

MISSOURI SECTION

COMMENTS

EVIDENCE—ADMISSIBILITY OF EVIDENCE OF ABSENCE OF PRIOR ACCIDENTS

Schillie v. Atchison, T. & S.F. Ry., 222 F.2d 810 (8th Cir. 1955)

While employed as a member of defendant's steel bridge gang, plaintiff's decedent climbed onto the upper part of a sloping batter post of defendant's bridge. As decedent was attempting to direct others from his position on the bridge, he fell and sustained injuries which later resulted in his death. In an action for wrongful death brought by the plaintiff as administratrix of decedent's estate, the trial court permitted defendant's witnesses, also members of the bridge crew, to testify that they had never heard or known of anyone having fallen from the batter posts prior to decedent's fall. The jury returned a verdict for defendant and the trial court rendered judgment accordingly. On appeal, the Court of Appeals for the Eighth Circuit, following Missouri law,¹ held that the admission of such evidence was reversible error.²

As a general rule, evidence of prior accidents is admissible in negligence cases in the discretion of the trial judge.³ The proponent of such evidence must establish to the trial judge's satisfaction both that the evidence has probative value⁴ and is vital to his case, and that its admission would not unduly prolong the trial, prejudice the jury, or confuse the issues.⁵ When such proof is made, evidence of prior

1. The case was tried in the federal court on diversity of citizenship. Under Rule 43(a) of the Federal Rules of Civil Procedure, the federal courts are to apply that rule of evidence—either federal or state—which favors the reception of the evidence. There is no federal rule concerning the admissibility of evidence regarding the non-occurrence of prior accidents; consequently, Missouri law was applicable.

2. *Schillie v. Atchison, T. & S.F. Ry., 222 F.2d 810 (8th Cir. 1955)*.

3. *Cogswell v. C. C. Anderson Stores Co., 68 Idaho 205, 192 P.2d 282 (1948)*; *Robitaille v. Netoco Community Theatre, Inc., 305 Mass. 265, 25 N.E.2d 749 (1940)*; *Henderson v. Bjork Monument Co., 222 Minn. 241, 24 N.W.2d 42 (1946)*; *Biener v. St. Louis Pub. Serv. Co., 160 S.W.2d 780 (Mo. App. 1942)*; *Trautman, Logical or Legal Relevancy—A Conflict in Theory, 5 VAND. L. REV. 385, 398 (1952)*; *Annot., 31 A.L.R.2d 190, 215 (1953)*. Some courts do not mention the element of discretion. *District of Columbia v. Armes, 107 U.S. 519, 524 (1882)*. A few courts have adopted an inflexible rule of exclusion. See, e.g., *Fox Tucson Theatres Corp. v. Lindsay, 47 Ariz. 388, 56 P.2d 183 (1936)*.

4. For example, the proponent must establish that the conditions at the time of the prior accidents are similar to those existing at the time of plaintiff's injury. *Magnuson v. City of Stockton, 116 Cal. App. 532, 3 P.2d 30 (1931)*; *Robitaille v. Netoco Community Theatre, Inc., 305 Mass. 265, 25 N.E.2d 749 (1940)*. The degree of strictness with which the similarity of conditions must be proved will vary, of course, according to the purpose for which the evidence is offered.

5. *McCORMICK, EVIDENCE § 167 (1954)*.

accidents is generally admitted for the jury's consideration on several of the issues normally involved in negligence cases, e.g., whether the particular condition was dangerous,⁶ whether defendant knew or should have known of the dangerous condition,⁷ and whether the plaintiff's injury was caused by the defective condition.⁸

Since evidence of prior accidents is generally admissible to show defendant's negligence, it would seem logical to permit the defendant to introduce evidence of the absence of prior accidents to show non-negligence.⁹ On this point, however, there is considerable judicial disagreement. The majority of courts, while admitting evidence of prior accidents, have excluded evidence of the non-occurrence of such accidents.¹⁰ Some of these courts have merely stated that such evidence is not relevant in the determination of negligence.¹¹ Other courts, while not denying that the evidence is relevant,¹² have excluded such evidence on the ground that it would raise innumerable collateral issues¹³ which would merely serve to confuse the jury.¹⁴ Other reasons

6. *Cogswell v. C. C. Anderson Stores Co.*, 68 Idaho 205, 192 P.2d 383 (1948); *Robitaille v. Netoco Community Theatre, Inc.*, 305 Mass. 265, 25 N.E.2d 749, 750 (1940) (dictum); *Trautman*, *supra* note 3, at 401.

7. 2 WIGMORE, EVIDENCE § 252 (3d ed. 1940); MCCORMICK, EVIDENCE § 167 (1954).

8. *Gorman v. County of Sacramento*, 92 Cal. App. 656, 268 Pac. 1083 (1928); *Wight v. H. G. Christman Co.*, 244 Mich. 208, 221 N.W. 314 (1928); MCCORMICK, EVIDENCE § 167 (1954).

9. *Campion v. Chicago Landscape Co.*, 295 Ill. App. 225, 14 N.E.2d 879 (1938); *Jackson v. Chicago, M., St. P. & P.R.R.*, 238 Iowa 1253, 30 N.W.2d 97 (1947); *Henderson v. Bjork Monument Co.*, 222 Minn. 241, 24 N.W.2d 42 (1946); *Trautman*, *supra* note 3, at 402-03.

10. *Murphy v. County of Lake*, 106 Cal. App. 2d 61, 234 P.2d 712 (1951); *Burgess v. Davis Sulphur Ore Co.*, 165 Mass. 71, 42 N.E. 501 (1896); *Haverkost v. Sears, Roebuck & Co.*, 193 S.W.2d 357 (Mo. App. 1946); *Annot.*, 31 A.L.R.2d 190, 215 (1953). Evidence of prior accidents also has been excluded because in the particular case there was no need for such evidence since the condition was obviously dangerous, *Kirchoff v. Hohnsbehn Creamery Supply Co.*, 148 Iowa 508, 123 N.W. 210 (1909); *Wright v. Kansas City Terminal Ry.*, 195 Mo. App. 480, 193 S.W. 963 (1917), or because of the dissimilarity of the circumstances, *Smith v. Town of Milford*, 89 Conn. 24, 92 Atl. 675 (1914). It should be noted that these same objections could be used to exclude evidence of the occurrence of prior accidents. MCCORMICK, EVIDENCE § 167 (1954).

11. *Louisville & N.R.R. v. Kemper*, 153 Ind. 618, 53 N.E. 931 (1899); *Johnson v. Kansas City Pub. Serv. Co.*, 360 Mo. 429, 228 S.W.2d 796 (1950); *Trautman*, *supra* note 3, at 403. In *Chase v. Wabash R.R.*, 156 Mo. App. 696, 137 S.W. 999 (1911), the court apparently conceded that evidence of the absence of prior accidents was relevant but excluded it on the ground that admission of such evidence would result in the conclusion that a condition is not dangerous until the first accident occurs.

12. It would seem that evidence of the absence of prior accidents is clearly within the usual definition of relevant evidence. Evidence is relevant if it tends to establish the proposition for which it is offered. For a definitive discussion of relevancy, see James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689 (1941).

13. Wigmore treats this as a matter of "auxiliary probative policy." 2 WIGMORE, EVIDENCE § 458 (3d ed. 1940).

14. *Cassanova v. Paramount-Richards Theatres, Inc.*, 204 La. 813, 16 So. 2d 444 (1943); *Aldrich v. Inhabitants of Pelham*, 67 Mass. (1 Gray) 510 (1854).

In *Blackwell v. J. J. Newberry Co.*, 156 S.W.2d 14 (Mo. App. 1941), the court said that it would not adopt an absolute rule of exclusion, but would admit such

advanced for exclusion are that such evidence would unduly prejudice the jury, or surprise the adversary,¹⁵ or would be inadmissible under the hearsay rule.¹⁶

The trend of recent decisions, however, is to admit evidence of the non-occurrence of prior accidents, in the court's discretion, to aid in determining whether the condition was such that accidents were likely to occur,¹⁷ whether the defendant knew or should have known that the condition was dangerous,¹⁸ whether the plaintiff was contributorily negligent or assumed the risk,¹⁹ whether the condition was the cause of the injury,²⁰ and whether the condition was maintained with due care by the party responsible.²¹ These courts do not overlook the objections advanced as reasons for exclusion. Thus, they will exclude the evidence if it lacks probative value and tends only to introduce collateral issues and unnecessarily confuse the jury.²² Again, if the evidence would unduly prejudice the jury or surprise the opponent, the trial judge may exercise his discretion to exclude it. In answer to the hearsay objection, it has been held that such evidence is not hearsay in that the questions do not call for out-of-court statements but merely for the personal knowledge and experience of the witness.²³

The decisions of those courts which admit evidence of the non-occurrence of prior accidents seem to be better-reasoned. It appears to be a paradoxical position for the courts to allow evidence of prior accidents and at the same time to exclude evidence of the absence of such accidents. Experience has always been a guide for human conduct—the fact that certain events do not occur is virtually

evidence where the party opponent was given an opportunity to rebut the testimony and any inferences raised therefrom. But *Johnson v. Kansas City Pub. Serv. Co.*, 360 Mo. 429, 228 S.W.2d 796 (1950) clearly shows that an absolute rule of exclusion is followed in Missouri.

15. *Branch v. Libbey*, 73 Me. 321, 5 Atl. 71 (1886); *Blackwell v. J. J. Newberry Co.*, 156 S.W.2d 14 (Mo. App. 1941).

16. *Woodward Iron Co. v. Spencer*, 194 Ala. 285, 69 So. 902 (1915); *Blackwell v. J. J. Newberry Co.*, 156 S.W.2d 14 (Mo. App. 1941).

17. *Cook v. Leavenworth Terminal Ry. & Bridge Co.*, 101 Kan. 103, 165 Pac. 803 (1917); *Albertson v. Chicago, M., St. P. & P.R.R.*, 64 N.W.2d 175 (Minn. 1954); *Menard v. Cashman*, 93 N.H. 273, 41 A.2d 222 (1945) (dictum). See also McCORMICK, EVIDENCE § 167 (1954); Morris, *Proof of Safety History in Negligence Cases*, 61 HARV. L. REV. 205 (1948).

18. *Campion v. Chicago Landscape Co.*, 295 Ill. App. 225, 14 N.E.2d 879 (1938). See also McCORMICK, EVIDENCE § 167 (1954); Morris, *supra* note 17, at 233; Trautman, *supra* note 3, at 402-03.

19. In *Jackson v. Chicago, M., St. P. & P.R.R.*, 238 Iowa 1253, 30 N.W.2d 97 (1947), the plaintiff used the evidence as tending to show he neither appreciated the risk nor knew that the condition was dangerous.

20. See, e.g., *Birmingham Union Ry. v. Alexander*, 93 Ala. 133, 9 So. 525 (1891).

21. *Chicago, R.I. & P.R.R. v. Lint*, 217 F.2d 279 (8th Cir. 1954) (applying Minnesota law); see Morris, *supra* note 17, at 233.

22. *Cook v. Leavenworth Terminal Ry. & Bridge Co.*, 101 Kan. 103, 165 Pac. 803 (1917); *Henderson v. Bjork Monument Co.*, 222 Minn. 241, 24 N.W.2d 42 (1946).

23. *Howe v. Jameson*, 91 N.H. 55, 13 A.2d 471 (1940).

as important as the fact that they do. Again, the whole atmosphere of scientific research is grounded upon a cause and effect relationship. Thus, those courts that exclude such evidence are denying the product of experience. It is not proposed that such evidence raise a presumption of non-negligence or that it be determinative of the issue, but it should be a factor to be considered by the jury. While it may be true that evidence of the absence of prior accidents is not so persuasive as the affirmative evidence of the occurrence of such accidents, this should affect only the *weight*, not the *admissibility* of the evidence. When such evidence has probative value, and when its inclusion would not be disproportionate to its usefulness—*i.e.*, result in confusion of issues, unfair surprise, or undue prejudice²⁴—there does not appear to be a sound basis for exclusion. It is hoped that the Missouri courts will change their position and allow the trial judge, in the exercise of his sound discretion, to admit evidence of the non-occurrence of prior accidents.

24. *Henderson v. Bjork Monument Co.*, 222 Minn. 241, 24 N.W.2d 42 (1946); 2 WIGMORE, EVIDENCE § 458 (3d ed. 1940).

