself does not define which reports are inadmissible, but the Board’s regulations do:

Board accident report means the report containing the Board’s determinations, including the probable cause of an accident, issued either as a narrative report or in a computer format (“briefs” of accidents). Pursuant to [49 U.S.C. § 1154(b)], no part of a Board accident report may be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such reports.

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Factual accident report means the report containing the results of the investigator's investigation of the accident. **The Board does not object to, and there is no statutory bar to, admission in litigation of factual accident reports.** In the case of a major investigation, group chairman factual reports are factual accident reports.

49 C.F.R. § 853.2 (emphasis added). The Board's regulations show that the only report excluded by 49 U.S.C. § 1154(b) is the Board's probable cause report. Thus it stands to reason, that if the NTSB's probable cause findings for the accident at bar are not admissible, then probable cause findings relating to other acts are not admissible either.

C) FAA Service Difficulty Reports

Plaintiffs frequently attempt to use Service Difficulty Reports ("SDR") to show evidence of other acts. The Service Difficulty Reporting System is a means by which the FAA collects reports of failures, defects, or imperfections in aeronautical products in the field. The FAA advises that an SDR should be filed "whenever a system, component, or part of an aircraft, powerplant, propeller, or application fails to function in a normal or usual manner" or when it contains "a flaw or imperfection, which impairs or may impair its future function." The FAA SDR database contains reports dating back to 1974. Currently, the FAA receives approximately 45,000 reports per year. See generally <http://av-info.faa.gov/isdr/>.

Service Difficulty Reports are short, cursory, unverified reports filled out by various members of the aviation community regarding malfunctions in aviation equipment in the field. Malfunction is defined very broadly by the FAA, and even imperfections that have only the potential to impair future function of the equipment are included as events that should be reported. The reports are collected and maintained in a database by the FAA, and are used by the FAA to detect possible trends in equipment performance. The data fields in the reports are usually only partially completed, and often are missing even the most basic data. Generally, little detail is submitted about a particular malfunction. The following descriptions are typical:

- "Throttl (sic) jammed half way open. Found a sliver of metal in accelerating pump assy."
- "Found float to weigh 19 grams. Replaced float."
- "During insp found carb accell pump plunger rusted & inop."
- "Eng ran rough + rich found venture (sic) melted."

Thus, SDRs do not represent investigations conducted by any government entity, or even by

any non-government entity. Rather, they are simply unverified “squawks” consisting of brief and often cryptic complaints about an aircraft or component part. And at least one court has deemed them “unverified information submitted by the aviation community without FAA review for accuracy.” *Trump Taj Mahal Associates v. NTSB*, 1989 WL 130216 at *3 (E.D. Pa. 1989).

The FAA itself recognizes the limitations on this unverified information, and warns users of its database that “[T]his report derives from unverified information submitted by the aviation community without FAA review for accuracy.” The FAA cautions on its SDR website that the “number of SDR’s submitted on a specific product, or by a particular operator is not an indication on the mechanical reliability, fitness, or safety of that product or operator, and the information should not be used in that manner.” See <http://av-info.faa.gov/isdr/> (Quoted text is next to the “Query SDR Data” link).

Moreover, the aviation industry recognizes the limitations on the quality of the data contained in SDRs. In 1999, the Flight Safety Foundation conducted a study that reviewed the information provided by SDRs and their usefulness. The study concluded, among other things, that:

[T]he Flight Standards Service Difficulty Program has not realized its potential because, in part, some reporters do not provide sufficient data, and data are submitted in incorrect or unusable formats. . . .

• • •

Accurate interpretation of data in aviation operations is complex and demands analysts and operational personnel who are familiar with the context in which the data were generated. In relation to other operational or maintenance activities, an event or occurrence may have an entirely different meaning and level of seriousness than might appear to an outside analyst, however competent.

• • •

The study team found the SDRS data and other public data to be lacking in uniformity and quality, making analysis difficult and of limited value.

• • •

FAA’s SDRS database . . . contains examples of poor data quality and incomplete reporting. Users of these data must be aware of these limitations and restrict their analysis and conclusions to those areas that can be supported by the data.

See http://www.flightsafety.org/members/serveme.cfm/?path=/fsd/fsd_sept_oct99.pdf.

Courts have generally found SDRs an unreliable method of proving other incidents:

To sum up, product defects must be proved; they cannot simply be inferred from a large number of complaints. If the rules were otherwise, product claims would be a self-fulfilling prophecy – the more complaints that are made, the more likely all must be true. Without proof . . . that any of the reported incidents were due to a defect similar to those alleged by [plaintiff], the trial court erred in admitting the database of complaints.

Nissan Motor Co. v. Armstrong, 145 S.W. 3d 131, 140-141 (Tex. 2004) (holding it was reversible error to admit manufacturer's database of 757 incident reports); see also *Jones v. Ford Motor Co.*, 320 F. Supp. 2d, 440, 449-50 (E.D. Va. 2004) (excluding database consisting of 2,900 customer complaints of product defect); *Richardson v. Bombardier, Inc.*, 2005 WL 3087864 at *11 (M.D. Fla. November 16, 2005) (holding that court properly precluded plaintiffs from admitting Service Difficulty Reports "reflecting earlier problems with the APS-65 servo mount").

There is a strong policy rationale for rejecting SDRs as a means of proof beside the fact that they are highly unreliable. Any product, no matter how well designed or manufactured, is bound to draw complaints. And one can speculate that the longer a product is in service, the more complaints it is likely to generate. At some point, the sheer number of SDRs due to a product's length of production would tend to make legal proof of a defect *sui generis*. Thus to allow SDRs as a means of proof would, ironically, tend to penalize the very manufacturers whose products have the longest histories of safe service.

D) Warranty Claims and Recall Documents

Unverified reports of customer complaints and recall documents are also routinely held inadmissible. See, e.g., *Jones*, 320 F. Supp. 2d, at 449-50; *Nissan Motor*, 145 S. W. 3d at 140-141; *Jones*, 559 S.E.2d at 594; see also *Richardson v. Bombardier, Inc.*, 2005 WL 3087864 at *11 (excluding unverified reports of problems submitted to FAA). Moreover, they are hearsay within hearsay and do not fall within an exception of the hearsay rule. See also, William T. Barker, *Admissibility of Recall Documents in Products Liability Cases*, 60 Def. Couns. J. 624 (1993).

V. Other Evidentiary Concerns

A) Unfair Prejudice

Assuming a party meets its burden to establish substantial similarity, evidence of other incidents, “like any evidence offered at trial, should be excluded ‘if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.’” *U.S. v. Gaskell*, 985 F.2d 1056, 1060 (11th Cir. 1993) quoting FED. R. EVID. 403. Thus, even if relevant, such other incident evidence may be inadmissible under Federal Rule of Evidence 403. *Weeks v. Remington Arms Co., Inc.*, 733 F.2d 1485, 1491 (11th Cir. 1984).

“Proof of prior accidents or occurrences are not easily admitted into evidence since they can often result in unfair prejudice, consumption of time and distraction of the jury to collateral matters.” *Uitts v. GMC*, 411 F. Supp. 1380, 1383 (E.D. Pa. 1974), *aff’d* 513 F.2d 626 (3d Cir. 1975). “[T]he 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.” *Gardner v. S. Ry. Sys.*, 675 F.2d 949, 952 (7th Cir. 1982).

B) Excessive Use of Time

Another issue that arises under Rule 403 is the danger of undue delay and jury confusion arising when the parties conduct what are, in effect, “mini-trials” on each of the other incidents. “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.” *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1269 (7th Cir. 1988). As the Court explained in *Nachtsheim*:

[the] costs—in terms of time, distraction and, possibly, prejudice—resulting from such evidence also may weigh against admissibility. Accordingly, “even when substantial identity of the circumstances is proven, the admissibility of such evidence lies within the discretion of the trial judge who must weigh the dangers of unfairness, confusion, and undue expenditure of time in the trial of collateral issues against the factors favoring admissibility.”

Id. (quoting *McKinnon v. Skil Corp.*, 638 F.2d 270, 277 (1st Cir. 1981)).

In *Farley v. Cessna Aircraft Co.*, 1996 WL 37823 at *6 (E.D. Pa. Jan. 25, 1996), *aff’d* 101 F.3d 390 (3d Cir. 1996) the trial court excluded nine other incidents primarily because introduction of the evidence would have required “nine mini-trials” on the issue of the cause of each incident, subjecting the jury 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.” *See also, Wilson v. Bicycle South, Inc.*, 915 F.2d 1503, 1510 n.10 (11th Cir. 1990).

C) Hearsay

The means by which other incidents are proven will often involve hearsay problems. And courts routinely exclude evidence of other incidents solely on this basis. *See, e.g., Johnson v. Ford Motor Co.*, 988 F.2d 573, 579 (5th Cir. 1993) (excluding owner complaints provided by Ford to the NHTSA because they “amount to nothing more than a summary of allegations by others which constitute hearsay”); *Wolf By Wolf v. Procter & Gamble Co.*, 555 F. Supp. 613, 620 (D.N.J. 1982) (complaints received by manufacturer held inadmissible double hearsay); *Uitts v. General Motors*, 411 F. Supp. 1380, 1382-83 (E.D. Pa. 1974) (“to permit [owner complaints] to be considered by the jury would be tantamount to allowing the person making the statements to testify against defendant without being subject to cross examination or required to take an oath”). All types of proof discussed in this paper, for example—SDRs, NTSB reports, warranty claims, and recall claims—are out-of-court statements by individuals who are not subject to cross-examination that are offered for the truth of the matter asserted.

D) Procedure for Determining Admissibility

Because evidence of other incidents has great potential for prejudice, the trial court should determine outside the presence of the jury whether plaintiff has established the required foundation of substantial similarity. *See, e.g., Pau v. Yosemite Park & Curry Co.*, 928 F.2d 880, 889 (9th Cir. 1990) (establishing the requisite degree of similarity between the other incident and the events involved in the pending case “is a foundational requirement that will have to be taken out of the presence of the jury and the court will determine at that time whether the evidence can come in.”). Likewise, in *Mount Olivet Tabernacle Church v. Emerson Elec. Co.*, 781 A.2d 1263, 1275 (Pa. Super. Ct. 2001), the court recognized “the possibility that an open-ended, argumentative exploration of possible similar incidents will confuse the jury and prejudice the defendant with the taint of unproven prior incidents.” Thus, the court reasoned that “[r]ather than conduct this line of questioning in the presence of the jury, an *in camera* hearing is advisable, which would allow the trial court to determine which particular incidents (if any) are relevant to the instant case, and to limit the plaintiff’s line of questioning to those incidents that have already been deemed relevant by the court.” *Id.* The court expressly “disapprove[d] of the trial court’s decision to allow the [plaintiff’s] counsel to ‘shoot first and ask questions later.’” *Id.*

VI. Conclusion and a Proposed New Evidence Rule

The “substantial similarity” doctrine is the universally accepted standard for determining the admissibility of “other act” evidence in federal courts. But its application is subject to widely differing applications and interpretations. This occurs primarily because the rule is a substitute for a predicate determination by the court that causation in the other incidents is the same as that alleged in the one being tried.

The following is a proposed new evidence rule that attempts to solve this, and other problems, with the substantial similarity test:

ADMISSION OF OTHER ACTS IN PRODUCTS LIABILITY CASES

A party may introduce evidence of other acts only if the party can show by clear and convincing evidence that:

- (1) The “other incidents” involved the same causal factor as the theory alleged in the case at bar;
- (2) The party against whom the evidence is offered knew or should have known of the other incident;
- (3) The other incident is not remote in time;
- (4) The introduction of the other incidents will not be unduly prejudicial or waste time; and
- (5) The absence of other contributing causes in the case at bar that might distinguish the “other incidents.”

Evidence of other incidents may not be admitted through, referred to, or relied upon by expert witnesses unless those incidents satisfy the elements set forth above in this rule.

Determinations of admissibility under this rule shall be made by the court out of the presence of the jury.

At least 60 days in advance of trial any party seeking to offer evidence under this rule shall serve upon all parties against whom such evidence is offered a list of the specific incidents to be offered including the date, time, cause, and a specific list of all proof the party intends to offer to prove each incident.



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