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Plaintiffs' Irrelevant Elephant: NEISS Evidence

Law360, New York (December 11, 2008) -- Plaintiffs often attempt to introduce statistical extrapolations at trial to demonstrate the total number of injuries that happen each year in the United States on the specific product at issue.

This "other accident" statistical evidence is usually derived from information gathered by the Consumer Product Safety Commission ("CPSC").

The CPSC maintains several accident databases; however, plaintiffs primarily attempt to introduce the statistical extrapolations from the National Electronic Injury Surveillance System ("NEISS").

NEISS monitors emergency room visits for injuries associated with consumer products.

Significantly, NEISS only monitors a small set of emergency rooms throughout the United States; however, by applying a mathematical formula to the sample data, the CPSC estimates, through extrapolation, the total number of injuries occurring in the United States during a given period, for a particular product.

The CPSC then publishes the data in various reports and other public documents, which plaintiffs attempt to introduce at trial.

This evidence is extremely prejudicial to defendants. Indeed, for certain products, a NEISS estimate can be tens of thousands of injuries in a given year based on only a few hundred actual incidents.

It is counter to the rules of evidence and product liability law generally, however, to allow a jury to infer defect simply because there have been other accidents involving a particular product. Defendants, therefore, can make several evidentiary arguments for exclusion.

Namely, defendants can argue that (1) the evidence is irrelevant; (2) the evidence is unreliable hearsay; and (3) the evidence's prejudicial effect outweighs its probative value and introduction of the evidence will lead to confusion of the issues and undue delay.

Evidentiary Exclusions For NEISS Evidence

1. NEISS Evidence is Irrelevant

To be relevant, "a showing of substantial similarity is required when a plaintiff attempts to introduce evidence of other accidents as direct proof of negligence, a design defect, or notice of the defect." *Cooper v. Firestone Co.*, 945 F.2d 1103, 1105 (9th Cir. 1991).

Accident circumstances are substantially similar only if (1) the same or substantially similar product is involved; and (2) there is a similarity in the accident scenarios. *Lohr v. Stanley-Bostitch Inc.*, 135 F.R.D. 162, 164 (W.D. Mich. 1991).

As an initial matter, it is impossible for plaintiffs to make this showing based on the NEISS data alone. NEISS only provides a terse accident description, oftentimes relating nothing more than that a patient was, in fact, injured using a particular product (i.e., "patient injured using band-saw").

Defendants should highlight the circumstances that caused or contributed to the specific accident at issue. Because the plaintiff will have conducted limited, if any, discovery regarding the NEISS accidents, the plaintiff will not be able to demonstrate that the other accidents are similar to the specific accident scenario at trial.

Additionally, defendants should highlight that plaintiffs cannot demonstrate that the same, or substantially similar, product as the one at issue was involved in the NEISS cases. NEISS is not limited to any specific manufacturer.

Moreover, the database is not limited to any specific product models, manufactured by specific manufacturers. Thus, because plaintiffs do not investigate the accidents in the database, they cannot demonstrate whether the products in those accidents were substantially similar to the one at issue.

Indeed, without investigation, plaintiffs cannot even demonstrate whether a particular manufacturer's product was involved in a NEISS case, let alone the specific model of product at issue.

Finally, defendants should review the relevant NEISS database regarding the product at issue. In many instances, the limited information available in the database will demonstrate that the NEISS injury was caused by a facially different scenario than the subject accident. The analysis will depend on the specific product; however, defendants should review the relevant data for obvious irrelevancy.

For example, there are numerous "table saw accidents" in the NEISS database that do not involve blade contact. Presumably, most, if not all, table saw litigation will involve some form of blade contact injury. Therefore, any reported accident that does not involve blade contact would be irrelevant in those cases.

Defendants should argue that these facially irrelevant accidents must be removed from any statistical extrapolation offered by the plaintiff. Of course, plaintiffs will not be able to do so and defendants should insist, therefore, that the evidence be globally prohibited.

At the very least, any irrelevant accidents should be presented to the court to demonstrate that they clearly have no probative value and epitomize the problem of allowing NEISS evidence at trial.

2. NEISS Evidence is Based Upon Unreliable Hearsay

Hearsay is "a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted." See Fed. R. Ev. 801(c).

First, plaintiffs clearly intend to introduce this evidence for the truth of the matter asserted. In other words, plaintiffs intend to introduce the data to show that the NEISS accidents, in fact, happened as reported. Otherwise, there would be no purpose in introducing the evidence at trial.

Second, the NEISS database contains several layers of out-of-court statements to be offered at trial. By way of background, the NEISS data collection process begins when an emergency room patient relays an accident account to a hospital employee. The healthcare provider then records this information in the medical record, creating a second layer of hearsay.

Another member of the hospital staff then unilaterally determines, based on the medical record, which cases from that day should be reported in the NEISS database and does so by assigning a product code to the accident with a brief narrative, thereby creating a third layer of hearsay.

The actual documentary NEISS account is the fourth layer of hearsay, and this is what is used to create the statistical conclusions plaintiffs intend to offer at trial.

The evidence, therefore, is clearly hearsay and plaintiffs must introduce it through some exclusionary exception. In this regard, the NEISS data, even if arguably admissible as either a business record under Fed. R. Evid. 803(6), or a public record under Fed. R. Evid. 803(8), nevertheless contains sub-levels of hearsay (i.e. hearsay-within-hearsay), which are inadmissible.

Regardless of the exception, it is black letter law that otherwise admissible evidence cannot contain underlying hearsay statements not admissible under their own exception. See, e.g., *Wolf v. Proctor & Gamble Co.*, 555 F.Supp. 613, 620 (D.N.J. 1982) (prohibiting hearsay accounts in otherwise admissible business records).

The only way plaintiffs can overcome the hearsay exclusion of the NEISS data is to present testimony from the injured party in those other accidents to explain what occurred.

Otherwise, those individuals would essentially be allowed to testify, through their NEISS accounts, against a defendant without being subject to cross-examination, and without having to take an oath. Since plaintiffs have no intention of presenting live testimony, they will not be able to overcome the hearsay exclusion.

Courts that have addressed the admissibility of CPSC reports have consistently refused to allow the evidence on the grounds that the information is untrustworthy under the Rules. See, e.g., *Kloepfer v. Honda Motor Company Ltd.*, 898 F.2d 1452, 1458 (10th Cir. 1990) (upholding the exclusion of CPSC injury data because the evidence did not meet the "trustworthy" standards of Fed. R. Evid. 803(8)); see also *McKinnon v. Skil Corp.*, 638 F.2d 270, 278-79 (1st Cir. 1981) (upholding the trial court's exclusion of CPSC reports as inadmissible hearsay).

3. NEISS Evidence Should be Prohibited Due to Unfair Prejudice and Undue Delay

Although relevant, evidence may be excluded if, among other things, its probative value is substantially outweighed by the danger of unfair prejudice, or creates undue delay, or needless presentation of cumulative evidence. See Fed. R. Evid. 403.

Therefore, even if the evidence contained in the NEISS database was somehow considered relevant, and its numerous levels of unreliable hearsay overlooked, defendants can still

assert that the information should be excluded on the grounds of prejudice, confusion, and waste of judicial time.

Defendants should argue that a jury would give NEISS evidence undue deference, thereby making it unfairly prejudicial. See, e.g., *Denny v. Hutchinson Sales Corp.*, 649 F.2d 816, 822 (10th Cir. 1981) (stating that "there is a real possibility that the jury would give undue deference to [a governmental report]").

Furthermore, defendants should highlight that the prejudice is only compounded by allowing plaintiffs to establish the premise of defect solely through documentary evidence.

By doing so, a jury is allowed to infer that the product at issue is defective, simply because individuals that have not been called to testify at trial asserted that, at some point, they had some type of incident involving the type of product at issue.

This, in turn, highlights a second and related problem. By permitting the inference of defect and/or causation based solely on the other accidents, plaintiffs are allowed to circumvent the rigors of expert testimony on defect and causation as outlined in *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993).

By introducing other accident evidence contained in the NEISS database, plaintiffs can likely avoid the presentation of expert testimony altogether and simply allow the jury to draw its own conclusions.

Relevant evidence may also be precluded if the court determines that the presentation of the evidence will confuse the issues, mislead the jury, or create undue delay, a waste of time, or the needless presentation of cumulative evidence. See Fed. R. Evid. 403; see also *U.S. v. Fell*, 531 F.3d 197 (2nd Cir. 2008) (prohibiting testimony that court determined was cumulative).

Defendants should stress that, if the NEISS data is admitted, substantial trial time will be required to address each accident/incident in detail. Defendants should make the court aware that this would expand the trial into potentially many other "mini trials," as the parties offer and rebut evidence of alleged "similar instance." See *Vincent v. Louis Marx and Co.*, 874 F.2d 36, 43 (1st Cir. 1989).

Defendants should highlight that the process would involve an avalanche of collateral questions and competing arguments involving each alleged prior incident, which will result in unavoidable confusion.

On this basis alone, courts have excluded evidence of prior accidents. See, e.g., *Brooks v. Chrysler Corp.*, 786 F.2d 1191, 1198 (D.C. Cir. 1986) (excluding National Highway Transportation Safety Administration statistics because of prejudice, delay and confusion that would arise due to collateral issues).

Conclusion

Stated simply, NEISS evidence is irrelevant and unreliable.

First, for NEISS accident data to be relevant, a plaintiff must prove that the other accidents used to derive the statistical conclusions occurred under "substantially similar" circumstances to the accident at issue.

This requires a plaintiff to prove that the other accident scenarios, as well as the products involved in the other accidents, are substantially similar to the accident and product at issue

in the particular case where the evidence is to be offered. If the plaintiff cannot make this requisite showing, the evidence should be prohibited.

Second, the NEISS data to be offered must be reliable. For this reason, defendants should highlight the numerous layers of hearsay that comprise the statistical extrapolation.

Defendants should make sure that the court is aware of each layer of hearsay and require a plaintiff to provide a sufficient exclusionary exception for each layer. If the plaintiff cannot demonstrate that the other accidents, in fact, occurred as alleged, then the evidence has no probative value.

Finally, defendants should argue that the evidence's probative value is substantially outweighed by the danger of unfair prejudice, and that the evidence confuses the issues, creates undue delay, and a needless presentation of cumulative evidence.

Defense counsel may be able to exclude the evidence if it can convince the court that the admission of the NEISS data will significantly increase the length of the trial and the amount of evidence admitted on collateral issues.

--By Christopher R. Daily, Miles & Stockbridge PC

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