# Admissibility of Similar Incidents Evidence –What Guidance from Oregon Courts?

By Stephanie Hendricks and Bruce C. Hamlin, Lane Powell PC

## INTRODUCTION

Oregon appellate courts generally uphold trial courts' decisions regarding whether to admit evidence of other similar incidents or evidence of the *absence* of other similar incidents in products liability cases. Although Oregon appellate court decisions suggest that Oregon courts take an arguably liberal view as to the admissibility of absence of other similar incidents evidence, no Oregon appellate court decision sets out a well-reasoned methodology to guide trial courts and help litigants predict whether such evidence will be admitted. The arguably liberal approach taken by Oregon courts is advantageous to defendants in product liability cases, particularly cases based on theories of negligence in which the defendant can argue that the lack of prior incidents renders the injury not foreseeable. However, the absence of a clear methodology to guide trial courts and litigants creates opportunities for litigants to be prejudiced by trial courts' *ad hoc* analysis of whether such evidence should be admitted.

Oregon courts do not lack examples of methodologies for determining whether absence of other similar incidents evidence should be admitted. In *Jones v. Pak-Mor Mfg. Co.*, 700 P.2d 819 (Ariz. Sup. Ct. 1985), the Arizona Supreme Court set out one analytical methodology for determining whether the absence of similar incidents evidence ought to be admissible. That methodology is discussed in more detail below, not to urge its adoption, but rather to highlight the need for guidance in admitting such evidence in Oregon courts.

## OREGON COURTS' TREATMENT OF ABSENCE OF OTHER SIMILAR INCIDENTS EVIDENCE

In Oregon product liability cases, it is within the trial court's discretion whether to admit evidence showing the presence or absence of incidents similar to the one at issue in a particular case. Oregon appellate courts will uphold the trial court's ruling as long as the trial court engaged properly in the balancing required by OEC 403.[1] *McCathern v. Toyota Motor Corp.*, 332 Or. 59, 72, 23 P.3d 320 (2001) ("We conclude that the trial court permissibly could have determined that the probative value of the 'other similar incidents' evidence was not substantially outweighed by the danger of unfair prejudice."); *Lakin v. Senco Products, Inc.*, 144 Or. App. 52, 63, 925 P.2d 107 (1996), *aff'd* 329 Or. 62 (1999) ("we conclude, without further discussion, that the trial court did not err in determining that the probative value of the 'prior claims' evidence 'was not substantially outweighed by the danger of unfair prejudice' to defendant"). The Oregon appellate courts consistently have upheld the trial court's decision to admit such evidence. *See e.g.*, *Oberg v. Honda Motor Co.*, 316 Or. 263, 267-69, 851 P.2d 1084 (1993), *rev'd on other grounds*, 512 U.S. 415 (1994) (affirming trial court's admission of "other claims" evidence as relevant to notice of product danger); *Benjamin v. Wal-Mart Stores, Inc.*, 185 Or. App. 444, 465, 61 P.3d 257 (2002) (testimony of director of engineering acknowledging awareness of prior incidents sufficient).

The Oregon appellate courts also consistently have upheld trial courts' decisions to admit absence of other similar incidents evidence in product liability cases involving negligence and strict liability claims. The Sixth Circuit's analysis in *Koloda v. General Motors Parts Division*, 716 F.2d 373, 377-78 (6th Cir. 1983) articulates the policy behind making such evidence admissible:

> [There is] no danger of arousing the prejudice of the jury, as the proof of another accident may do. Moreover, the danger of spending undue time and incurring confusion by raising "collateral issues," conjured up in some of the opinions, seems not at all borne out by experience in jurisdictions where the evidence is allowed. The defendant will seldom open this door if there is any practical possibility that the plaintiff may dispute the fact.

Although such evidence has been held admissible in Oregon, the Oregon appellate courts have not articulated a precise analytical methodology outside of the basic requirement that the trial court properly engage in OEC 403 balancing.

Two cases illustrate this point. First, in *Robertson v. Coca-Cola Bottling Co. of Walla Walla, Wash.*, 195 Or. 668, 247 P.2d 217 (1952), a products liability case premised on a negligence theory, the Court of Appeals concluded that the bottler's lack of experience with exploding soda bottles was admissible to prove the absence of a product defect and the absence of its knowledge of the defect. The plaintiff was an employee of a hotel who was responsible for stocking a vending machine with Coca-Cola products. One of the bottles exploded, causing permanent injuries to the plaintiff's face. The plaintiff argued that the Coca-Cola bottler was negligent for selling a bottle that was likely to explode and cause injury either because it contained too much pressure or because of the poor quality of the container. Plaintiff further claimed that, had the bottler exercised reasonable care, it would have learned of the defect. At trial, the bottler presented the testimony of a Coca-Cola vice president and general manager who had worked for the company for 24 years, had visited almost every Coca-Cola bottling company in the United States, and had visited the company that manufactured the bottles. He testified that, over the course of his time at Coca-Cola, he had never heard of a Coca-Cola bottle exploding, and the

plaintiff's was the first such claim ever filed against the company. In response to the plaintiff's challenge to the admission of that evidence on appeal, the Court of Appeals stated:

> It is contended that the court erred in permitting agents of the defendant to testify that they had never before heard of a bottle of Coca-Cola exploding, and that there had never before been a claim filed against the company. There is a conflict of authority upon this question. * * * However, this court has at least once indicated its adherence to the rule of admissibility. In *Briggs v. John Yeon Co.*, 168 Or. 239, 122 P.2d 444, 449, we said:
>
> > * * * That other persons had used the floor without mishap is evidence in conflict with the truth of plaintiff's claim, and would warrant an inference that the floor was in a reasonably safe condition, but it would be for a jury to say whether it overcame the force of the sworn testimony on behalf of the plaintiff and the reasonable inferences therefrom. * * *
>
> Where, as in this case, it is alleged that the defendant knew, or in the exercise of reasonable care should have known of the danger, we think such evidence is admissible.

*Id.* at 681. The court then proceeded to cite, and implicitly adopt, the rule followed in New Hampshire and Minnesota,[2] permitting the admission of the absence of other similar incidents evidence to prove both a defendant's lack of knowledge of the dangerous condition and the absence of the dangerous condition. *Id.*

Second, *Reiger v. Toby Enterprises*, 45 Or. App. 679, 609 P.2d 402 (1980), involved strict products liability. In that case, the plaintiff was employed at a meat processing plant and was injured when she slipped and, in order to avoid a fall, grabbed onto the portion of the slicing machine where the slicing blade was exposed. She lost the tips of four fingers and brought an action against the manufacturer of the meat slicer. On appeal, the plaintiff challenged the admission into evidence of testimony regarding the lack of any previous similar incidents as proof that the slicer was not unreasonably dangerous. In concluding that evidence of the absence of other similar instances was admissible in a strict product liability case, the court reasoned:

> This case was brought under the strict liability theory of Restatement (Second) of Torts s 402A (1965). Plaintiff was required to prove that the slicer is dangerously defective, that is, that it is a product "which a reasonable person would not put into the stream of commerce if he had knowledge of its harmful character." * * * Strict liability imposes on the manufacturer constructive knowledge of the harmful nature of the product. * * *
>
> Plaintiff argues that since knowledge of the dangerous propensity of the slicer was imputed to defendant, no issue of foreseeability of harm arose and, therefore, the testimony on prior safe use was inadmissible. Safety in prior related situations is, however, admissible not only to show in a negligence case whether defendant was reasonably chargeable with knowledge of a defective condition but whether the condition alleged was dangerous. * * * The Oregon Supreme Court has noted that the proof of "the frequency or infrequency of use of the same product with or without mishap" is relevant to proof of defective design. * * * We hold that the trial court did not err in admitting the testimony on prior safe use.

*Id.* at 682-83 (footnote omitted).

Oregon appellate courts have not analyzed the admissibility of evidence of the absence of other similar incidents evidence since *Toby Enterprises* in 1980. From the foregoing, it is clear that there is a general policy in favor of upholding trial courts' decisions with respect to whether such evidence should be admitted.

## OTHER STATE COURTS

Other states' courts have not taken the same broad approach. McCormick On Evidence states:

> * * * One might think that if proof of similar accidents is admissible in the judge's discretion to show that a particular condition or defect exists, or that the injury sued for was caused in a certain way, or that a situation is dangerous, or that defendant knew or should have known of the danger, then evidence of the absence of accidents during a period of similar exposure and experience likewise would be receivable to show that these facts do not exist. * * *
>
> Yet, many decisions lay down just such a general rule against proof of absence of other accidents. Admittedly, there are special problems with proving the nonexistence of something. In particular, an absence of complaints does not necessarily mean that accidents have not been occurring. * * * While these factors should be considered in balancing probative value against the usual counterweights, they do not justify a flat rule of exclusion.
>
> * * * *
>
> * * * A large number of cases recognize that lack of other accidents may be admissible to show (1) absence of the defect or condition alleged, (2) the lack of a causal relationship between the injury and the defect or condition charged, (3) the nonexistence of any unduly dangerous situation, or (4) want of knowledge (or of grounds to realize) the danger.

1 Charles T. McCormick, McCormick On Evidence (Practitioner Treatise Series) § 200, pp. 806-808 (6th ed. 2006) (footnotes omitted).

As mentioned in the introduction, the Arizona Supreme Court set out one analytical methodology for determining whether the absence of similar incidents evidence ought to be admissible in *Jones v. Pak-Mor Mfg. Co.*, 700 P.2d 819 (Ariz.

Sup. Ct. 1985). In that case, the plaintiff's leg was seriously injured while he was standing on the exterior running board of a garbage truck as the truck drove through a narrow alley. At trial, the plaintiff moved in limine to exclude any evidence of the absence of similar accidents in the almost 30 years that the garbage compactor—to which the running board was attached—had been in service. The defendant manufacturer opposed that motion by offering to prove "that the product had been designed and put into use in 1947, that the relevant portion of the design had not been changed, that thousands of machines with the same design had been sold, that they had been used under widely varying conditions, and that there had been no report of claims to or against [the] defendant based on any injury sustained in a manner similar to that alleged by [the] plaintiff." *Id.* at 821. The defendant sought to prove that such evidence was available through the testimony of the company's president. The trial court granted the plaintiff's motion without engaging in rule 403 balancing because it was the court's view that such evidence was per se inadmissible. The Arizona Supreme Court disagreed.

The court began its analysis by reviewing cases that had explained why such evidence was per se inadmissible and observed that the analysis in those cases had fallen out of favor with "most, if not all, evidence scholars." *Id.* at 822. The court then analyzed how the rules of evidence impact whether such evidence should be admitted. It observed that, as a general matter, such evidence was relevant, but reasoned that before such evidence is admitted a trial court must carefully engage in rule 403 balancing because of the problematic nature of such evidence:

> There is little logic in the proposition that the trial court may admit evidence of other accidents but may never admit evidence of their absence. * * * Nevertheless, experience teaches us that the problems of prejudice, inability of the opposing party to meet the evidence, and the danger of misleading the jury are substantial. We are aware, also, that defendant's "lack of notice" of injury does not establish the fact that no injuries had occurred, and that a "long history of good fortune" may not preclude the conclusion that the product was defective and unreasonably dangerous. * * *
>
> We believe that the true problem underlying the rejection of evidence of the lack of prior accidents is more evidentiary than substantive in nature. The essential nature of evidence of the absence of prior accidents is different from evidence of the existence of prior accidents. It is harder to prove that something did not happen than to prove that it did happen. When a witness testifies that he knows of no prior accidents, there are two possible explanations. The first is that there have been no prior accidents; the second is that there have been prior accidents but the witness does not know about them. This problem, however, is not peculiar to safety-history evidence in product liability cases. It is, we believe, a variant of the "negative evidence" problem.

*Id.* at 824 (internal citations omitted).

The court noted that trial courts should take several factors into consideration when engaging in rule 403 balancing. First, the trial court should take into consideration the nature of the product and its distribution, *i.e.*, whether it is distributed to millions of users, some of whom may have sustained some form of injury from the product about which the manufacturer may or may not be aware. Second, the trial court should consider the nature of the danger presented. The Arizona Supreme Court observed as an example that "[a]n open hole in a sidewalk poses a patent, unreasonable danger to pedestrians. Evidence of the lack of prior accidents is no more than evidence that the plaintiff was the first to fall in the hole. It creates a considerable risk of misleading the jury with respect to the purpose for which the evidence is admitted." *Id.* at 825. Third, the trial court should have the proponent of the evidence establish that it has systems in place that make it likely that if an incident had occurred with its product, it would know about it:

> The relevance of safety-history evidence is to establish evidentiary facts from which it may be inferred that there have been no prior accidents, thus warranting the ultimate inference that the product was neither defective and unreasonably dangerous nor the cause of the injury. Thus, the proponent of the evidence must establish that if there had been prior accidents, the witness probably would have known about them. This portion of the evidentiary predicate will, in most cases, be formidable. It is not, however, insurmountable. The defendant may have established a department or division to check on the safety of its products and may have a system for ascertaining whether accidents have occurred from the use of its products. The defendant or its insurers may have made a survey of its customers and the users of its product to determine whether particular uses of the product have produced particular types of injuries. Information may have been compiled by and obtained from governmental agencies such as the Consumer Product Safety Commission, the FAA, the FDA, or the FTC. Defendant may have established a system with its insurers, distributors, or retailers whereby retail customers are encouraged to report accidents, accidents are investigated, and data is compiled. Any of these methods, or others, may produce facts with which the proponent of the evidence may establish that if there had been accidents or near-accidents when the product was used in a relevant manner, defendant probably would have learned of the information and would have it available.

*Id.* at 825.

Finally, the court observed that a rule

of per se inadmissibility creates a safety issue for the public because it removes an incentive for companies to track safety issues with their products:

> One further consideration must be examined. Plaintiff argues that the policy of product liability law should be to foster the manufacture and distribution of safe products and to discourage the distribution of unsafe products. Therefore, plaintiff maintains that we should continue to follow a policy of admission of proof of prior accidents under similar circumstances and *per se* exclusion of relevant evidence of lack of prior accidents, even though this rule has been criticized. We agree with the premise but not with the conclusion. * * * Safety is not promoted by giving manufacturers, sellers, and distributors an incentive to refrain from learning about their products. The present rule, providing for discretionary admission of evidence of prior accidents and automatic exclusion of evidence of the lack of prior accidents, does just that. We believe the law is better served by a rule which gives manufacturers and distributors the utmost incentive to acquire, record, and maintain information regarding the performance of their products.

*Id.* at 826. The court ultimately concluded that the evidence that the defendant sought to present was not admissible because the defendant had not established that it could show that it had systems in place that would ensure its knowledge of any prior accidents involving the compactor.

The analysis in *Jones v. Pak-Mor* has been adopted by several other states' courts, including Hawaii, California, and Idaho. *See, e.g.*, *Lau v. Allied Wholesale, Inc.*, 922 P.2d 1041 (Hawaii App. 1996); *Benson v. Honda Motor Co.*, 32 Cal. Rptr.2d 322, 26 Cal. App.4th 1337 (Cal. App. 2 Dist. 1994); *Evans v. State*, 18 P.3d 227 (Idaho App. 2001).

## FEDERAL COURTS

Federal courts also have cited with approval the analysis in Arizona's *Jones v. Pak-Mor* decision. *See, e.g.*, *Van Houten-Maynard v. ANR Pipeline Co.*, 1995 WL 311367 (N.D.Ill. May 19, 1995); *Forrest v. Beloit Corp.*, 424 F.3d 344 (3rd Cir. 2005); *Lokai v. Mac Tools, Inc.*, 2007 WL 1666025 (S.D. Ohio Jun 05, 2007). However, some federal courts require an even more thorough analysis of the balancing prescribed by rule 403.

In *Forrest v. Beloit Corp.*, the plaintiff suffered injuries when, during the course of his employment at a paper mill, his arm was caught between two multi-ton rollers manufactured by the defendant. The plaintiff suffered severe and permanent injuries and sued the defendant on theories of strict liability and negligence under Pennsylvania law. At trial, the defendant was permitted to introduce evidence concerning the absence of prior accidents involving the piece of equipment that caused his injury. The defendant introduced the evidence through the testimony of two of *the plaintiff's* own witnesses who were former employees at the same paper mill. One had been employed at the paper mill for seventeen years while the other had been employed there for thirty-five years. They had testified that the way that the plaintiff attempted to clear the equipment on the night of the accident was by the same method employed by other employees, but neither was aware of any other employee having a similar accident.

The plaintiff filed a motion in limine seeking exclusion of the testimony, and objected repeatedly to admission of the evidence. The plaintiff's objections were premised on the defendant's failure to establish an adequate foundation for introducing the co-workers' testimony. The plaintiff further noted that, during his deposition, the defendant's chief engineer had admitted that the defendant had kept no records relating to either safety complaints by the defendant's customers or past accidents involving the machine at issue. Relying on FRCP 402 and 403, the plaintiff argued that the lack of records precluded the defendant from laying the foundation required before a product liability defendant could introduce testimony concerning the alleged absence of prior accidents involving its products. Therefore, the plaintiff argued, the admission of the evidence of an absence of prior similar incidents was unfairly prejudicial to the plaintiff.

The court began its analysis by observing that the law to be applied was federal rather than state law because "[t]he admissibility of the evidence ultimately turns on a balancing of its probative value versus its prejudicial effect, and we have held that in a federal court the FRCP govern procedural issues of this nature." *Id.* at 354. The court then observed that Federal Rule of Evidence 403 "recognizes that a cost/benefit analysis must be employed to determine whether or not to admit evidence; relevance alone does not ensure its admissibility. * * * However, there is a strong presumption that relevant evidence should be admitted, and thus for exclusion under Rule 403 to be justified, the probative value of evidence must be 'substantially outweighed' by the problems in admitting it." *Id.* (internal citations and quotation marks omitted).

The court then observed that federal and state courts addressing the admissibility of evidence of "the absence of prior accidents have recognized that the probative value of such evidence is determined in large measure by the foundation laid by the offering party." *Id.* Therefore, the court noted, "most courts admitting evidence of the absence of prior accidents in product liability cases have done so only where the testifying witness, usually an employee of the product manufacturer, has testified that (a) a significant number of substantially identical products have been used in similar circumstances over a period of time; (b) the witness would likely be aware of prior accidents involving these products; and (c) to the witnesss knowledge, no such prior accidents have occurred." *Id.* at 355-56.

The court recognized that evidence related to the absence of prior accidents is likely relevant "to show (1) the absence of the alleged defect; (2) the lack of a causal relationship between the injury and the defect or condition charged; and (3) the nonexistence of an

*Continued next page*

unduly dangerous situation." *Id.* at 356. However, despite that, the court was concerned that "[t]estimony concerning an alleged absence of prior accidents, if offered without a proper foundation, can create risks of unfair prejudice that may substantially outweigh whatever probative value the evidence otherwise has." *Id.* The court then observed that, in *Jones v. Pak-Mor*, the Arizona Supreme Court accurately summarized the issues with such evidence, specifically (a) the fact that a witness does not know of prior accidents does not mean that they did not occur, (b) that rebutting such evidence can be difficult if the defendant has not kept accurate records of incidents, (c) that there is always a first victim, and (d) that testimony about the absence of prior incidents does not account for near misses. The court then summarized the applicable framework as follows:

> [I]n federal court the admissibility of evidence concerning an absence of prior accidents is governed by federal law. The admissibility of such evidence turns on the facts and circumstances of each case. Testimony concerning an alleged absence of prior accidents will usually satisfy the relevance threshold established by Rule 402. Such testimony, however, by its very nature, raises significant concerns regarding unfair prejudice to the plaintiff, and these concerns are heightened in product liability cases arising under Pennsylvania law. District courts are required under Rule 403 to balance the probative value of such evidence against its likely prejudicial effect, but the evidence may not be excluded unless the unfair prejudice created by admitting the evidence would substantially outweigh its probative value. In an effort to ascertain probative value and minimize undue prejudice, other courts considering such evidence have consistently insisted that the offering party lay a proper foundation. In most cases the required foundation has involved three elements: (a) *similarity* -- the defendant must show that the proffered testimony relates to substantially identical products used in similar circumstances; (b) *breadth* -- the defendant must provide the court with information concerning the number of prior units sold and the extent of prior use; and (c) *awareness* -- the defendant must show that it would likely have known of prior accidents had they occurred.

*Id.* at 358.

In applying the foregoing guidelines to the facts of the *Forrest v. Beloit Corp.* case, the court observed that, besides going an unusual route and eliciting the absence of other similar instances testimony from plaintiff's own witnesses, the defendant also focused its questions on the safety history of the specific piece of machinery at issue. The court concluded that the defendant's narrow focus on the specific piece of equipment at issue diluted the probative value of the testimony at issue and rendered it "inadmissible in light of the potential for unfair prejudice that inheres in all such testimony." *Id.* The court explained the reason for its conclusion as follows:

> * * * Our primary concern is that notwithstanding the disputed testimony, we have no idea whether there were prior accidents involving Beloit's allegedly defective Gloss Calenders. The record is clear that Beloit designed and sold its Gloss Calenders to many customers over a period of several decades. Wong, who at one time personally led Beloit's Gloss Calender design group, testified that to his knowledge Beloit kept no records concerning whether injuries or accidents involving these Gloss Calenders might have occurred during the decades prior to Forrest's accident. The combination of (a) the existence of multiple other Beloit Gloss Calenders of similar or identical design; (b) the likely use of these Gloss Calenders in similar circumstances over a period of several decades; and (c) the absence of any evidence concerning the safety history of these other Gloss Calenders, leaves us with no reliable way to determine the probative value of what is essentially anecdotal testimony from two former Jefferson-Smurfit employees concerning a single Gloss Calender installed at a single mill. Thus, we can do little more than engage in rank speculation concerning the "probative value" side of the Rule 403 balancing equation.
>
> The same uncertainty that hampers our ability to ascertain the probative value of the disputed testimony also undermines Forrest's ability to respond. Forrest could of course speculate that other accidents might have occurred on one or more of the Beloit Gloss Calenders used at other mills over the past forty years. Such speculation, however, is unlikely to have anywhere near the same effect on the jury when compared to the concrete testimony from two witnesses concerning the specific Gloss Calender involved in Forrest's accident.

*Id.* at 359.

The court explained that the plaintiff was prejudiced by the defendant's failure to keep records and by the inherent difficulty in proving a negative with respect to accidents similar to the one that the plaintiff experienced:

> The asymmetry in the persuasive force of the cross-examination testimony extracted by Beloit and the speculative nature of Forrest's potential response highlights two ways in which Forrest was unfairly prejudiced. First, Forrest's inability to address the issue in a more concrete fashion is traceable in large measure to Beloit's failure to maintain records concerning the safety history of its own products. Second, the advantage Beloit gains over Forrest in this situation is not primarily the result of the natural probative force of the disputed testimony; indeed, the disputed testimony leaves us no way of knowing whether the absence of prior accidents involving the Jefferson-Smurfit Gloss Calender was

> an aberration, as opposed to a typical example of industry experience with substantially identical Beloit Gloss Calenders. This problem is basically a variation of a general concern applicable to all similar evidence from which a jury is asked to draw a negative inference: Witnesses testify from limited knowledge, and the fact that a particular witness is unaware of prior accidents does not mean such accidents have not occurred. We believe that given these considerations, the potential harm Forrest suffered as a result of Beloit's reliance on the disputed testimony constitutes the sort of unfair prejudice that Rule 403 is meant to combat. * * *

*Id.* (footnote omitted).

Finally, the court reasoned that admission of the evidence at issue would confuse the issues and mislead the jury given its limitation to the machine that caused plaintiff's injury as opposed to all the similar pieces of equipment manufactured by the defendant:

> The disputed testimony at issue is also troubling in light of Rule 403's reference to "confusion of the issues" and "misleading the jury." Isolated testimony concerning the alleged safety history of the Gloss Calender on which Forrest was injured tends naturally to focus the jury's attention upon that specific Gloss Calender. This focus may lead the jury to generalize from the limited experience surrounding one Gloss Calender to a broader conclusion concerning the overall safety of Beloit's Gloss Calender design. Pennsylvania law, however, focuses on the design of the product in the abstract, rather than the safety history of a particular unit. * * * Thus, to the extent an inference concerning the safety of a product's design can be drawn from a product's safety history, the reliability of such an inference is determined in large measure by the scope of the available safety history information. Here, of course, the information relied upon by Beloit does not cover all of Beloit's prior Gloss Calenders, or even a majority of them. Thus, to the extent this evidence could lead the jury to an inference concerning the overall safety of Beloit's Gloss Calender design, we cannot discount the possibility that the inference would be based on either false assumptions, unsupported speculation, or both.

*Id.* at 360 (internal citation omitted). The court therefore concluded that admission of the testimony was error and remanded the case to the district court for a new trial.

Based on the analysis set out in the Oregon cases discussed above, it appears unlikely that an Oregon appellate court would have reached the same conclusion.

## CONCLUSION

The absence of a recognized methodology in Oregon jurisprudence is problematic. Presently, litigants are not able to predict whether such evidence will be admitted, and therefore must be prepared to present or rebut such evidence.

Guidelines for admissibility of absence of other similar incidents evidence could result in more predictable evidentiary rulings, promoting even application of law and administration of justice. However, guidelines for admissibility would also require the court to make implicit findings about whether the absence of other similar incidents evidence is persuasive, as opposed to admissible, a determination traditionally left to the jurors themselves. Further, a detailed methodology for determining whether absence of other similar incidents evidence should be admitted increases the likelihood that such evidence will not be admitted. That is because one of the factors considered under other states' tests is whether defendants have systematically tracked incidents in which their products are involved.

### Endnotes

1 OEC 403 states: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence.

2 See *Howe v. Jameson,* 13 A.2d 471 (N.H. 1940) and *Nubbe v. Hardy Continental Hotel System of Minn.,* 31 N.W.2d 332 (Minn. 1948).

*Continued next page*