

## **SUBSTANTIAL SIMILARITY**

**By Ted Babbitt**

In product liability cases and particularly automobile rollover cases, defendants often seek to introduce tests done on exemplar vehicles. These tests are extremely expensive to perform and are generally not available to be duplicated by the plaintiff because of their excessive costs. In addition, automobile manufacturers have testing materials readily available to them because of their need to perform similar tests in the design and manufacture of their vehicles. These tests are often quite dramatic and can be extremely persuasive. Plaintiffs often argue that the admissibility of these tests is subject to objection because they fail the substantial similarity test.

That issue was raised in the recent case of Mitsubishi Motors Corp. v. Laliberte, 35 Fla. L. Weekly D2849 (Fla. 4<sup>th</sup> DCA, Dec. 15, 2010). That case came up on appeal based upon a multi-million dollar verdict in a product liability case against Mitsubishi arising out of a rollover accident with one of its vehicles. The plaintiff claimed a defect in the seatbelt and seat design of the vehicle which allegedly resulted in ejection of a young boy and his ultimate death.

Defendants sought to introduce into evidence four different crash tests designed to show that their seat design was safe, that the plaintiff's alternative seat design was, in fact, more dangerous and that the seat and seatbelt conformed to industry standards.

In addition to the tests, Mitsubishi attempted to introduce statistical information concerning other rollover accidents as well as slides and a video of the tests.

The trial court granted plaintiff's objection and refused to allow admission of any of the tests or statistical information. Importantly, the trial court did not exclude testimony by expert witnesses on the subjects in question because the defendants did not claim that any of those expert opinions were based upon the tests.

The substantial similarity test is described by the Court at 2851 as follows:

Generally, the doctrine of substantial similarity applies in products liability claims when a party attempts to introduce evidence of prior accidents, to recreate the accident involving the defendant's product, to show notice of defect, magnitude of the danger involved, the defendant's ability to correct a known defect, or the lack of safety for intended uses. See *Tran v. Toyota Motor Corp.*, 420 F.3d 1310, 1316 (11<sup>th</sup> Cir. 2005).

It is important to note that the defendants never made a representation that they were trying to recreate this accident. Instead, defendants admittedly performed these tests on other makes and models of vehicles in other scenarios involving different seats and different forces. The appellate court thus held that the substantial similarity test did not apply to this case. At 2851, the Court stated:

Here, Mitsubishi admittedly did not attempt to recreate the accident. Instead, Mitsubishi attempted to "demonstrate" body movement in a rollover accident, the advantages of its seat back and seatbelt design in other types of accidents, and the unique nature of the movement of this vehicle during the rollover accident. "The substantial similarity doctrine does not apply to situations . . . where the evidence is 'pointedly dissimilar' and 'not offered to reenact the accident.'" *Tran*, 420 F.3d at 1316 (quoting *Heath v. Suzuki Motor Corp.*, 126 F.3d 1391, 1396-97 (11<sup>th</sup> Cir. 1977)).

Nevertheless, the appellate court affirmed the trial court's refusal to admit the tests in question or the statistical information. The trial court carefully explained in her ruling that her decision was based specifically on the issue for which the evidence was offered. The Court sustained the plaintiff's objection to hearsay as to the statistical information. Furthermore, the Court found that there was a lack of relevance to many of the tests because they were, in fact, based upon differing crash scenarios and that the tests had a high likelihood of misleading the jury.

Using the abuse of discretion test, the Court found that the trial court's reasoning based upon relevance, hearsay, foundation and prejudice in deciding whether or not to admit what amounted to demonstrative evidence was not reversible error and thus, on rehearing, sustained the trial court's rulings and the ultimate verdict.

This case teaches a valuable lesson, which is amplified by Judge Ciklin's special concurring opinion emphasizing a trial court's ability and need to use appropriate discretion with reference to evidentiary rulings. The trial court, and not the appellate court, listens to all the evidence face to face. Only the trial court is in a position to strike the proper balance as to what is probative and what will unfairly prejudice a jury. Only the trial court can view relevance and unfair prejudice in the context of a real trial. It is these tenets which underscore the abuse of discretion standard. It is a plain fact that tests of these kinds can, in fact, unfairly prejudice and overwhelm a jury. Attempting to actually recreate an accident is extremely difficult because the forces can never truly be duplicated. Allowing into evidence tests which purportedly are only utilized for demonstrative purposes have an extraordinary propensity to confuse and mislead a jury which doesn't have the technical expertise to distinguish between dissimilar vehicles or

forces. The Court found that it should be left to the trial judge to determine just how probative such tests are and the dangers inherent in their admissibility.

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