Institutional to Innovative: New Arguments in Products Liability

"Products Liability" claims are made in both traditional and emerging markets, but viable defenses vary depending on the jurisdiction and obviously the product, and in some instances, the emergent nature of the claim may have some advantages to defendants. This paper focuses on two different defense strategies that vary by jurisdiction: (1) design defect summary judgment motions for lack of proof of an alternative reasons design, and (2) limiting evidence of "substantially similar incidents and accidents" in traditional and evolving applications of the doctrine. It also discusses products liability and other claims recently pled against social media giants Facebook, TikTok and others and presents 3D printing in the construction industry as a case study for future products liability claims.

Design Defect Summary Judgment Motions

Although not available in all jurisdictions, many states' products liability laws require a heavy burden of proof for plaintiffs seeking to establish a prima facie design defect claim in a product liability case. This means that, for defendants, there are opportunities for summary judgment when a plaintiff fails to meet that burden. The Restatement (Third) of Torts on "categories of product defect" provides, in pertinent part:

> A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:
>
> . . .
>
> (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative

> design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe[.]

Restatement (Third) of Torts: Prod. Liab. § 2 (1998). In many states, this has been interpreted to mean that, to prove a design defect claim, the plaintiff must satisfy the "risk-utility test," which generally requires not only that an alternative design exists for the allegedly defective product, but also that the adoption of the alternative design was "reasonable" or feasible when considering the circumstances. Additionally, in some states—such as Louisiana and several others—if the plaintiff fails to provide proof of the reasonable alternative design available under the state's risk-utility test, their claim may be dismissed on summary judgment for failing to meet the burden of proving a design defect claim as a matter of law.

Such was the case when on January 20, 2022, Judge Sarah Vance of the Eastern District of Louisiana granted a Motion for Summary Judgment on behalf of Crown Equipment Corporation ("Crown"). In the suit, the plaintiff claimed that Crown's product, an RM6000, was defectively designed under the Louisiana Products Liability Act ("LPLA") and that the alleged defective design caused injuries that ultimately resulted in a below-the-knee leg amputation. On the deadline for filing dispositive motions, which was after the conclusion of expert discovery, Crown filed a Motion for Summary Judgment arguing that, under the LPLA, the plaintiff had failed to meet the elements of a design defect claim. In particular, Crown argued, the plaintiff failed to identify an alternative design that was both capable of preventing his alleged injury and, additionally, that

satisfied the risk-utility test set forth in the applicable statutory provisions. The case was dismissed with prejudice just two weeks ahead of a five-day jury trial set to begin on February 7, 2022.[1]

In its Motion, Crown argued that it was entitled to summary judgment because the plaintiff had not proposed an alternative design for the RM6000 that he claimed could have prevented his injury. In response, the plaintiff argued that he had, in fact, proposed several alternative designs for the RM6000—including, primarily, the addition of a door to the operator compartment, but also a proposed backrest sensor and a foot pedal modification—and that those purported alternative designs were outlined in the reports of more than one expert witness. Crown, however, pointed out that the plaintiff and his experts had merely suggested a "concept" rather than an alternative design within the meaning of the LPLA. Specifically, Crown argued that, without specifications for the purported "alternative design"—including the material from which the proposed door would be constructed; the size, weight, height, and thickness of the proposed door; and the manner in which the proposed door latches and/or otherwise closes the operator compartment—there was simply no starting point from which to evaluate whether any such design was capable of preventing the plaintiff's injury.

The District Court agreed. In a 30-page opinion, the Court found that "[c]ourts applying the LPLA have found expert design testimony insufficient when the proffered expert fails to *identify and describe a specific alternative design*, and *explain how that design would apply to the*

[1] *Dawson Vallee v. Crown Equipment Corp. of Ohio, et al.*, No. CV 20-1571, 2022 WL 179532 (E.D.La. Jan. 20, 2022).

product at issue."[2] Accordingly, the Court concluded, "*there was no valid alternative design presented*[,]" notwithstanding the existence of reports submitted on behalf of Plaintiffs' experts. Holding that the plaintiff was unable to satisfy his burden of proof under the LPLA, the Court granted summary judgment in favor of Crown and dismissed the case with prejudice.

The plaintiff appealed the District Court's decision, which was fully brief and later argued before the United States Fifth Circuit Court of Appeals on October 3, 2022. On April 14, 2023, the Fifth Circuit issued an Order with written reasons affirming the District Court's decision. It held that plaintiff "proposed three alternative forklift designs" but that "none meet the LPLA's requirements."[3]

Of course, the law regarding what, exactly, a plaintiff must prove to establish a prima facie design defect claim (and survive summary judgment) varies by jurisdiction, and each state has its own products liability statutes and/or case law on the issue. Under Louisiana law, for example, the LPLA has a particularly stringent statutory requirement for such claims, providing:

> A product is unreasonably dangerous in design if, at the time the product left its manufacturer's control:
>
> > (1) There existed an alternative design for the product that was capable of preventing the claimant's damage; and
> > (2) The likelihood that the product's design would cause the claimant's damage and the gravity of that damage outweighed the burden on the manufacturer of adopting such alternative design and the adverse effect, if any, of such alternative design on the utility of the product. An adequate

[2] *Dawson Vallee v. Crown Equipment Corp. of Ohio, et al.*, No. CV 20-1571, 2022 WL 179532, at p. 12 (E.D. La. Jan. 20, 2022).

[3] *Vallee v. Crown Equip. Corp.*, No. 22-30053, 2023 WL 2964407, at *2 (5th Cir. Apr. 14, 2023).

> warning about a product shall be considered in evaluating the likelihood of damage when the manufacturer has used reasonable care to provide the adequate warning to users and handlers of the product.

La. R.S. 9:2800.56.

Evidence of Other Incidents and Accidents

One of the most significant reoccurring issues in products liability cases, including aviation products liability cases, is whether the court will permit the jury to hear evidence of other incidents and accidents. Indeed, "[t]here is nothing stealth or secret about the devasting effect of 'other incident' evidence. It is the most dangerous evidence a jury will hear." Jonathan R. Friedman, et al., A Wolf in Wolf's Clothing – Other Incident Evidence in Aviation Litigation, 73 J. Air L. & Com. 441, 441 (2008).

The majority of jurisdictions recognize that evidence of other similar incident and accidents is relevant in products liability cases (1) to show existence of the danger, (2) to show the cause of the accident, and (3) to show notice to the defendant of the danger. *Nachtsheim v. Beech Aircraft Corp*., 847 F.2d 1261 (7th Cir. 1988); *see also Smith v. Beech Aircraft Corp*., Case No. 97-17135, 1999 U.S. App. LEXIS 8351 (9th Cir. April 29, 1999). In some jurisdictions, evidence of other similar incidents and accidents may also be offered to show causation even when those other similar incidents and accidents have occurred after the incident or accident that is the subject of the complaint. *United Oil Co. v. Parts Assocs*., 227 F.R.D. 404, 414 (D. Md. 2005). Other jurisdictions hold that evidence of similar accidents is not generally admissible for the purpose of proving negligence or causation, but such evidence may be admissible to show notice or actual knowledge by the defendant of a defect in its product. *Bertrand v. Air Logistics, Inc*., 820 So. 2d

1228, 1238 (La. App. 3d Cir. 2002) ("The general rule with regard to the admissibility of evidence of prior accidents is that it is admissible for the limited purpose of showing that the defendant had notice of defects or physical conditions which are dangerous."); *see also Blevins v. New Holland N. Am., Inc.*, 128 F. Supp. 2d 952, 960-61 (W.D. Va. 2001) (citing *Roll 'R' Way Rinks, Inc. v. Smith*, 237 S.E.2d 157, 160 (Va. 1977)).

Regardless of the reason for which it is proffered, evidence of other incidents and accidents "can change the verdict calculus and lay the foundation for a punitive damages award." Friedman, et al., 73 J. Air L. & Com. at 441. For that reason, it "'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." *Id*. (quoting 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)).

While the Rules of Evidence relating to relevancy establish some guardrails around the admissibility of evidence of other incidents and accidents, in practice, the guardrails vary significantly from one jurisdiction to another. *See In re Crash of Aircraft N93PC*, No. 3:15-cv-0112-HRH, 2021 U.S. Dist. LEXIS 108635, at *15 (D. Alaska June 10, 2021) (recognizing that the rule "rests on the concern that evidence of dissimilar accidents lacks the relevance required for admissibility under [Federal Rule of Evidence] 401 and 402").

Some courts strongly disfavor evidence of similar incidents and accidents. In *Dodson v. Ford Motor Co.*, No. C.A. PC 96-1331, 2006 WL 2405872 (R.I. Super. Ct. Aug. 17, 2006), the

Rhode Island Superior Court, relying on Massachusetts law, explained that "evidence of incidents similar to the plaintiff's, generally, 'is viewed with disfavor because the other incidents may have been the consequence of idiosyncratic circumstances.'" 2006 WL 2405872, at *3 (quoting *Santos v. Chrysler Corp.*, 715 N.E.2d 47, 52 (Mass. 1999)). Other courts exercise great caution when admitting evidence of similar incidents and accidents, recognizing that "this type of evidence has the potential to be 'highly prejudicial.'" *Branham v. Ford Motor Co.*, 701 S.E.2d 5, 19 (S.C. 2010)

There are, however, courts that appear more inclined to admit such evidence. *S. Pac. Co. v. Watkins*, 435 P.2d 498, 507 (Nev. 1967) ("While a few courts still tend to look with general disfavor upon proffers of evidence of similar accidents occurring at the same place where plaintiff was injured, it now seems to be generally recognized that such evidence has some logical tendency to establish various matters pertinent to the plaintiff's case, particularly that the condition complained of was in fact dangerous . . . and that defendant was informed of that potential danger.").

In nearly all jurisdictions, "before such evidence will be admitted, the proponent must show that the other accidents occurred under substantially similar circumstances." *Nachtsheim*, 847 F.2d 1261. The key here is *substantial* similarity. *Id.*; *accord Borden, Inc. v. Florida East Coast Ry. Co.*, 772 F.2d 750, 755 (11th Cir. 1985); *Specter v. Texas Turbine Conversions, Inc.*, No. 3:17-cv-00194-TMB, 2020 WL 7358989, at *2 (D. Alaska Dec. 14, 2020); *Dodson*, 2006 WL 2405872; *Santos*, 715 N.E.2d at 52; *Nesbitt v. Sears, Roebuck & Co.*, 415 F. Supp. 2d 530, 535 (E.D. Penn. 2005). Courts are generally in agreement that a plaintiff must present a factual foundation that permits the court to determine the other accidents were substantially similar to the accident at

issue. *Branham*, 701 S.E.2d at 19-20. However, the degree of requisite similarity often varies based on the jurisdiction.

The Seventh Circuit recognized that "[t]he foundational requirement that the proponent of similar accidents evidence must establish substantial similarity before the evidence will be admitted is especially important in cases such as this where the evidence is proffered to show the existence of a dangerous condition or causation." *Nachtsheim*, 847 F.2d at 1258. Other courts, including the Tenth Circuit, have similarly recognized that "'[e]vidence 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.'" *Four Corners Helicopters, Inc. v. Turbomeca, S.A.*, 979 F.2d 1434, 1439 (10th Cir. 1992) (quoting *Wheeler v. John Deere Co.*, 862 F.2d 1404 (10th Cir. 1988)); *see also In re Crash of Aircraft N93PC*, 2021 U.S. Dist. LEXIS 108635, at *15.

The First Circuit has held that the substantial similarity assessment "is a function of the theory of the case." *Moulton v. Rival Co.*, 116 F.3d 22, 27 (1st Cir.1997). Thus, "[i]n determining the existence of similar circumstances, the trial judge examines the factors that relate to the particular theory underlying the case." *Libby v. Griffith Design & Equip. Co.*, 1990 U.S. Dist. LEXIS 19475, at *6 (D. Me. June 19, 1990) (citing *Ponder v. Warren Tool Corp.*, 834 F.2d 1553, 1560 (10th Cir. 1987)).

In some jurisdictions, "[t]he showing of substantial similarity must include a showing of similarity as to causation." *Stovall v. DaimlerChrysler Motors Corp.*, 608 S.E.2d 245, 247 (Ga. Ct. App. 2004); *accord Kia Motors Corp. v. Ruiz*, 432 S.W.3d 865, 881 (Tex. 2014).

Some courts hold that "[t]he requirement of similarity is less strict when the evidence is sought to be admitted to show notice." *Nachtsheim*, 847 F.2d at 1258 n.9; *see also Four Corners Helicopters, Inc.*, 979 F.2d at 1440 ("The requirement of substantial similarity is relaxed, however, when the evidence of other incidents is used to demonstrate notice or awareness of a potential defect."); *Jackson v. Firestone Tire & Rubber Co*., 788 F.2d 1070, 1083 (5th Cir. 1986) ("For purposes of proving other accidents in order to show defendants' awareness of a dangerous condition, the rule requiring substantial similarity of those accidents to the accident at issue should be relaxed.").

However, other courts have rejected a relaxed standard even when the evidence is used only to show notice. *See, e.g., GM Corp. v. Moseley*, 447 S.E.2d 302, 307 (Ga. Ct. App. 1994), overruled on other grounds *Webster v. Boyett*, 496 S.E.2d 459 (Ga. 1998) (observing that plaintiffs' argument that substantial similarity need not be shown when such evidence is used to show notice "begs the question, notice of what defect? If the relative defects are not similar, how can one be notice of the other?").

As the foregoing illustrates, in products liability cases and, especially in aviation product liability cases where plaintiffs often seek to admit evidence of other similar incidents and accidents, familiarity with the forum jurisdiction's tolerance for such evidence is critical. Such familiarity can inform a defendant's discovery strategy, examination of expert witnesses, dispositive motion strategy, *Daubert* motions and motions *in limine*. Careful thought given to these issues at each stage of the continuum has the potential to provide the basis for a dispositive motion or, at a minimum, significantly limit the evidence admitted at trial.

Institutional Defenses Applied to Present and Future "Innovative" Product Defect Claims

Recently, a new line of personal injury and institutional economic damages claims against social media platforms have emerged. In those cases, plaintiffs' counsel argue that platforms are essentially "defective" products that can be held legally responsible for harms they cause to younger users. Here, the products' innovative nature, coupled with the novel nature of the claims advanced, may inure to the social media giants' benefit when it comes to assessing whether there is a reasonable alternative design and/or evidence of substantially similar incidents and accidents.

- ***Product Defect and Other Claims against Social Media Platforms***

Beginning in the last two years, there has been a rapid increase in products liability claims filed against various social media platforms. These cases generally allege that defendants' social media platforms are defective because they are designed to maximize screen time, which can encourage addictive behavior in adolescents. As alleged, this conduct results in various emotional and physical harms, including death. Given the number of cases advanced across the country, the cases have been consolidated into MDL No. 3047, *In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*, which is now pending in the United States District Court for the Northern District of California before Judge Yvonne Gonzales Rogers. Although it remains to be seen how these types of claims will evolve over time, the current cases generally fall into one of two categories: first, cases brought by school boards for damages arising from the need to address issues arising from their students' use of the social media platforms; and second, cases brought by individual personal injury plaintiffs for damages sustained by them

and/or their minor children. These two types of cases can be illustrated with two examples of cases that were ultimately transferred to the MDL for consolidated proceedings.

In *Jefferson County School District v. Meta Platforms, Inc., et al.,* USDC for Western District of Kentucky, 23 CV 00153-RGJ, Plaintiff Jefferson County School District (the "School District") filed a public nuisance claim against defendants, including social media giants Facebook Holdings, Inc., Instagram, LLC, TikTok, Inc. YouTube, and others. It claims that "[o]ver the past decade, social media platforms designed, marketed, promoted and operated by the Defendants have grown exponentially," resulting from increases in 1) the number of users, 2) how often a given user visits, and 3) time spent per user visit. School District Complaint at p.2, ¶1.

The School District alleges that, given defendants' financial incentive to increase advertising revenue through increased user platform use, America's youth are a key target demographic. Further, it argues, youth are particularly susceptible to the defendants' intentional exploitation of their neurophysiology—especially in light of the immature and vulnerable teen brain reward systems. The School District contends the defendants' conduct has resulted in a mental health crisis among America's youth, citing to declarations by the American Academy of Pediatrics and other professional and medical organizations.[4] Plaintiff's complaint ultimately seeks an order that defendants abate their public nuisance, as well as an award to cover its needs for "significantly more funding to implement potentially lifesaving programs in the face of this ever-increasing mental health crisis that Defendants helped create." *Id.* at pp.4, 12.

[44] The School District further alleges that when students experience increased mental health problems, they are less likely to attend school, perform worse in school, and engage in other risky and disruptive behavior. Additionally, when school attendance drops, so does funding.

In *Nina White v. Meta Platforms, Inc. et al.,* USDC for Eastern District of Kentucky, 22 CV 00189-KKC, Plaintiff again generally alleges that teenagers are particularly vulnerable to the perils of excessive social media use, and that Facebook parent Meta and affiliates of knowingly exploits teenage vulnerabilities. Specifically, in this matter, Plaintiff claims to be an 18-year-old woman who is a heavy user of social media platforms and that, shortly after registering, she began engaging in addictive and problematic use prompted by the addictive design of Defendants' product(s) and constant notifications the platforms push. Plaintiff claims that as a proximate cause of her compulsion to interact with the platforms—and specifically due to the defendants' curated content pushes, which she initially experienced as a minor user—she developed injuries including social media compulsion, attempted suicide, multiple periods of suicidal ideation, self harm, eating disorders, depression, body dysmorphia, severe anxiety, and a reduced inclination or ability to sleep. She has pled 14 counts, including strict liability for design defect, failure to warn, and manufacturing defect; products liability for negligent design, negligent failure to warn, and negligent manufacturing; negligence failure to recall/retrofit; and medical monitoring.

- ***Social Media Giants – Developing Defenses***

Collectively, the School District and White plaintiffs allege 15 various counts of action in their filings. The omission of any product defect claims by the School District, coupled with the laundry list of alternative causes of action pled by White, perhaps suggests no clear path to allowing a plaintiff to establish a prima facia defect case in their original shared jurisdiction of Kentucky. One can easily imagine the social media defendants will argue vigorously—and at great expense—that both plaintiffs cannot meet their burden of proof and that their product defect claims must be

dismissed where plaintiffs cannot produce evidence of a reasonable alternative design. Under the criteria laid out above, questions arise as to 1) when the product leaves the manufacturer's control, if at all, 2) whether and when the social media platforms knew or should have known their designs were causing damage, or the gravity of such harm, and 3) whether plaintiffs' counsel is able to present a reasonable alternative design beyond a mere concept or speculative proposed modifications. Without this evidence, as in Crown's case, the courts would be left with no starting point from which to evaluate whether an alternative design would have prevented injury.

With the social media product defect claims, the question of admissibility of evidence of other incidents and accidents is likewise interesting to ponder. For example, which other incidents and accidents are sufficiently similar to cite as support for their claims, given that nearly all the social media platforms are named in each of these suits; that the history of each of the companies and the alleged injuries are relatively short; and that the potential for prejudice is undeniably high. The defendants will almost certainly argue none: what other "product" has ever provided constant ability to communicate and monitor personal contacts, celebrities, and strangers via an application downloaded to a likely mobile personal device? But again, some courts have held that the requirement of similarity is less strict when the evidence is introduced to demonstrate notice. And this type of evidence of does indeed seem to be mounting against the social media giants following numerous congressional hearings and now, lawsuits asserting product defect and other claims subject to different evidentiary standards.

- ***Future Product Defect Claims against 3D Construction Printing Pioneers?***

In 2006, University of South Carolina Professor Behrokr Khoshnevis claimed to have used 3D printing to construct a house in a single day.[5] Since then, 3D projects have become more prevalent on construction sites worldwide and recently, on multifamily residential developments in the United States. As of November 2023, there are no known lawsuits alleging product defect or other claims against developers using 3D printed-construction.[6] As the 3D-printed construction market matures, we anticipate the development of both regulations and case law as a result of product defect, negligence, and breach of contract claims.

Major benefits to 3D construction are touted as providing 1) decreased human-error and work-related injuries or fatalities; 2) reduced construction time and increased project efficiency, with completion in days; 3) reduced material waste and increased use of recycled materials; 4) increased design and construction site freedom; and 5) more disaster-resilient and durable homes. Concrete is the most commonly used material, though the industry also boasts plaster, clay, metals, and sand products and additives.[7]

[5] *See* https://en.wikipedia.org/wiki/Contstruction_3D_printing (last visited November 22, 2023).
[6] https://constructiondive.com/news/why-3d-printing-still-flat-commercial-construction/641731 (last visited November 22, 2023).
[7] https://www.economist.com/science-and-technology/the-rise-of-3d-printed-houses/21803667 (last visited November 22, 2023).

Example of 3D-Printed Home Project Site. Image Credit: 3dnatives.com

3D printing – wall assembly close up
Image Credit: Shutterstock.com/guteksk7

Unique to 3D-printed homes are the ridged interior and exterior walls, which act as the wall "finish" and the cavity between which cases plumbing, electrical, HVAC, and other building components. Window, door, and larger penetrations are typically pre-programed into the printer, though some smaller penetrations are punched after the fact.

The 3D-printed construction single-family industry is pioneered by designers/builders able to purchase and/or developing their own expensive 3D printers.[8] Pioneering projects include the Reginato Project in Redding, California—a 1,200 square-foot home constructed in 2023 that purports 100% compliance with Califoria's builing codes, which are arguably the strictest in the country. The Genesis Collection at Wolf Ranch touts itself as the the largest 3D-printed residential development in the United States at 100 units projected.

A Genisis Collection Model Home at the Wolf Ranch Community
Image Credits: www.iconbuild.com/projects/the-genesis-collection-at-wolf-ranch

Increased production, however, obviously subjects the developers to increased claims. And, as with any new market, query whether insurance coverage for 3D printed construction is widely available. Theoretically, these builders are operating under bespoke insurance coverage scenarios, high self-insured retentions, and/or robust warranty departments ready to accept and remedy claims.

[8] *See* www.iconbuild.com (last visited November 22, 2023); *see also* https://cobod.com/projects-partners/emergent/ (last visited November 22, 2023).

- ***3D Construction - Future Claims and Defenses***

Lawsuits arising out of 3D-printed construction are inevitable and, when such suits arise, we can anticipate an array of negligence, construction defect, and products liability claims. Where 3D construction is an evolution of a longstanding industry, query whether evidence of reasonable alternative designs may be easier to establish than for the Social Media giants discussed above. Potential plaintiffs may look to the manufactured/mobile home market or to extruded fiber cement siding products for example in developing these new claims. Additionally, this industry will likely raise its own "risk-utility" analysis and point to the lesser occurrence of on-site death and injury—as well as the lower material and labor cots—as outweighing the risk of alleged defects that may lead to products liability claims, such as leaks and other building failures.

As more and more cutting-edge technology continues to rapidly develop, so too will the landscape of litigation as we know it, affecting a wide variety of regulations, evidentiary issues, defenses, which is certain to affect numerous practice areas, including construction, products liability, insurance, and more. Now more than ever, it is critical to keep up with emerging technological trends to see just how much the world of litigation will continue to evolve with the technology.