Other accidents: Relevance and admissibility

Evidence of other accidents is compelling, but the trick is getting it admitted

By Jeffrey R. Smith

It appears average, common, and safe. There is nothing unusual or out of the ordinary. And yet, the intersection is host to nearly six times the average number of accidents of comparable three-way intersections. Seventeen prior accidents in less than five years. Seven subsequent accidents in three and half years.

The cluster of accidents at this location suggests something beyond a coincidental collection of inattentive drivers (the cause of each collision according to the traffic collision reports). It suggests a trap. On July 17, 2008, the trap snapped on plaintiff.

Plaintiff, a business owner and single father of four sons, operated his motorcycle in the left of two eastbound lanes on a somewhat busy road in the Sacramento Valley when he was struck by a left-turning pickup truck exiting a shopping center driveway. Plaintiff suffered injuries to his right leg and foot that ultimately necessitated a below-the-knee amputation.

The pickup truck driver attempted a left turn across two lanes of eastbound travel. His view of plaintiff at the uncontrolled intersection was obscured by a vehicle turning right into the shopping center from the right eastbound lane. The pickup truck driver did not see plaintiff until it was too late to avoid the collision.

The pickup truck driver was not the first to be involved in such a collision at this intersection. He was not the second, third, fifth, or even 10th. The driver was the 18th driver attempting a left turn from the main driveway of the shopping center to be involved in a similar traffic collision since the shopping center opened in January, 2003. At least seven others have followed.

Evidence of other accidents is compelling. But notwithstanding the high probative value of the intersection's accident history, getting the evidence of the other accidents admitted at trial may be challenging. This article describes how evidence of other accidents (prior and subsequent) can be relevant and admissible for several purposes provided the appropriate foundation is laid.

Evidence of other accidents is relevant on several grounds

The relevance of evidence concerning other accidents is well-settled. Evidence of such accidents is relevant for at least ***four*** purposes:

> It will be observed that such proof [of other accidents] may serve at least four different evidentiary functions, – as proof of (a) *existence* of defective or dangerous condition, (b) the *cause* of the subject accident, (c) knowledge or *notice* of the dangerous condition, (d) *negligence* in permitting that condition to continue. But it is not necessary that the proffered evidence of previous accidents be probative in all those respects. If it fairly raises an inference upon one phase of the case it is admissible. Specifically, it should be received if it tends to prove a dangerous condition, even if it be not enough to constitute proof upon any of the other matters. [emphasis added].

(*Gilbert v. Pessin Grocery Company* (1955) 132 Cal.App.2d 212, 217. See also *1 Witkin, Evidence* (4th edition 2000) Circumstantial Evidence, § 102, p. 450.)

The purpose for which this evidence is introduced determines the foundation required for its admission.

The *substantially similar* standard

Evidence of prior and subsequent accidents is admissible to establish the *existence* of a dangerous condition, the *cause* of the subject accident, and a defendant's *negligence* in permitting a condition to continue, provided the other accidents are *substantially similar* to the subject accident.

The *substantial similarity* standard for admissibility of other accidents does not require a showing that such accidents occurred under precisely the same circumstances as the accident at issue. Instead, it is sufficient if the accidents are "similar in their general character." (*Magnuson v. City of Stockton* (1931) 116 Cal.App. 532, 535.) This is true, according to the California Court of Appeal, because no two accidents happen in exactly the same way. (*Ibid.*) Thus, admission of other accidents can be appropriate where the conditions are not identical. (See also *1 Witkin, Evidence* (4th edition 2000) Circumstantial Evidence, § 104, p. 452.)

In *Magnuson*, a mother brought a wrongful-death action against the City of Stockton for the death of her child. While playing on the banks of Lake Yosemite, plaintiff's son fell into the water and drowned. To support a claim for dangerous condition, plaintiff successfully admitted evidence of three prior child-drowning deaths at Lake Yosemite. Defendant contested admission of these

other accidents on the basis they did not meet the *substantial similarity* standard.

The appellate court affirmed the trial court's admission of the evidence, explaining that it would be "very difficult, if not impossible, to show that two persons were drowned in ***exactly*** the same place in the same manner." (*Magnuson* at 535 (emphasis added).) It was enough to show that all the deceased children, just prior to their deaths, were playing on the steep, slippery, and unprotected banks of the lake. (*Ibid*.)

The opposite result was reached in *Wilkerson v. City of El Monte* (1936) 17 Cal.App.2d 615. In *Wilkerson*, plaintiff suffered injury when thrown against the ceiling of the vehicle she occupied as it passed over a dip in the road. Plaintiff presented evidence of other accidents. The Court of Appeal held that some of the other accidents could not be used to establish a dangerous condition of public property or negligence of the defendant in allowing the condition to exist because the other accidents were not *substantially similar.* Specifically, where plaintiff was incapable of stating the speed at which the other vehicles were traveling, a critical factor to the court, the other accidents could not be considered *substantially similar*. "The question is not whether accidents do or do not occur; it is whether they occur under given conditions and the all-important condition in the present case was whether such accidents occurred when cars crossed the intersection at usual and reasonable speeds." (*Id*. at 620.)

Wilkerson was distinguished by *Gilbert v. Pessin Grocery Company*, *supra*. In *Gilbert*, plaintiff tripped over a concrete island in a parking lot and suffered injury as a result of inadequate lighting. At trial, plaintiff sought to introduce evidence of a prior trip and fall over the same concrete island. On appeal the defendant argued that the prior accident was not *substantially similar* because it was unclear whether:

> . . . the woman assertedly involved in the prior accident was normal (if her fall was because of old age and disability, crippled condition, blindness, instability because of some existing injury such as a broken leg coupled with the use of crutches, any one of which would render the prior accident inadmissible); . . . the prior accident was caused by or resulted from the same thing which plaintiff here claimed cause her fall (if the former accident resulted from slipping on grease . . . or from spilled milk . . . or from fruit peelings, etc., it would be inadmissible); . . . the climatic conditions were remotely similar (there may have been a heavy fog on the prior occasion or it may have been raining heavily).

(*Id*. at 219.)

The court rejected defendant's argument. "This argument introduces into the foundational proof the actions of other individuals at the time of previous accident and thus would make the foundation-laying an insuperable task." (*Ibid*.) Again, "'. . . it would be very difficult, if not impossible, to show that two persons [were injured] in *exactly* the same place in the same manner. Accidents do not happen that way.'" (*Gilbert* quoting *Magnuson*, *Id*. at 219.) In distinguishing the holding from *Wilkerson,* the *Gilbert* court explained:

> . . . when the similarity depends upon the conduct of the actors in the accidents, rather than the condition of the locale, the general similarity rule requires a matching of those elements . . . but that is not necessary when the sole fact of dangerous condition of the premises is in issue.

(*Id*. at 221.)

In other words, where framed as a premises issue, there is leeway with regard to establishing the conduct of the actors.

The issue in *Magnuson* was the steep, slippery lake bank (premises). The issue in *Gilbert* was the poorly lighted parking lot (premises). The issue in *Wilkerson* was a drainage dip combined with the speed of the automobiles (premises plus conduct).

In summary, where it can be established that other accidents are *substantially similar* to the subject accident, they may be used to prove the *existence* of a dangerous condition, the *cause* of the subject accident, and a defendant's *negligence* in permitting a condition to continue.

Evidence of prior accidents to establish notice

The foundation requirement for the admission of prior accident evidence for notice of a dangerous or unsafe condition is considerably less than *substantial similarity*. "The requirement of similarity of conditions is 'much relaxed' when the evidence is offered to show notice of the dangerous condition." (*Genrich v. State of California* (1988) 202 Cal.App.3d 221, 232.) "[A]ll that is required . . . is that the previous injury should be such as to attract the defendant's attention to the dangerous situation . . ." (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388.)

In *Laird v. T.W. Mather, Inc.* (1958) 51 Cal.2d 210, the Supreme Court permitted admission of prior-accident evidence for the limited purpose of establishing notice. In *Laird*, the 79-year-old plaintiff fell while descending a stairway in defendant's store. The stairway's handrail ended a step and a half before the bottom. When plaintiff reached the end of the handrail, she assumed that she had simultaneously reached the end of the staircase. She misstepped, fell, and broke her hip. (*Id*. at 213-214.)

Over the objection of defendant, a former employee of the store testified at trial that he had learned of a prior accident on the stairway and informed the store's vice president. (*Id*. at 219-220.) The prior accident was not *substantially similar* because it was unclear from which step the prior victim fell. However, because the witness connected the prior incident to the insufficient handrail, evidence of the prior accident was admissible to show notice. The Court explained:

> If believed, the testimony would support a finding that defendant was

> aware that the handrail presented a hazard to users of the stairway. It [evidence of prior accident] was therefore relevant and admissible . . . to show defendant's knowledge of the dangerous condition of the stairway.

(*Id*. at 220.)

Similarly, in *Elsworth v. Beech Aircraft Corp*. (1984) 37 Cal.3d 540, a wrongful-death action against the manufacturer of the Travel Air twin-engine plane, plaintiff introduced evidence of 13 prior airplane accidents for the purpose of establishing defendant's notice of a dangerous condition. Most of the accidents introduced "occurred in the Baron airplane, an airplane different from the Travel Air . . ." but with some of the same characteristics. (*Id*. at 555.)

In its appeal, defendant argued that because there was no evidence concerning weather conditions or potential pilot error, admission of the thirteen prior accidents was inappropriate. The Supreme Court explained that the admission of such evidence was appropriate for the purpose of establishing defendant's notice. Specifically, the Court stated:

> Even if the accidents did not occur in precisely the same manner as in the present case, testimony regarding the accidents that occurred prior to the crash of the Travel Air in this case was admissible to show that Beech had notice of the dangerous condition.

(*Id*. at 555.)

In other words, even where the other accidents involved a different plane and therefore did not meet the *substantial similarity* standard, evidence of the prior accidents could be used for the limited purpose of establishing notice of a dangerous condition.

Statistically aberrant, unusual, and excessive

In public entity cases, the number of prior accidents must reach a level of "statistically aberrant" before considered relevant and admissible for the purpose of establishing notice to overcome the design immunity. (*Compton v. City of Santee* (1993) 12 Cal.App.4th 591; *Wyckoff v. State of California* (2001) 90 Cal.App.4th 45.)

In *Wyckoff v. State of California,* plaintiff was injured and his wife and children were killed when a northbound driver on State Route 85 in Santa Clara County, crossed the center median and struck plaintiff's car head-on. (*Id*. at 49.) In his action for dangerous condition of public property based on the absence of a center barrier, plaintiff offered evidence of nine prior cross-median accidents over a 21-month period. The evidence was excluded by the trial court. The Court of Appeal agreed with the trial court, finding that this was not an unusual accident rate because the nine prior accidents were dispersed over the entire 24-mile freeway. In fact, the court stated, the accident rate at the site of the subject accident was zero. (*Wyckoff* at 61.) As a result, evidence of the prior accidents was not admissible for the purpose of notice to overcome the State of California's design immunity.

As the basis of expert opinion

According to California Evidence Code section 801(b), expert witnesses may testify to and describe the information that they relied upon in formulating an opinion, even if the evidence is otherwise inadmissible.

In *Genrich v. State of California*, a pedestrian was struck by a car at an intersection of the Pacific Coast Highway in South Laguna Beach. Plaintiff's expert (the renowned Harry Krueper) opined that the intersection constituted a dangerous condition based, in part, on information gleaned from a computerized accident data system. This accident report disclosed 244 accidents occurring within 1,500 feet of the subject intersection. The expert did not review the individual traffic collision reports prior to his trial testimony.

On appeal, defendant argued that disclosure of "raw accident data" confused and inflamed the jury, causing undue prejudice. The Court of Appeal disagreed, explaining:

> Evidence Code section 801, subdivision (b) permits an expert to rely upon inadmissible evidence if it is 'of the type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates . . . .' And, pursuant to Evidence Code section 802, the expert may state the reasons for his or her opinion and the matter upon which it is based.

(*Id*. at 229.)

The court clarified that experts may not testify "to the details" of the other accidents if evidence of such accidents was otherwise inadmissible. (*Ibid*.)

Therefore, even where evidence of other accidents is held inadmissible for the four purposes described above, experts can describe, to a certain degree, such evidence if it is the reasonable basis of their opinion.

A dangerous intersection claims another victim

The average, common, safe-looking intersection claimed another victim on July 17, 2008. The trap of this dangerous premise had snapped before and continues to do so.

Evidence of the other accidents was critical to this case. Without the 17 prior and seven subsequent accidents, the subject accident appeared simply the result of an inattentive driver. The case is likely lost without this evidence.

Fortunately, facts were attained through litigation and discovery supporting *substantial similarity*. Each accident occurred at the intersection of the busy road and the shopping center's all-access main driveway. Each involved an outbound, left-turning vehicle attempting to turn west from the shopping center driveway. Each involved a vehicle traveling in the eastbound direction on the main road, like the plaintiff. As many as 10 prior and three subsequent accidents involved a vehicle obstructing the outbound, left-turning vehicle's view of other traffic. As many as 11 prior and five subsequent accidents occurred in daylight.

As many as seven prior and four subsequent accidents involved injuries. In other words, the other accidents occurred "under given conditions." (*Wilkerson* at 620.)

Plaintiff's traffic engineering expert was of the opinion that the 17 prior accidents and seven subsequent accidents at the subject intersection were *substantially similar* to the subject collision.

Defendants experts ultimately agreed to the *substantial similarity* of the majority of the other accidents.

The case resolved on the eve of trial. Undoubtedly, this was in part a result of the intention to present evidence of other accidents at trial, the facts and opinions supporting the *substantial similarity* of these other accidents, and the likely admission of this evidence.

Conclusion

Evidence of other accidents (prior and subsequent) is compelling. It indicates a problem; a problem beyond the coincidental cluster of inattentive drivers causing the collisions at the same location in the same manner.

This evidence can be relevant and admissible for many purposes and in many ways:

First, evidence of other accidents is relevant and admissible for purposes of proving the *existence* of a dangerous condition, the *cause* of the subject accident, and defendant's *negligence* in permitting the condition to continue, provided *substantial similarity* is established. According to *Magnuson v. City of Stockton*, this foundation is established if the other accidents are "similar in general character." *Substantial similarity* does not mean exactly the same. Accidents do not happen in such a way.

Second, evidence of prior accidents is relevant and admissible for the purpose of proving *notice* of the dangerous condition. This is true even where *substantial similarity* is not established. According to *Genrich v. State of California*, the foundational standard for the admission of evidence of prior accidents to prove notice is "much relaxed."

Third, even if incapable of laying the proper foundation for admission, expert witnesses can rely on inadmissible evidence of other accidents in forming their opinions. And according to Evidence Code section 802, an expert may state the reasons for his or her opinion and its basis.


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