Responding to the "This Never Happened Before" Defense

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It is early January. I'm sitting in a federal courtroom in Nashville listening to the closing argument of my opposing counsel. His repeated case theme is, "*this never happened before*." It is a familiar refrain: in virtually every premise and product liability case with no other similar incident evidence, the "*this never happened before*" defense will arise. If the incident was unwitnessed, this defense plants the seed of doubt in the juror's mind that if what the plaintiff claims to have happened, has never happened before, then maybe … it didn't really happen.

This is a formidable and insidious defense. It need not be specially pled—the defense can raise it anytime, in any way. During my January trial, all that defense counsel asked my engineering expert on cross-examination was versions of "there are no documented incidents of this ever happening before." The defense offered no expert testimony that the condition that caused my client's injury was not hazardous; but it argued "*this never happened before*" in its closing argument. Fortunately, I was prepared for it, countered it early on, and was able to secure a favorable verdict for my client.[1]

In this article, I will detail the ways in which the "*this never happened before*" defense can be defused in a premises liability case and in some products liability cases.[2] For purposes of this article, my discussion of products liability cases excludes vehicles, medical devices and medicines,[3] and the premise liability case regards a longstanding rather than temporary hazard.

Engineering Evaluation

By "premises liability case," I mean hazardous conditions on someone's property that causes an injury to an invited guest.[4] I approach a premises liability case the same as I approach a products liability case. In products liability, theories consist of defective design, a failure to guard, or a failure to warn. The same holds true in a premises liability case, and in my experience almost always requires a top-notch engineer to explain how the hazard was created, how it caused the harm, and how easy it was to fix. In anticipating the "*this never happened before*" defense, I instruct my engineer that during his evaluation he needs to be able to answer the following:

1) Is it likely that the hazard/defect that harmed my client happened to someone else?
2) Is it likely that the property owner/manufacturer was aware of this condition?

If the engineer concludes "no" to either or both questions, the case probably is not worth pursuing.

Basic Discovery

The most effective way to disarm the "*this never happened before*" defense is to uncover other similar incident (OSI) evidence.

The initial obligatory discovery requests include something like this:

> "Describe and identify all other similar incidents, complaints, notices, correspondence, threats, demands, lawsuits which describe and/or allege any kind of harm suffered by a person that slipped, tripped, lost footing and/or fell regarding the condition that is at issue in this lawsuit."

The above request can be differently worded, and regardless of the language used, the defendant's response is almost always multiple objections followed by:

> "Subject to the foregoing objections, and without waiving the same, defendant is aware of no information responsive to this discovery request."

While this discovery request usually produces no useful information, you need to make the defense answer it—the commitment of the answer itself is important. It is important to have that commitment in the event the OSI information is later revealed.

Rule 30(b)(6) Deposition

To determine whether there are other similar incidents, and to confront the "*this never happened before*" defense, a Federal Rules of Civil Procedure 30(b)(6) deposition or its state counterpart is indispensible. In a Rule 30(b)(6) deposition, the corporate defendant is obliged to present a representative to respond and give testimony on subject matters described in the deposition notice, and provide all of the information reasonably known and available to the corporate defendant. It matters not that the representative designated to be the witness is the person with the most knowledge of the subject matters or has no personal knowledge. The obligation of the corporate defendant in responding to a Rule 30(b)(6) deposition is to have its designated representative prepared to respond to the described subject matters so that it can provide all of the information reasonably known and available to the corporate defendant.[5]

In the Notice of 30(b)(6) Deposition Duces Tecum, and assuming the earlier request produced no evidence of other similar incidents, you will state that the defendant must produce the person or persons most knowledgeable about these following subject matters:

A) The defendant's position and/or opinion as to the incident occurred in which the plaintiff was injured and which is at issue in this litigation.
B) Search efforts to documents in response to Plaintiff's Request No. __. What computer search terms were used, what files were examined, what employees, managers, and departments were interviewed, how many people were involved in the search, how long did the search occur, and who is most knowledgeable in the corporation that can provide this type of information.
C) All incidents similar to that which harmed the plaintiff, the method and recordkeeping of how these incidents are documented, who is most knowledgeable regarding these incidents, and where and how this documentation is stored.

The Rule 30(b)(6) deposition testimony is binding upon the corporate defendant, and it is important to get the defendant on record as to how they say the incident occurred which harmed the plaintiff. Assuming there is no surveillance video that captured the event (and there usually is not), a corporate representative may concede the event occurred as the plaintiff has described.[6] By the same token, if the corporate defendant is alleging or insinuating (which it usually does) that the plaintiff is pulling some type of scam, it is important to lock down the corporate defendant in testimony as the defendant's commitment to how and why it believes the plaintiff is pulling some type of fraud.

The second category is important to determine how the search was conducted that resulted in no other similar incidents—was it a good-faith search designed to yield the existence of other similar incidents, or an intentionally-misdirected sham designed to give them cover for saying "we looked, there are no other similar incidents"? An experienced corporate counsel admitted to me that "the key to determining whether certain documents exist is to ask the right person in the corporation." That is the value of the Rule 30(b)(6) deposition. If the corporate representative answers all of the questions with "I don't know," he was unprepared. One can move to compel to take another deposition and have the corporate representative prepared. In my experience, in privately held corporations, it is not uncommon for the corporate representative to be unprepared. However, an unprepared corporate representative may unknowingly provide clues as to where the documentation can be found.

In a products liability case in which the corporate representative indicated that the incident that harmed my client was "rare," "unheard of," "very unusual," the product malfunction was repaired by the manufacturer under its product warranty. The corporate representative explained that any time its product malfunctioned within 18-months of its sale, the manufacturer would repair the product and there would be documentation as to what the malfunction was, where it occurred, and how it occurred. Following the deposition, I requested all warranty claims involving the product malfunction that harmed my client. The manufacturer produced some 73 similar incidents that occurred before and after my client's injury. In the corporate world, knowing what to ask for in terms of terminology is almost as important as whom to ask it from.

In a products failure to warn case, the corporate defendant answered initially that there were no other similar incidents. During the corporate deposition, the representative conceded the following:

1) That there was no department, persons or person within the corporation that was responsible for accumulating data regarding incidents similar to what happened to my client; and
2) The only way to determine whether there were other similar incidents was to ask each district manager as to whether they received complaints, communications or e-mails regarding problems similar to my client.

Following this testimony, another set of discovery was sent which then produced e-mails that district managers had received, confirming that there had in fact been other similar incidents.

With OSI information, the "*this never happened before*" defense is effectively neutralized, so long as it is admissible evidence.[7] Armed with the new OSI and in light of the initial discovery request that produced nothing, one can move for or defend against a protective order in seeking another Rule 30(b)(6) deposition. The follow-up corporate deposition is important for the following reasons:

1) establish the OSI is substantially similar to the accident at issue;
2) authenticate the OSI evidence for trial; and
3) find out how far up the corporate ladder who knew when and what was done about the OSI.

This may give rise to a punitive damage claim. At the least, it makes the corporate defendant look callous.

The third category is important in those cases where there are no other similar incident data because this subject matter forces the corporate defendant to explain why that is: it may be due to

a conscious, or at least consciously indifferent, attitude about safety. In a case where there is no other similar incident data, it is important to expose the corporate defendant's record keeping system, or more appropriately, the lack of it.

During my January trial, the Rule 30(b)(6) deposition produced the following exchange that the jury heard:

Q. How are complaints about a store condition recorded?
A. We—we have them write an incident report. We have a form which is called an incident report, and we have employees fill that out if there's any kind of problem. Either employees or managers.
Q. What if it's a—a—a condition that doesn't cause or result in an incident but it is a potentially harmful condition?
A. I would have them fill out an incident report and keep a record of it.
Q. How are complaints about a store condition recorded?
A. We—we have them write an incident report. We have a form which is called an incident report, and we have employees fill that out if there's any kind of problem. Either employees or managers.

. . . . .

Q. Can you testify with a hundred percent confidence that the wood louver door at the bottom of this beverage cooler at the store in Terminal C had never fallen before August 22, 2016?
A. I can testify that I don't know of it falling. I cannot testify a hundred percent that it did not fall and someone did not let me know.
Q. You just don't know either way?
A. Yes. I mean, I know that they didn't contact me about it, but I don't know that something couldn't have happened and they didn't contact me.

. . . . .

I can't testify that there were no complaints made. I can testify that I was not notified of any complaints. If something happened and they didn't notify me, then I can't say a hundred percent that it never happened.

This testimony exposes the corporate defendant defense of "*this never happened before*" is in reality the manager doesn't know if this happened before. The reason why the manager doesn't know is because no other incidents caused enough harm to someone to either complain or file a lawsuit, or he doesn't care to know.

Trial

The "*this never happened before*" defense should be raised first in voir dire. The danger point question is some form of the following:

> If a property owner/manufacturer claims that the condition/product that harmed my client has never hurt anybody else because there are no other claims of this sort, does that mean no previous events occurred?

Obviously, before this danger point question is asked, a meaningful and relevant share is important to get the jurors talking. Jurors can come up with all kinds of reasons why a corporate defendant may not have known or may not want to have known about other similar incidents. The important point is to get this insidious defense out front as soon as possible—to quote Don Clarkson, "if you can't talk about it, it's already out of control."

In a case in which there is no OSI, the deposition testimony of the defendant's 30(b)(6) designee should be introduced as one of the first witnesses to demonstrate to the jury the fallacy of "*this never happened before*" defense even if the defense does not raise it in opening. It is important to immediately educate the jury that the reason there is no OSI is because the corporate defendant has no organized record keeping system, or simply doesn't give a damn.

The expert engineer's testimony should follow. Along with describing the hazard/defect, the engineer must make three important points:

1) It is most likely there were previous incidents involving the hazard/defect;
2) If the defendant was paying attention, it had to know about it; and
3) How easy and inexpensive it would be to correct the problem.

An important counter to the "*this never happened before*" defense is the jury instructions. In premises liability cases, defense counsel will argue that if there is no prior notice, then there can be no liability. In Tennessee, the jury instruction for a premises liability case includes, but does not require, notice to establish fault. It reads as follows:

> "To recover for an injury caused by an unsafe condition of the property, the plaintiff must show that the defendant either created the unsafe condition, or knew of it long enough to have corrected it before plaintiff's injury, or that the unsafe condition existed long enough that the defendant, using ordinary care, should have discovered and corrected [or adequately warned of] the unsafe condition. An unsafe condition is a condition which creates an unreasonable risk of harm." *See* Tennessee Pattern Jury Instruction (Civil), 9.02.

This instruction is important for the engineering expert giving his opinions to the questions I earlier posed, and most importantly to describe how easy and inexpensive it was to correct the problem. This testimony fits hand-in-glove with the theme "An ounce of prevention is worth a pound of cure."[8]

In preparing for closing, I subscribe completely to Gerry Spence's admonition that you have to explain what the jury gets out of returning a verdict in your client's favor. I spend a lot of time pondering why the case affects the jury and their lives. In my January trial, the incident at issue occurred at the Nashville airport. Jury selection established that everyone had been through the airport and almost everyone was very familiar with the store where the incident happened. During the trial I had the airport's executive director testify that upwards of a million people a day walk through the Nashville airport terminal.

Armed with my engineer's testimony about how likely it was that this condition had malfunctioned before and how simple it was to correct, my liability case theme was: THIS WAS AN ACCIDENT WAITING TO HAPPEN. This could happen to anyone, a child, a senior citizen, an airport worker, anyone who happened to be in the airport that day and entered this particular store. The obvious insinuation being: this could happen to anyone on the jury unless something was done about it. That's why finding a fault was important to the jury.

The last piece effectively inoculated my client from the "*this never happened before*" defense. As I sat down and listened to my opposing counsel launch into his "*this never happened before*" closing, I wondered if he had been paying as close attention as the jury had been. Minutes after the jury began deliberations, the jury foreperson sent a note to the judge asking for a calculator. That told me the jury had easily disposed of the "*this never happened before*" defense.

Endnotes

1 *McClay v. AMS*, No. 3:17-CV-705, U.S. District Court, Middle District of Tennessee.

2 "Did this ever happen before?" is a question that jurors ask in almost every civil case. For some causes of action, actual knowledge such as in a Title IX case is a required element. See *Vance v. Spencer County Public School Dist.*, 231 F.3d 253, 259 (6th Cir. 2000). For purposes of space, this article is limited to products and premises liability cases.

3 Discovery of other similar incidents in product liability cases involving vehicles, medical products and medicines is considerably different because there are more effective reporting mechanisms regarding defective products in those areas and involves electronically stored information (ESI), which is an entire subject matter that should be an article unto itself.

4 Trip and fall, slip and fall on leaked liquid, fluid, deformed surface, improper shelving/stocking causes something to fall and strike someone, and any unsafe condition on someone's property that causes harm.

5 30(b)(6) Deposing Corporations, Organizations and the Government, by Mark Kosieradzki (*Trial Guides*, 2016), is an excellent resource on this rule and application.

6 If the defendant admits the incident occurred as the plaintiff described, a motion in limine can be filed to prevent any argument, suggestion or insinuation that the incident was fraudulent.

7 This is not as easy as it sounds. Essentially, the test of admissibility requires the same product malfunction under the same or substantially similar circumstances as the accident at issue. See *Baker v. Deere Co*., 60 F.3d 158, 162 (3rd Cir. 1995); *Brazos River Auth. V. GE Ionics, Inc.*, 469 F.3d 416, 526 (5th Cir. 2006); *Croskey v. BMW of North America, Inc.*, 532 F.3d 511, 518 (6th Cir. 2008). I caution to research the law in your jurisdiction. Whether OSI is admissible turns on the purpose of it: to establish a defect; causation; bad faith, etc.

8 Paul Luvera in his plaintiff trial lawyer tips blog describes how to respond to "this never happened before" defense in closing statement. See May 1, 2015 posting. However, I agree with Gerry Spence's position that if you don't deal with the danger point up front and during the trial, it's too late to deal with it for the first time in closing statement.