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Similar Fact Evidence

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A case comment on *Triple 3 Holdings Ltd. et al v. Paccar Inc. et al*, 2014 SKQB 427

By: Franco Cabanos

With the growing mass production of goods, litigation involving product defects has correspondingly increased within the justice system. Invariably, products will fail, some more than others. Consequently, an often contentious battleground in products liability litigation involves the utility of and the ability of a party to rely on evidence of other similar events/failures. The common sense reaction is often that "similar fact evidence" (or evidence of similar losses) should be admissible. However, as will be discussed, there are many legal issues considering the use of similar fact evidence, such that admissibility is rarely straightforward.

Recently, our office had the opportunity to appear before Madam Justice Gunn of the Court of Queen's Bench for Saskatchewan in a products liability matter to argue the many procedural steps that can be impacted by the introduction of similar fact evidence. There, the Defendants, Paccar Inc., Paccar of Canada Ltd.-Paccar Du Canada Ltee. and Kenworth Truck Company (collectively the "**Paccar Defendants**"), applied to strike of pleadings and resist document production on the basis that the Statement of Claim we filed raised allegations of similar facts, which they argued was prejudicial and unjust.

We were wholly successful in resisting the application to strike and in obtaining an order for further document production on matters alleged to involve similar fact evidence and this paper highlights some of the key aspects of that decision and its implications on products liability litigation.

What is Similar Fact Evidence?

At the outset, it is important to understand what exactly "similar fact evidence" means in the legal context. In essence, similar fact evidence is a concept whereby evidence of prior acts is used to prove or otherwise strengthen the argument that a given loss occurred in the same way. There are many contexts in which a litigant may attempt to introduce similar fact evidence such is in relation to criminal behaviour (e.g. past criminal behaviour to show a propensity to comment a crime) or medical malpractice (e.g. a prior negligent procedure to show an inability to perform other procedures).

Similar fact evidence can be a particularly powerful tool in products liability claims. Parties often attempt to use evidence of past defects to prove that a current loss was caused by the same defect. This is especially useful where, for example in a fire loss claim, the evidence is destroyed. In that circumstance, the existing evidence may not be sufficient to prove a claim, but may be supplemented by similar fact evidence relating to a similar loss.

It is often tempting for people to rely on similar fact evidence because there appears to be a logical connection between a previous act or loss and a current act or loss. The reasoning goes, "If it happened once already, then that must explain why it happened again." If one accepts this analysis, then the prejudice to a defendant becomes readily apparent as that defendant is almost condemned because of a prior act, regardless of any efforts to correct it.

With that said, the law has developed parameters around the ability of a party to use similar fact evidence to negate the potential prejudice that a defendant may suffer. In other words, the Courts accept that prior acts of negligence do not, in and of themselves, prove a current allegation and that freely admitting this evidence may skew a trier of fact's ability to properly determine an issue. Justice Binnie, [1]in *R. v. Handy*, artfully used the words of William Shakespeare to explain this "reasoning prejudice":

> The policy of law recognizes the difficulty of containing the effects of [similar fact evidence] which, once dropped like poison in the juror's ear, "swift as quicksilver it courses through the natural gates and alleys of the body": *Hamlet,* Act I, Scene v. 11. 66-67.

In the criminal context, where the consequences to a defendant are far greater, similar fact evidence is presumptively inadmissible and, only in limited circumstances will it be admitted. However, in civil cases, the Courts take a slightly more relaxed approach. As explained by the Court in *C.M. v. Canada (Attorney General)*:

> In civil cases the courts will admit evidence of similar facts if it is logically probative, that is, if it is logically relevant in determining the matter which is in issue; provided that it is not oppressive or unfair to the other side; and also that the other side has fair notice of it and is able to deal with it.[2]

Triple 3 Holdings Ltd. et al v. Paccar Inc. et al, 2014 SKQB 427

Background

This case involved a truck fire that subsequently caused significant damage not only to the truck, but also the surrounding building.

Our client and the plaintiff, Triple 3 Holdings Ltd. ("**Triple 3**") owned a building in Stoughton, Saskatchewan, which was leased to our client and the other plaintiff, Mustang Vac Services Inc ("**Mustang Vac**"), and from which, Mustang Vac operated its trucking business.

The Paccar Defendants manufacture transport trucks, including the T800 model of truck. The T800 model of trucks can be custom built, with the Paccar Defendants manufacturing them to an owner's specifications. Mustang Vac owned a 2007 Kenworth T800 model of truck (the "**Truck**"), which included a truck frame and cab designed and manufactured by the Paccar Defendants. The Truck was equipped with a vacuum unit manufactured and installed by the Defendant, Camex Equipment Sales & Rental Inc.

On February 14, 2009, a fire occurred within the building destroying the building and most of the contents within it. In the action, the Plaintiffs allege that the fire originated within the Truck and was electrical in origin; specifically that the fire was the result of a short circuit of a power conductor connected to the battery. At the time of the fire, the Truck was parked and not in use. The quantum of damage is approximately $2.1 million.

Other Fires

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[1] *R. v. Handy*, 2002 SCC 56, at para. 40.
[2] *C.M. v. Canada (Attorney General)*, 2002 SKQB 174, at para. 63.

Our office acts as counsel in three other actions (all in Alberta) involving fires in 2007 Kenworth T800 models of truck, each of which occurred while the trucks were in the "off" position. It is also alleged in those actions that the fires were caused by short circuits of the power conductors and/or other wires connected to the batteries. We further learned of other 2007 Kenworth T-800 trucks catching fire in North America.

Application to Strike Pleadings

The Paccar Defendants applied to strike the pleadings relating to allegations of "similarly caused fires", which are reproduced as follows:

> 20. The Kenworth T800 model of truck has experienced other similarly caused electrical fires in the engine components throughout Canada and the United States and the Defendant Camex and the Paccar Defendants knew or ought to have known of these incidents. In particular, the other similarly caused electrical fires include:
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> a. other fires in the Kenworth T800 model of truck caused or contributed to by a short circuit between wires connected to the battery, including the Power Conductor; and
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> b. other fires in the Kenworth T800 model of truck caused or contributed to by chaffing of wires connected to the batter, including the Power Conductor.
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> …
>
> 25. Particulars of the negligence, breaches of duty, breaches of statutory duty, breaches of the duty to warn and breaches of contract of the Paccar Defendants include, but are not limited to:
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> …
>
> h. failing to reasonably and adequately investigate other similarly caused fires in Kenworth T800 truck models that they knew or ought to have known about;
>
> i. failing to reasonable and adequately test Kenworth T800 truck models for the risk of electrical fires in the engine components on an ongoing basis and, in particular, after they knew or ought to have known about other similarly caused fires;
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> j. failing to communicate their findings on other similarly caused fires in Kenworth T800 truck models to the appropriate authorities, Kenworth truck retailers, repair facilities, purchasers and users, including the Plaintiffs;
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> k. failing to communicate their findings on other similarly caused fires in Kenworth T800 truck models to and within each department of the respective Paccar Defendants including but not limited to failing to advise the following:
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> i. the other Paccar Defendants;
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> ii. the engineering departments or other similar departments;
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> iii. the sales departments or other similar departments;

iv. the marketing departments or other similar departments;

v. the design and manufacturing departments or other similar departments;

vi. the customer complaints departments or other similar departments;

vii. management; and

viii. their employees;

…

n. failing to promptly update or amend existing owner manuals, repair manuals or other instructing documents concerning Kenworth T800 truck models to include warnings or, alternatively, appropriate warnings concerning the risk of electrical fires when it knew or ought to have known of other similarly caused fires;

o. failing to promptly distribute updated owner manuals, repair manuals or other instructing documents on Kenworth T800 truck models to Kenworth truck retailers, repair facilities, purchasers and users, including the Plaintiffs;

The discovery process, whether document production or examinations for discovery, is governed by the scope of the pleadings. Consequently, the significance of the above-allegations relating to "similarly-caused fires" is that it broadened the scope of inquiry beyond the specific events that resulted in the loss to include inquiry on other losses. In response, the Paccar Defendants sought to narrow the scope of discovery by asking the Court to strike any pleadings that gave rise to possible similar fact evidence.

In support of this argument, the Paccar Defendants argued that similar fact evidence is presumptively inadmissible where prior acts of negligence are used to prove a present act of negligence. The Paccar Defendants relied on the case of *Woods (Litigation Guardian of) v. Jackiewicz*, 2013 ONSC 519, where Justice Murray explained:

> Similar fact evidence is presumptively inadmissible because of the prejudice – both reasoning prejudice and moral prejudice – which results. … A general allegation that there is similar fact evidence is insufficient to justify its inclusion in the amended statement of claim. Similar fact evidence has sometimes been pleaded in medical malpractice cases. *Williams v. Cai-Ping*, [2005] O.J. No. 1940 is one such case. In *Williams v. Cai-Ping*, specific cases of repetitive negligence were set out in the statement of claim and in each case there were striking similarities before the Court. As Justice Mackinnon said at para. 15 of his decision:
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> > Where there is a real and substantial nexus or connection between the allegations made and the facts relating to previous transactions which are sought to be given in evidence, then those facts have relevance and are admissible not only to rebut the defences such as accident but also to prove the facts of the acts or allegations made.
>
> …

> The principles applicable to pleading similar facts have been set out in *Prism Data Services Ltd. v. Neopost Inc.*, [2003] O.J. No. 2994 (Ont. Master) as the relevant principles to apply when a party seeks to plead allegations of similar facts. They are:
>
> (a) Such allegations are proper as long as the added complexity resulting therefore does not outweigh the probative value;
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> (b) Similar acts are not probative if there is not a sufficient degree of similarity;
>
> (c) The similarity must be provable without prolonged inquiry, although inevitably, the litigation process will be lengthened to some extent as a result of proper similar fact allegations;
>
> (d) The added complexity should not lead to undue oppression or unfairness;
>
> (e) If a system of scheme of conduct is alleged, the past similar acts must have sufficient common features to constitute the system or scheme.[3]

The Paccar Defendants further maintained that the pleading of similar fact evidence would create significant added complexity as the cause of the "similarly caused fires" would have to be canvassed on a case-by-case basis to prove that they were, in fact, similarly caused. This would potentially entail the involvement of two experts for each "similarly caused fire". In addition, the Paccar Defendants argued that since the Kenworth T800 model of truck was fully customizable, there was no similarity between the other trucks that may have suffered an electrical fire.

In response, we asserted that there was not only a real and substantial nexus or connection between the similar fact evidence and the present claim, but, more importantly, the allegations of "similarly caused fires" and the Paccar Defendants' knowledge of them went to the root of the allegation that the Paccar Defendants' breached their duty to warn. As a result, the supposed similar fact evidence pleadings involved the material facts necessary to prove this claim of negligence.

We highlighted the case *C.M. v. Canada (Attorney General)*, where the Court explained that similar fact evidence will be admitted if it is logically probative. We further maintained that the probative value was self-evident in light of the allegation of a breach of duty to warn.

A manufacturer's duty to warn is set out in the judgment of La Forest J. in *Hollis v. Dow Corning Corp.*:

> It is well established in Canadian law that a manufacturer of a product has a duty in tort to warn consumers of dangers inherent in the use of its product of which it has knowledge or ought to have knowledge. … The duty to warn is a continuing duty, requiring manufacturers to warn not only of dangers known at the time of sale, but also of dangers discovered after the product has been sold and delivered …
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> … When manufacturers place products into the flow of commerce, they create a relationship of reliance with consumers, who have far less knowledge than the manufacturers concerning

[3] *Woods (Litigation Guardian of) v. Jackiewicz*, 2013 ONSC 519, at paras. 8 & 10.

> the dangers inherent in the use of the products, and are therefore put at risk of the product is not safe. The duty to warn serves to correct the knowledge imbalance between manufacturers and consumers by alerting consumers to any dangers and allowing them to make informed decisions concerning the safe use of the product.[4]

Relying on this excerpt, we argued that if the pleadings are assumed to be true (i.e. if the Paccar Defendants were aware of similarly caused fires and failed to take any steps to warn the Plaintiffs), then there was a clear cause of action against the Paccar Defendants in negligence for breaching their duty to warn. The pleading of "similarly caused fires" was not included to prove a tendency or disposition of negligence, but instead, to incorporate the material facts giving rise to the allegations of a breach of a duty to warn, which is separate and distinct from the negligent design and negligent manufacture claims.

Madam Justice Gunn accepted our arguments and, in adopting our Brief of Law, she held that if the allegations are assumed to be true, then it was evident that the Plaintiffs had a cause of action. She further held that the added complexity did not outweigh the probative value, nor did it lead to undue oppression or unfairness which could not be compensated for by costs. As a result, she dismissed the application to strike. Madam Justice Gunn further ordered that the documents requested as part of our application (relating to the similarly caused fires) be produced.

Implications of the Decision

The decision by Madam Justice Gunn is important, particularly in products liability claims, because it underscores some key issues where the similar fact evidence may be used by a plaintiff to strengthen its position or by a defendant to resist a claim.

For a plaintiff, understanding when and how to use similar fact evidence can not only bolster the evidence supporting negligence, but it may also be an important strategic weapon in litigation. A pleading that properly incorporates "similar facts" may result in expanded discovery over matters that the defendant may not wish to disclose, particularly in a public forum. This may include:

(a) customer complaints about a product;

(b) product quality reports from dealers and retailers;

(c) investigation (or even expert) reports from similar losses;

(d) testing or other research data/reports; or

(e) documents showing any steps or lack of steps taken by the defendant after learning about the similar loss.

For claims involving multi-national corporations, the scope of relevance may be expanded beyond territorial borders, as in this case, where the allegations involved fires throughout North America. Again, this puts pressure on a defendant, as it may be forced to provide documents or other evidence from other jurisdictions.

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[4] *Hollis v. Dow Corning Corp.*, [1995] 4 SCR 634, at paras. 20 – 21.

As an aside, although not an issue before Madam Justice Gunn, the principles respecting similar fact evidence may go beyond past events and include post-incident remedial measures. While not expressly referring to "similar fact evidence", the Courts have taken a similar approach in finding that post-incident measures may be admitted as evidence provided that it is "logically probative" to the claims being advanced. In *Winsor v. Marks & Spencer Canada Inc.*, Justice Mercer, after examining the law relating to the admissibility of post-incident evidence, explained:

> In many Canadian jurisdictions evidence of post-accident measures are generally accepted as relevant and receivable as evidence. Though such evidence would not, standing alone, be sufficient to support a finding of negligence it is properly considered with other evidence in that determination. … This is now the prevailing view in Canada and I accept its applicability in Newfoundland.[5]

Thus, a plaintiff may also be able to use evidence of a defendant's actions after an incident to help prove that the initial incident was caused by negligence.

For a defendant, the decision sets out the types of arguments that may be advanced to avoid similar fact evidence and limit the discovery process with arguments such as undue oppression or prolonged inquiry resulting in an unnecessarily lengthened trial process. Moreover, by understanding that a plaintiff must establish "a sufficient degree of similarity" between events, a defendant may sculpt its strategy to focus on minimizing any similarities between events.

Summary

Ultimately, the application of similar fact evidence depends on the particular circumstances of each case. With that said, the case of *Triple 3 Holdings Ltd. et. al. v. Paccar Inc. et al* (and the cases referred to therein) provides a succinct analysis of its application in Canadian products liability litigation and can assist not only lawyers, but also others involved in the investigation of claims (e.g. examiners, adjusters, experts, etc.). Armed with an understanding of its implications, the principles regarding similar fact evidence may be an important tool for litigants in resolving disputes.

For more information, please visit us at www.whitelawtwining.com or contact:

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[5] *Winsor v. Marks & Spencer Canada Inc.* (1995), 1995 CanLII 10572 (NL SCTD), at para. 15.