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The Admissibility Of Subsequent Remedial Measures In Strict Liability Actions: Some Suggestions Regarding Federal Rule Of Evidence 407

THE ADMISSIBILITY OF SUBSEQUENT REMEDIAL MEASURES IN STRICT LIABILITY ACTIONS: SOME SUGGESTIONS REGARDING FEDERAL RULE OF EVIDENCE 407

Subsequent remedial measures such as repairs, changes of condition, or precautions taken by a defendant after an injury traditionally have not been admissible when offered as evidence to prove the defendant's negligence or culpability in causing the injury.[1] Rule 407 of the Federal Rules of Evidence codifies the common law[2] rule excluding evidence of

[1] *See, e.g.*, Columbia & P. S. R.R. v. Hawthorne, 144 U.S. 202, 207 (1892) (taking precautions against future not construed as admission of responsibility for past); Stephen v. Merlin Firearms Co., 353 F.2d 819, 823 (2d Cir. 1965) (evidence of subsequent repair not admissible to prove negligence); Cox v. General Elec. Co., 302 F.2d 389, 390 (6th Cir. 1962) (defendant's change in product design after accident not admissible as proof of alleged negligence before and at time of accident); Northwest Airlines, Inc. v. Glenn L. Martin Co., 224 F.2d 120, 130 (6th Cir. 1955) (modifications by defendant after discovery of damage not properly admissible on issue of ordinary care). The exclusionary rule for subsequent repair evidence is so well settled that one commentator explaining the rule stated that citation of authority was unnecessary. *See* E. MORGAN, BASIC PROBLEMS OF STATE AND FEDERAL EVIDENCE 185 (5th ed. J. Weinstein 1976); *accord*, Eastern Air Lines, Inc. v. American Cyanamid Co., 321 F.2d 683, 690 (5th Cir. 1963).

[2] FED. R. EVID. 407; *see, e.g.*, Werner v. Upjohn Co., 628 F.2d 848, 853 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981) (common law rule excludes subsequent remedial measures to prove negligence); Harwood v. Chaney, 156 F.2d 392, 392 (8th Cir. 1946) (evidence of taking additional precautions after accident not admissible to prove negligence at time of accident); Burch v. Levy Bros. Box Co., 47 Cal. App. 2d 1041, _____, 117 P.2d 435, 436-37 (1941) (fact of remedial activity incompetent and immaterial); R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 186 (1977) [hereinafter cited as LEMPERT & SALTZBURG] (federal rule declaratory of common law); J. WEINSTEIN & M. BERGER, 2 WEINSTEIN'S EVIDENCE ¶ 407 [01], at 407-5 (1981) [hereinafter cited as WEINSTEIN'S EVIDENCE] (Rule 407 codifies almost uniform practice of American courts to exclude evidence of subsequent remedial measures as proof of admission of fault); Kennelly, *Postaccident Remedial Measures (Federal Rule of Evidence 407)—Suggested Discovery and Methods to Establish Admissibility*, 21 TRIAL L. GUIDE 61, 61 (1977) [hereinafter cited as Kennelly] (Rule 407 codifies state case law); Schwartz, *The Exclusionary Rule on Subsequent Repairs—A Rule in Need of Repair*, 7 FORUM 1, 1 (1971) [hereinafter cited as Schwartz] (exclusion of post-accident remedial activity in accord with law in most states). Many states have adopted by statute Rule 407 or a rule substantially similar. *See* ARIZ. REV. STAT. ANN. R. EVID. 407 (1977); ARK. STAT. ANN. § 28-1001, R. 407 (1976); COLO. R. EVID. 407 (1980); MICH. R. EVID. 407 (1978); MINN. STAT. ANN. EVID. R. 407 (1979); MONT. REV. CODES ANN. § 93-3002 R. EVID. 407 (Cumm. Supp. 1977); NEB. REV. STAT. § 27-407 (Cumm. Supp. 1978); NEV. REV. STAT. § 48.095 (1977); N.M.R. EVID. 407 (1978); N.D.R. EVID. 407 (1977); S.D.R. EVID. § 19-12-9 (Supp. 1978); VA. CODE ANN. § 8.01-418.1 (Cumm. Supp. 1978); WASH. R. EVID. 407 (1982); WIS. STAT. ANN. § 904.07 (West 1975); WYO. R. EVID. 407 (1978). A notable exception is Maine Rule of Evidence 407(a). *See* ME. R. EVID. 407(a) (1976). Maine Rule of Evidence 407(a) declares that evidence of subsequent measures taken after an event is admissible to prove negligence or culpable conduct. *See id.*; Note, *The Repair Rule: Maine Rule of Evidence 407(a) and the Admissibility of Subsequent Remedial Measures in Proving Negligence*, 27 ME. L. REV. 225, 226 (1975). *See also* text accompanying note 41 *infra*.

subsequent remedial measures[3] to prove negligence or culpable conduct.[4] While Rule 407 contains several exceptions that permit admission of subsequent repair evidence for limited purposes,[5] most commentators agree that the general exclusion of subsequent repair evidence in negligence actions is sound.[6] The need to exclude subsequent repair evidence in actions that do not require a determination of negligence, however, is less clear.[7] A standard of strict tort liability requires no showing of negligence,[8] and stands on proof and policy considerations significantly different from those supporting a negligence theory.[9] Courts disagree whether the rule excluding evidence of subsequent repairs extends to actions in strict liability.[10] Without uniform court

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[3] *See* FED. R. EVID. 407. The phrase "remedial measures" in Rule 407 brings within the scope of the rule any post-accident change, repair, or precaution. *See* WEINSTEIN'S EVIDENCE, *supra* note 2, ¶ 407 [01], at 407-5. Evidence of remedial measures also includes evidence of subsequent installation of safety devices, changes in design; recall letters, additional warnings, changes in company rules, changes in product labelling, packaging or advertising, changes in the choice of materials or components, and discharge of employees. *See* Note, *The Case for the Renovated Repair Rule: Admission of Evidence of Subsequent Repairs against the Mass Producer in Strict Products Liability*, 29 AM. U.L. REV. 135, 135 (1979) [hereinafter cited as *Renovated Repair Rule*].

[4] FED. R. EVID. 407. The subsequent remedial measures rule provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Id.

[5] FED. R. EVID. 407; *see* Patrick v. South Cent. Bell Tel. Co., 648 F.2d 1192, 1196 (6th Cir. 1980) (Rule 407 allows admission of subsequent repair evidence for purposes of proof of ownership, control, or feasibility of precautionary measures, if controverted, and impeachment); text accompanying notes 28-30 *infra*; note 4 *supra*.

[6] *See* Schwartz, *supra* note 2, at 2; *e.g.*, C. MCCORMICK, EVIDENCE § 275 (2d ed. 1972) [hereinafter cited as MCCORMICK] (evidence of remedial safety measures taken after injury excluded when offered as admission of negligence or fault); 2 J. WIGMORE, EVIDENCE § 283 (J. Chadbourn ed. 1979) [hereinafter cited as WIGMORE] (same); Falknor, *Extrinsic Policies Affecting Admissibility*, 10 RUTGERS L. REV. 574, 590-91 (1956) (same). *But see* ME. R. EVID. 407(a) (evidence of repairs after event admissible to prove negligence or culpable conduct). The bases of the general rule excluding subsequent repair evidence are relevancy and public policy. *See* Lloyd, *Admissibility of Evidence of Post-Accident Repairs: The Graying of a Black-Letter Rule*, 25 DRAKE L. REV. 400, 400 (1975) [hereinafter cited as Lloyd]; text accompanying note 19 *infra*.

[7] *See* text accompanying notes 38-42 *infra*.

[8] *See* Carmichael, *Strict Liability in Tort—An Explosion in Products Liability Law*, 20 DRAKE L. REV. 528, 528 (1971) [hereinafter cited as Carmichael]. Strict liability in tort imposes liability for damages on a person without requiring proof of negligence or fault. *Id.* *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 75, at 494 (4th ed. 1971) [hereinafter cited as PROSSER].

[9] *See* note 127 *infra*.

[10] *See* Foster v. Ford Motor Co., 616 F.2d 1304, 1309 n.11 (5th Cir. 1980) (noting conflict among circuits); Costello & Weinberger, *The Subsequent Repair Doctrine and Products Liability*, 51 N.Y. ST. B. J. 463, 463 (1979) [hereinafter cited as *Subsequent Repair Doctrine*]

treatment of repair evidence in strict liability actions, producers and manufacturers defending strict liability claims find their products assessed differently from jurisdiction to jurisdiction.[11] The disparate treatment of subsequent repair evidence is anomalous when a stated purpose of the Federal Rules of Evidence is fairness in the administration of evidence law,[12] and the legislative intent is uniformity of evidence rules used in the federal circuits.[13]

Absent the exclusionary rule, plaintiffs in tort actions would introduce subsequent repair evidence as an implied admission of the defendant of his culpability with respect to the injury.[14] Supporting the admis-

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(indicating controversy over subsequent repair exclusion); Note, *Federal Rule of Evidence 407 and Its State Variations: The Courts Perform Some "Subsequent Remedial Measures" of Their Own in Products Liability Cases*, 49 U. MO. K.C. L. REV. 338, 350-51 (1981) [hereinafter cited as *State Variations*] (decisive split of authority in jurisdictions ruling on applicability of Rule 407 in products liability cases). Some judges and commentators note the distinctions between theories of negligence and strict liability, but nevertheless extend the rule excluding evidence of subsequent repair to strict liability actions. *See, e.g.*, Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981) (distinction between negligence and strict products liability causes of action does not justify admission of evidence); Oberst v. International Harv. Co., 640 F.2d 863, 866 (7th Cir. 1980) (exclusion of post-accident change from trial not reversible error); Note, Ault v. International Harvester Co.—*Death Knell to the Exclusionary Rule Against Subsequent Remedial Conduct in Strict Products Liability*, 13 SAN. DIEGO L. REV. 208, 224 (1975) [hereinafter cited as *Death Knell*] (considerations warrant application of exclusionary rule to strict products liability). Conversely, others have viewed the distinction as sufficient to render the rule inapplicable when the theory of recovery is strict liability. *See* text accompanying notes 58-60 *infra*; *e.g.*, Farner v. Paccar, Inc., 562 F.2d 518, 528 (8th Cir. 1977) (rule prohibiting admission of evidence of subsequent remedial measures does not apply to actions based on strict liability); Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788, 793 (8th Cir. 1977) (evidence of remedial activity by defendant admissible with respect to plaintiff's strict liability claim); Note, *Products Liability and Evidence of Subsequent Repairs*, 1972 DUKE L.J. 837, 849-50 [hereinafter cited as *Products Liability*] (evidence of subsequent repair should be admissible in strict liability actions to be consistent with policy of strict liability).

[11] *See Renovated Repair Rule*, *supra* note 3, at 141. Products liability law needs uniformity and stability because products liability insurance rates are set on a nationwide basis. *See* Department of Commerce, Introduction, MODEL UNIFORM PRODUCT LIABILITY ACT, 44 Fed. Reg. 62,714 (1979). Product sellers and insurers, therefore, need to know the rules by which courts will judge products liability. *Id.* Courts should hold manufacturers to a uniform duty of care no matter where they market their goods, as product distribution flows freely over jurisdictional lines. *See* Note, *Post-Accident Design Modification and Strict Products Liability in New York*, 45 ALB. L. REV. 386, 408 (1981).

[12] *See* FED. R. EVID. 102 (rules construed to secure fairness of administration, elimination of unjustifiable expense and delay, and promotion of growth and development of evidence law). One commentator recently has noted that the adoption of the Federal Rules of Evidence seems to have contributed to a growing consistency among the various circuits and among states under similar rules, although to date the circuits and states have not achieved uniformity. Rothstein, *The Federal Rules of Evidence: Six Years After*, 28 FED. BAR NEWS & J. 282, 282 (1981).

[13] *See* 120 CONG. REC. 1412 (1974) (remarks of Rep. Hungate) & 1413 (remarks of Reps. Hutchinson and Smith) (purpose of bill to provide uniformity with the Federal Rules of Evidence so that same rules will apply throughout all circuits).

[14] *See* RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES 111 (2d

sion of subsequent repair evidence is the general policy of the adversary system of justice and the law of evidence, which is to place before the trier of fact all facts necessary for proper determination of the issues in controversy.[15] Although a plaintiff's remedial measures could be cogent evidence of elements of negligence,[16] two reasons support the traditional rule that excludes the evidence.[17] First, evidence of remedial measures frequently is irrelevant to the issue of negligence.[18] A defendant's subsequent repair activity often stems from reasons unrelated to the negligence issue, rather than from a defendant's belief in his own negligence.[19] Many post-accident changes reflect new technology or are made because of economic reasons.[20] Moreover, because a finding of

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ed. P. Rothstein 1981) [hereinafter cited as Rothstein] (stimulus for remedial measure may be feeling of culpability, if so evidence of measure like an implied admission); S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 181 (3d ed. 1982) [hereinafter cited as SALTZBURG & REDDEN] (without Rule 407 exclusion lawyers would use post-accident repair to promote inference of negligence).

[15] *See* United States v. Nixon, 418 U.S. 683, 709 (1974) (need to develop all relevant facts in adversary system both fundamental and comprehensive); Branzburg v. Hayes, 408 U.S. 665, 688 (1972) (public has right to every man's evidence); LEMPERT & SALTZBURG, *supra* note 2, at 140 (evidence rules judged on whether they increase chance jury will reach correct verdict); Morgan, *Some Observations Concerning a Model Code of Evidence*, 89 U. PA. L. REV. 145, 150-51 (1940) (testimonial privilege based on conviction that benefit to social interest from suppression of evidence outweights harm done in investigation of particular disputes); Note, *Post-Accident Repairs and Offers of Compromise: Shaping Exclusionary Rules to Public Policy*, 10 LOY. CHI. L.J. 487, 487 (1979) [hereinafter cited as *Post-Accident Repairs*] (provide trier of fact with as much evidence as possible to ensure proper issue determination).

[16] *See* PROSSER, *supra* note 8, § 30, at 143. Traditionally, the requisite elements of a negligence cause of action include a duty recognized by law that requires a defendant to conform to a certain standard of conduct for protection of others against unreasonable risk, failure of the defendant to conform to the required standard, a causal connection between the defendant's conduct and the resulting injury, and actual loss or damage to the plaintiff's interests. *See id.*; RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter cited as RESTATEMENT].

[17] *See* LEMPERT & SALTZBURG, *supra* note 2, at 187; *Products Liability*, *supra* note 10, at 840; Advisory Committee's Note, FED. R. EVID. 407; text accompanying notes 18-26 *infra*.

[18] *See* Columbia & P. S. R.R. v. Hawthorne, 144 U.S. 202, 207 (1892) (remedial measures have no legitimate tendency to prove defendant's negligence before accident); Terre Haute & I. R.R. v. Clem., 123 Ind. 15, 17, 23 N.E. 965, 966 (1890) (only activities occurring before accident determine defendant's culpable breach of duty); Morse v. Minneapolis & S.L. Ry., 30 Minn. 465, 468, 16 N.W. 358, 359 (1883) (evidence of subsequent repair affords no legitimate basis for admission of previous neglect of duty); WIGMORE, *supra* note 6, § 283 (improvement of injury causing object indicates object capable of injury and nothing more).

[19] *See Renovated Repair Rule*, *supra* note 3, at 149; Haysom v. Coleman Lantern Co., 89 Wash. 2d 474, 483, 573 P.2d 785, 790-91 (1978) (subsequent change sometimes implemented to improve product for reasons other than to cure dangerous defect).

[20] *See* Ault v. International Harv. Co., 13 Cal. 3d 113, 125-26, 528 P.2d 1148, 1156, 117 Cal. Rptr. 812, 820 (1974) (Clark, J., dissenting); *Renovated Repair Rule*, *supra* note 3, at 149. Post-accident repair might arise from a defendant's extreme caution. Columbia & P. S. R.R. v. Hawthorne, 144 U.S. 202, 208 (1892). Post-accident repair also could result from a defendant's feeling that such repair socially was desirable or humane. *See* 13 Cal. 3d at 125,

negligence in part rests upon the failure of a defendant to foresee the potential harm of the injury causing object, it is occurrences happening prior to the injury, not afterwards, that determine negligence.[21] A defendant's subsequent repair activities often stem from his discovery or realization that the object is capable of causing harm, rather than his negligence in failing to foresee the harm.[22] Second, and more importantly,[23] a jury might view remedial repair evidence as an admission of legal fault by a defendant,[24] with the effect of discouraging a defendant from repair for fear that he would provide evidence for a potential plaintiff.[25] The policy behind the rule excluding evidence of remedial repair is to encourage the defendant to repair and improve

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528 P.2d at 1155, 117 Cal. Rptr. at 819 (Clark, J., dissenting). Moreover, evidence of subsequent remedial measures may reflect only the defendant's opinion that he has been negligent or could have been more cautious and not his negligence under a legal standard. WIGMORE, *supra* note 6, § 283.

[21] PROSSER, *supra* note 8, § 31, at 146; WIGMORE, *supra* note 6, § 283, at 174-75; *see, e.g.*, Columbia & P. S. R.R. v. Hawthorne, 144 U.S. 202, 207 (1892) (taking of precautions against the future has no legitimate tendency to prove negligence before accident); Terre Haute & I. R.R. v. Clem., 123 Ind. 15, 19, 23 N.E. 965, 966 (1890) (occurrences prior to action determine culpable breach of duty). Evidence of subsequent remedial measures is not necessarily an admission of negligence because such measures are consistent equally with injury by accident or through contributory negligence. *See* Advisory Committee's Note, FED. R. EVID. 407. The rule excluding subsequent repair evidence rejects the notion that "because the world gets wiser as it gets older, therefore it was foolish before." *See id.* (quoting Hart v. Lancashire & Y. Ry., 21 L.T.R. N.S. 261, 283 (1869)).

[22] *See* SALTZBURG & REDDEN, *supra* note 14, at 181; *Products Liability*, *supra* note 10, at 840.

[23] *See* MCCORMICK, *supra* note 6, § 275, at 668; WEINSTEIN'S EVIDENCE, *supra* note 2, ¶ 407 [02], at 407-9. Courts have recognized the public policy grounds for excluding evidence of subsequent repair as controlling. *See* Lolie v. Ohio Brass Co., 502 F.2d 741, 744 (7th Cir. 1974); Kovacs v. Sun Valley Co., 499 F.2d 1105, 1106 (9th Cir. 1974); Louisville & N. R.R. v. Williams, 370 F.2d 839, 844 (5th Cir. 1966). The rationale of relevancy alone would not always be sufficient to support exclusion of subsequent repair evidence. *See* Advisory Committee's Note, FED. R. EVID. 407; WIGMORE, *supra* note 6, § 283; Schwartz, *supra* note 2, at 3; *Post-Accident Repairs*, *supra* note 15, at 487-88.

[24] *See* Ault v. International Harv. Co., 13 Cal. 3d 113, 126, 528 P.2d 1148, 1156, 117 Cal. Rptr. 812, 820 (1974) (Clark, J., dissenting) (jury may conclude change reflects admission of negligence and give decisive weight to perceived admission); Ortho Pharmaceutical Corp. v. Chapman, _____ Ind. App. _____, _____, 388 N.E.2d 541, 561 (1979) (jury might apply artificially high standard if influenced by subsequent repair evidence); *Products Liability*, *supra* note 10, at 841 (jury might construe defendant's repair making as admission of negligence); Note, *Exclusion of Evidence of Subsequent Repairs in Drug Products Liability Actions—An Unnecessary Resurrection of an Obsolete Rule*, 31 MERCER L. REV. 801, 803 (1980) [hereinafter cited as *Exclusion of Evidence*] (observing that courts have noted juries not capable of construing subsequent repair evidence in any way other than admission of negligence or liability).

[25] *See* Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981) (people loath to take actions that increase risk of losing lawsuit); Terre Haute & I. R.R. v. Clem., 123 Ind. 15, 19, 23 N.E. 965, 966 (1890) (repairers should not fear that evidence of repair will amount to admission of wrongdoing); WIGMORE, *supra* note 6, § 283.

without apprehension that remedial actions will later harm him in a lawsuit.[26]

While relevancy and public policy considerations have promoted a general exclusionary rule barring evidence of subsequent remedial repair to show negligence or culpable conduct, the rule is not absolute, with both the common law and Rule 407 recognizing a number of exceptions.[27] Consistent with the common law, Rule 407 excludes evidence of subsequent repair only when offered to prove negligence or culpable conduct in connection with some event.[28] Rule 407 explicitly allows introduction of evidence showing subsequent remedial measures as proof of ownership, control, or feasibility of precautionary measures, if con-

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[26] *See* Werner v. Upjohn Co., 628 F.2d 848, 855 (4th Cir. 1980) (rule including subsequent repair evidence designed to protect policy encouraging defendants to repair); Farner v. Paccar, Inc., 562 F.2d 518, 528 n.20 (8th Cir. 1977) (policy behind rule encourages defendant to remedy dangerous condition without fear remedial measure will indicate admission of fault). The policy argument encouraging post-accident repair has come to dominate the relevancy argument in excluding evidence of such repair. *See* note 23 *supra*.

[27] Kennelly, *supra* note 2, at 67-69 (prior to Rule 407 post-accident changes admissible for multiple reasons); FED. R. EVID. 407 (subsequent remedial measures not excluded when offered to prove ownership, control, feasibility of precautionary measures, if controverted, or impeachment). Prior to the adoption of Rule 407 in 1975, courts admitted evidence of post-accident changes to rebut and impeach, show the defendant had notice of a prior defect, establish the defendant's duty to make repairs, show repairs made by a third party, demonstrate conditions existing at the time of the accident, and establish a cause of action. *See, e.g.*, Choctaw, O. & G. R.R. v. McDade, 191 U.S. 64, 69 (1903) (no error in trial court admitting evidence of subsequent repair to rebut defendant's evidence); Kovacs v. Sun Valley Co., 499 F.2d 1105, 1106 (9th Cir. 1974) (subsequent repair evidence under Idaho law admissible only when question of defendant's duty at issue); Bailey v. Kawasaki Kisen, K.K., 455 F.2d 392, 395 (5th Cir. 1972) (evidence of subsequent corrective measures admissible to demonstrate condition at time of injury); Wallner v. Kitchens of Sara Lee, Inc., 419 F.2d 1028, 1032 (7th Cir. 1969) (evidence of subsequent repair properly admitted to show control); Fine v. Giant Food Stores, Inc., 163 F. Supp. 231, 236-37 (D.D.C. 1958) (evidence of subsequent changes admissible to show injury brought about in manner alleged and to show existing conditions at time of injury); Harig v. McCutcheon, 23 Ohio App. 500, 503, 155 N.E. 701, 702 (1926) (admission of testimony regarding subsequent remedial activity erroneous unless limited to show defendant's notice of prior defect). *Contra*, Laurenzi v. Vranigan, 25 Cal. 2d 806, 812-13, 155 P.2d 633, 637 (1945) (subsequent repair evidence excluded because would not prove knowledge prior to accident). Additionally, when controverted by the defendant, evidence of post-accident changes may show the feasibility of preventive measures and defendant's ownership and control. *See, e.g.*, Woolard v. Mobil Pipe Line Co., 479 F.2d 557, 563 (5th Cir. 1973) (evidence of remedial alterations admissible with limiting instruction to show defendant's control); Boeing Airplane Co. v. Brown, 291 F.2d 310, 315 (9th Cir. 1961) (evidence of subsequent changes may be admitted for limited purpose of showing practicability of use of safeguard). Before the adoption of Rule 407 many federal courts allowed evidence of subsequent remedial measures to show the difference between conditions at the time of the accident and those at the time of the trial. *See* United States v. Norfolk-Berkley Bridge Corp., 29 F.2d 115, 124 (4th Cir. 1928) (evidence of subsequent alteration admissible to show condition at time of accident); O'Brien v. Las Vegas & T. R.R., 242 F. 850, 853 (9th Cir. 1917) (evidence of repairs admissible to show condition at time of accident).

[28] *See* LEMPERT & SALTZBURG, *supra* note 2, at 186.

troverted, or for impeachment purposes.[29] Courts and commentators have construed the exceptions explicitly allowed by Rule 407 to be examples rather than an exhaustive list of permitted purposes, implying the admissibility of subsequent repair evidence for other purposes.[30]

Several courts have held that strict liability claims constitute yet another exception through which evidence of subsequent repair becomes admissible.[31] Given the differing elements required to sustain theories of negligence[32] and of strict liability,[33] controversy arises over whether the rule excluding evidence of subsequent remedial measures used to prove negligence or culpable conduct should apply to strict tort liability actions.[34] Although strict liability eliminates the necessity to prove negligence, a plaintiff in a strict liability action still has the burden to establish that the defendant's product caused the injury, the product was defective or unreasonably unsafe, and the defect existed when the product left the hands of the particular defendant.[35] At issue in a strict

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[29] FED. R. EVID. 407 (reprinted in note 4 *supra*); *see* Knight v. Otis Elevator Co., 596 F.2d 84, 91 (3d Cir. 1979) (evidence of subsequent remedial activity admissible to show feasibility of precautionary measures if controverted); Chute v. United States, 449 F. Supp. 172, 177 (D. Mass. 1978) (evidence of subsequent repair activity admissible under Rule 407 as probative on issue of feasibility of alternative measures); Doyle v. United States, 441 F. Supp. 701, 709 (D. S.C. 1977) (same). The Advisory Committee's Note to Rule 407 adds proof of duty to the list of purposes for which courts may admit proof of subsequent remedial measures. *See* Advisory Committee's Note, FED. R. EVID. 407.

[30] *See* Werner v. Upjohn Co., 628 F.2d 848, 856 (4th Cir. 1980) (exceptions listed in Rule 407 illustrative and not exhaustive); FED. R. EVID. 407 (reprinted in note 4 *supra*); Note, *Admissibility of Evidence of Subsequent Remedial Measures*, 38 WASH. & LEE L. REV. 671, 677 (1981) [hereinafter cited as *Remedial Measures*] (exceptions listed in Rule 407 illustrative, not exhaustive). The Advisory Committee's Note accompanying Rule 407 indicates that a defendant can offer evidence of subsequent measures only for purposes other than as proof of negligence or culpable conduct. *See* Advisory Committee's Note, FED. R. EVID. 407. Courts accordingly have been willing to admit subsequent repair evidence under Rule 407 for a range of purposes other than as proof of negligence or culpable conduct. *See, e.g.*, Patrick v. South Cent. Bell Tel. Co., 641 F.2d 1192, 1195-96 (6th Cir. 1980) (evidence of restoring to pre-accident condition); Kenny v. Southeastern Pac. Transp. Auth., 581 F.2d 351, 356 (3d Cir. 1978) (subsequent repair evidence used for rebuttal); Farner v. Paccar, Inc., 562 F.2d 518, 525 n.20 (8th Cir. 1977) (dictum) (subsequent repair made by party other than defendant).

[31] *See* Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 792-93 (8th Cir. 1977) (subsequent remedial warning admissible against cattle feed manufacturer in strict liability action); Ault v. International Harv. Co., 13 Cal. 3d 113, 118, 528 P.2d 1148, 1153, 117 Cal. Rptr. 812, 814 (1974) (manufacturer's subsequent change of metal used in gear box admissible in strict liability); Barry v. Manglass, 55 A.D.2d 1, 7, 389 N.Y.S. 2d 870, 875 (1976) (General Motor's issuance of recall letters after accident admissible in strict liability claim).

[32] *See* note 16 *supra*.

[33] *See* text accompanying note 35 *infra*.

[34] *See Subsequent Repair Doctrine*, *supra* note 8, at 463 (indicating controversy over subsequent repair exclusion); *Products Liability*, *supra* note 10, at 855 (evidence of subsequent repair should be admissible in strict liability actions to be consistent with policy of strict liability); *Death Knell*, *supra* note 10, at 224 (several considerations warrant application of exclusionary rule to strict products liability); text accompanying notes 38-42 *infra*.

[35] *See* PROSSER, *supra* note 8, § 103, at 671-72. Section 402A of the RESTATEMENT (SECOND)

products liability action, therefore, is the character of the defendant's product and not the defendant's conduct or culpability.[36] Since Rule 407 speaks only of negligence or culpable conduct, the argument runs, then Rule 407 should not apply to exclude subsequent repair evidence in strict products liability actions.[37]

Despite the shift of focus of proof, however, most courts continue to exclude subsequent repair evidence in strict liability actions.[38] Courts following the majority view discern the distinction between tort actions that require a showing of negligence and strict liability actions to be insufficient to merit the exclusionary rule inapplicable.[39] Several courts,

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OF TORTS defines strict tort liability such that a seller of a dangerous or defective product will be liable for the physical harm to the consumer from the product if the defect was the proximate cause of the injury, the seller was in the business of selling the product, and the seller intends and the product does reach the consumer without substantial change in the condition in which the product is sold. *See* RESTATEMENT, *supra* note 16, § 402A. Many courts have adopted widely § 402A as a description of the rules of strict tort liability. *See Renovated Repair Rule*, *supra* note 3, at 136 n.6. *See generally* Dickerson, *The ABC's of Product Liability—With a Close Look at Section 402A and the Code*, 36 TENN. L. REV. 439, 442 (1969).

[36] *See, e.g.*, Sutkowski v. Universal Marion Corp., 5 Ill. App. 3d 313, 319, 281 N.E.2d 749, 753 (1972) (shift of emphasis from defendant manufacturer's conduct to character of product); Barry v. Manglass, 55 A.D.2d 1, 7, 389 N.Y.S.2d 870, 875 (1976) (negligence action deals with defendant's conduct, strict liability action with the product); Shaffer v. Honeywell, Inc., 61 S.D. _____, _____, 249 N.W.2d 251, 257 n.7 (1976) (products liability case looks to defect in product rather than culpable act by manufacturer). At least one court has noted, however, that a suit brought under either strict liability or negligence theories seeks damages from the manufacturer, not the product. Werner v. Upjohn Co., 628 F.2d 848, 857 (4th Cir. 1980).

[37] *See* Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788, 793 (8th Cir. 1977) (Rule 407 does not bar subsequent remedial activity evidence in strict liability case because rule expressly applies only to proof of negligence or culpable conduct); Abel v. J.C. Penney Co., 488 F. Supp. 891, 896 (D. Minn. 1980) (dictum) (Rule 407 not applicable to products liability cases).

[38] *See, e.g.*, Bauman v. Volkswagenwerk A.G., 621 F.2d 230, 233 (6th Cir. 1980) (subsequent repair evidence excluded because feasibility exception not met); Ramos v. Liberty Mut. Ins. Co., 615 F.2d 334, 341 (5th Cir. 1980) (dictum) (Rule 407 requires exclusion of evidence of subsequent remedial measures when offered to prove negligence or culpable conduct); Knight v. Otis Elevator Co., 596 F.2d 84, 91 (3d Cir. 1979) (evidence of subsequent repair excluded because did not come within any exception); Holbrook v. Koehring Co., 75 Mich. App. 592, _____, 255 N.W.2d 698, 699 (1977) (not error for trial court to exclude evidence of subsequent remedial repairs); Haysom v. Coleman Lantern Co., 89 Wash. 2d 474, 483, 573 P.2d 785, 791 (1978) (rejects rule of universal admissibility of post-injury changes to prove prior defect); *Renovated Repair Rule*, *supra* note 3, at 155. *But see* text accompanying note 40 *infra*.

[39] *See, e.g.*, Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981) (failure of Rule 407 to refer explicitly to actions in strict liability does not prevent its application to such actions, common law principles apply to fill gaps in Federal Rules of Evidence); Oberst v. International Harv. Co., 640 F.2d 863, 866 (7th Cir. 1980) (rejecting theory that evidence of subsequent repair would be admissible for any purpose in a strict liability action); Werner v. Upjohn Co., 628 F.2d 848, 857 (4th Cir. 1980) (from policy standpoint if rule expressly excludes evidence of subsequent repairs to prove culpable conduct same should be true for strict liability); Smyth v. Upjohn Co., 529 F.2d 803, 805 (2d Cir. 1975) (per curiam) (public policy

however, have refused to allow the application of the negligence-based exclusionary rule in strict liability actions.[40] At least six states admit evidence of remedial repairs offered to prove the existence of a defect as part of the plaintiff's case in chief.[41] In addition, federal courts have split over Rule 407's applicability to strict liability actions.[42]

The initial difficulty in determining the applicability of Rule 407 to

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justification of encouraging subsequent repair may be less forceful for mass-produced items but still deserves some weight).

[40] *See, e.g.*, Unterberger v. Snow Co., 630 F.2d 599, 603 (8th Cir. 1980) (Rule 407 not applicable to strict liability actions); Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788, 792 (8th Cir. 1977) (evidence of remedial warning admissible in plaintiff's strict liability claim); Ault v. International Harv. Co., 13 Cal. 3d 113, 121, 528 P.2d 1148, 1152, 117 Cal. Rptr. 812, 816 (1974) (difference in focus of proof in products liability case makes subsequent repair admissible); Sutkowski v. Universal Marion Corp., 5 Ill. App. 3d 313, 319, 281 N.E.2d 749, 753 (1972) (post-accident change relevant and material); Shaffer v. Honeywell, Inc., 61 S.D. _____, _____, 249 N.W.2d 251, 257 n.7 (1976) (evidence of post-accident remedial actions admissible because different standard of proof in products liability cases). Even if Rule 407 did not exclude evidence of subsequent repair, the evidence would still have to be relevant and not unfairly prejudicial to be admissible. *See* FED. R. EVID. 402 & 403; text accompanying notes 113-115 *infra*. At least two commentators have discerned a trend or tendency by courts expressly considering admissibility of evidence of subsequent repairs in strict liability to reject the importation of the exclusionary rule from the negligence field. *See* Rothstein, *supra* note 14, at 114; Lloyd, *supra* note 6, at 408.

[41] *See* Caterpillar Tractor Co. v. Beck, 624 P.2d 790, 793 (Alaska 1981) (approving Alaska R. Evid. 407 which explicitly admits evidence of subsequent measures to prove defective condition in a products liability action); Burke v. Almaden Vineyards, Inc., 86 Cal. App. 3d 768, 774, 150 Cal. Rptr. 418, 422 (1978) (trial judge has discretion to allow admission of subsequent warning where probative value outweighs prejudicial effect); Good v. A.B. Chance Co., 39 Colo. App. 70, 79, 565 P.2d 217, 224 (1977) (application of exclusionary rule contrary to public policy encouraging distributor of mass-produced goods to market safer products, evidence of post-accident warnings had direct bearing on liability issue); McCaffrey v. Illinois C. G. R.R., 71 Ill. App. 3d 42, 50, 388 N.E.2d 1062, 1069 (1979) (since product bears scrutiny in strict products liability and not conduct of manufacturer in producing product, evidence of underlying motivation for design alternative not relevant); Cunningham v. Yazoo Mfg. Co., 39 Ill. App. 3d 498, 500, 350 N.E.2d 514, 516 (1976) (evidence of post-occurrence design change relevant and material to question of feasible design alternative available to manufacturer in products liability action); Chart v. General Motors Corp., 80 Wis. 2d 91, 100-01, 258 N.W.2d 680, 684 (1977) (economic realities will set course of mass producer's conduct and not evidentiary rule allowing admission of subsequent conduct evidence); ME. R. EVID. 407(a) (1976) (declaring evidence of subsequent measures taken after event admissible to prove negligence or culpable conduct).

[42] *See* Cann v. Ford Motor Co., 658 F.2d 54, 59 (2d Cir. 1981) (noting split among federal courts). Some federal courts have found Rule 407 acts to exclude subsequent repair evidence. *See, e.g., id.* at 60 (distinction insufficient between strict liability and negligence to admit subsequent repair evidence); Oberst v. International Harv. Co., 640 F.2d 863, 866 (7th Cir. 1980) (subsequent repair evidence admitted to show alternative design feasibility only if controverted); Werner v. Upjohn Co., 628 F.2d 848, 857-58 (4th Cir. 1980) (rejecting agreement that Rule 407 does not apply in strict liability). Other federal courts have found Rule 407 does not apply in actions founded upon strict liability to exclude subsequent repair evidence. *See, e.g.*, Farner v. Paccar, Inc., 562 F.2d 518, 528 (8th Cir. 1977) (Rule 407 inapplicable to actions based on strict liability); Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788, 793 (8th Cir. 1977) (Rule 407 confined to cases involving negligence or other culpable conduct).

actions based on strict liability stems from the paucity of congressional intent or other extrinsic guidance.[43] The legislative history of the Federal Rules of Evidence reveals that Rule 407 was neither the subject of floor debate, nor of discussion during the course of committee hearings on the Rules in the House of Representatives.[44] The Rule enacted by Congress was the Rule prescribed by the Supreme Court without change.[45] The Advisory Committee's Note accompanying Rule 407 also is silent regarding whether Rule 407 bars evidence of post-accident remedial measures in a strict liability case.[46]

Absent discernible congressional intent, the applicability of Rule 407 to a strict liability action depends in part upon the relevancy of the evidence of remedial measures to the action. Advocates for the position that strict liability requires no Rule 407 exclusion have challenged the traditional rationale that subsequent repair evidence is irrelevant in strict liability actions.[47] Courts and commentators argue that in strict liability, when the character of the defendant's product is the essential issue,[48] evidence of subsequent repair often is relevant.[49] As a reflection

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[43] *See* SALTZBURG & REDDEN, *supra* note 14, at 180 (little evidence of what drafters of Rule 407 intended). *But see* Werner v. Upjohn Co., 628 F.2d 848, 856-57 (4th Cir. 1980). In *Werner* the Fourth Circuit construed the inclusion of "culpable conduct" within the language of Rule 407 as congressional intent that Rule 407 should apply in strict liability actions. *See id.* The Fourth Circuit reasoned that from a policy standpoint if Rule 407 excludes evidence of subsequent repairs to prove culpable conduct the same should be true for strict liability. *Id.* at 857. Stating its reasoning alternatively the court found that if Congress excluded subsequent repair evidence on the issue of culpable conduct, the result should be no different on policy grounds on the issue of strict liability. *Id.*; *see Remedial Measures*, *supra* note 30, at 677-78.

[44] *See* WEINSTEIN'S EVIDENCE, *supra* note 2, at 407-1.

[45] Note by Federal Judicial Center, FED. R. EVID. 407. Between 1965 and 1969 an Advisory Committee composed of judges, lawyers, and teachers developed a preliminary draft of proposed rules of evidence for use in the federal courts, accompanied by detailed Advisory Committee notes. *See* S. REP. No. 93-1277, 93rd Cong., 2d Sess. 2, *reprinted in* [1934] U.S. CODE CONG. & AD. NEWS 7051, 7052. After circulation and revision of the proposed rules Chief Justice Warren Burger transmitted them to Congress. *Id.* Congress revised the proposed rules, and adopted the Federal Rules of Evidence by legislative enactment on Jan. 2, 1975, which became effective 180 days after enactment. *See* Act of Jan. 2, 1975, Pub. L. No. 93-595, § 1, 88 Stat. 1926 (1975).

[46] *See* Advisory Committee's Note, FED. R. EVID. 407.

[47] *See, e.g.*, Barry v. Manglass, 55 A.D.2d 1, 10, 389 N.Y.S.2d 870, 876 (1976) (admission of recall letters relevant to show defect); *Products Liability*, *supra* note 10, at 847 (evidence of subsequent repairs relevant in products liability case to prove reasonably attainable safety standard); *Exclusion of Evidence*, *supra* note 24, at 802 (proof of post-occurrence change relevant to demonstrate manufacturer's capability of creating safer product).

[48] *See* text accompanying note 36 *supra*.

[49] *See, e.g.*, *Renovated Repair Rule*, *supra* note 3, at 172-73 (subsequent repair evidence relevant in strict liability to prove feasibility and adequacy of warning); *Products Liability*, *supra* note 10, at 846-47 (evidence of subsequent repair relevant in strict liability to prove manufacturer's control and to establish legal defectiveness of product). Examples of subsequent repair evidence which may be relevant in a strict liability context are recall letters sent to consumers by manufacturers, now a commonplace occurrence in American

of the character of the product, evidence of subsequent modifications can be highly probative in strict liability cases.[50] Strict liability requires as an element of proof a defect in the product that is either unreasonably dangerous or that renders the product unmerchantable.[51] Evidence of subsequent repair often is relevant to prove a reasonably attainable safety standard, which the trier of fact may establish by comparing the improved or changed product with the allegedly defective product.[52]

Despite the possible relevancy of subsequent repair evidence in some strict liability actions, relevancy alone is not determinative of the application of Rule 407 to exclude the evidence. The Advisory Commit-

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economic life. *See Renovated Repair Rule*, *supra* note 3, at 158 (noting that campaigns to recall defective products are common in American economy); Ramp, *The Impact of Recall Campaigns on Products Liability*, 44 INS. COUNSEL J. 83, 83 (1977) (predicting in any given year over 25 million products will be recalled). When a plaintiff seeks recovery under strict liability for the very issue which is the subject of a recall letter, the letter has high probative value in determining the manufacturer's liability. *See* WEINSTEIN'S EVIDENCE, *supra* note 2, ¶ 407 [03], at 407-15. The question of a recall letter's admissibility in a strict liability action has arisen in suits against automobile manufacturers, where recall notices help to determine whether a defect existed at the time the product left the manufacturer's control. *See Renovated Repair Rule*, *supra* note 3, at 159 n.5. Most courts, when faced with recall letter evidence in a strict liability action, have admitted the recall letter when relevant to the defect that the defendant is attempting to establish. *See, e.g.*, Longnecker v. General Motors Corp., 594 F.2d 1283, 1286 (9th Cir. 1979) (no Rule 407 objection raised); Carey v. General Motors Corp., 377 Mass. 736, 744, 387 N.E.2d 583, 588 (Mass. 1979) (where plaintiff independently proves defect that was subject matter of recall in vehicle at time of accident recall letter admissible as part of plaintiff's proof against manufacturer); Manieri v. Volkswagenwerk A.G., 151 N.J. Super. 422, 431, 376 A.2d 1317, 1322 (1977) (recall letters clearly relevant on issue of whether defect arose while vehicle in control of defendant, were admissible with a limiting instruction by trial judge); Iadicicco v. Duffy, 60 A.D.2d 905, 906, 401 N.Y.S.2d 557, 559-60 (1978) (trial court exclusion of recall notice improper); Barry v. Manglass, 55 A.D.2d 1, 10, 389 N.Y.S.2d 870, 877 (1976) (recall letters admissible, but admission must weigh against possible prejudice); Fields v. Volkswagen, 555 P.2d 48, 58 (Okla. 1976) (recall letter by itself does not make prima facie case or shift burden of proof, but if defect that is subject of recall letter contributed or caused accident then letter would be evidence of defect existing at time product left manufacturer and would be admissible). *But see* Vockie v. General Motors Corp., 66 F.R.D. 57, 62 (E.D. Pa.), *aff'd mem.*, 523 F.2d 1052 (3d Cir. 1975) (where recall notice mandated by government regulation, public policy requires that manufacturers not be inhibited in making unqualified disclosure of potential safety hazard in good faith effort to comply with statutory duty).

[50] Caterpillar Tractor Co. v. Beck, 624 P.2d 790, 794 (Alaska 1981).

[51] *See* RESTATEMENT, *supra* note 30, § 402A(4); U.C.C. § 2-314 (1972).

[52] *See* Lolie v. Ohio Brass Co., 502 F.2d 741, 744 (7th Cir. 1974) (post-accident change evidence relevant and admissible to establish required standard of safety); Gasteiger v. Gillenwater, 57 Tenn. App. 206, 213-14, 417 S.W.2d 568, 572 (1966) (jury allowed to use evidence of subsequent repairs to determine if repairs met minimum industry standards); *Renovated Repair Rule*, *supra* note 3, at 173; *Products Liability*, *supra* note 10, at 850. Relevant evidence is defined by Fed. R. Evid. 401 as evidence that has any tendency to make the existence of a material fact more probable or less probable than it would be without the evidence. FED. R. EVID. 401. To be relevant under this definition, the evidence need not prove or even make more probable the ultimate proposition for which it is offered. *See* SALTZBURG & REDDEN, *supra* note 14, at 85.

tee's Note accompanying Rule 407 acknowledges that by itself the relevancy consideration is insufficient to support exclusion of subsequent repair evidence.[53] Courts and commentators generally recognize public policy as the controlling ground for excluding evidence of subsequent repair in negligence actions.[54] Similarly, public policy can support the exclusion of subsequent repair evidence in strict liability actions.[55]

Many courts[56] that have admitted evidence of subsequent repair in strict liability actions have been persuaded by the public policy analysis of the California Supreme Court in *Ault v. International Harvester Co.*[57] In *Ault*, the Supreme Court of California, whose opinions were among the first to accept and employ the concept of strict liability,[58] held California's statute excluding evidence of subsequent repair[59] inapplicable to strict products liability.[60] The plaintiff in *Ault* sustained injuries in an accident involving an automobile manufactured by International Harvester, and brought suit alleging that a defect in the gearbox design of the vehicle caused the accident.[61] On appeal from a jury verdict in favor of the plaintiff, the Supreme Court held that the trial court properly admitted evidence of a change in the gearbox design under Section 1151 of the California evidence code.[62] The majority opinion justified its holding on two grounds.[63] First, the majority held Section 1151 inapplicable to a strict liability case because proof of "negligence or culpable

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[53] *See* Advisory Committee's Note, FED. R. EVID. 407.

[54] *See* note 23 *supra.*

[55] *See* Werner v. Upjohn Co., 628 F.2d 848, 856 (4th Cir. 1980) (stating that to resolve whether Rule 407 excludes subsequent repair evidence court must examine policy behind Rule 407 and common law rule).

[56] *See* Farner v. Paccar, Inc., 562 F.2d 518, 527 n.17 (8th Cir. 1977); Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788, 792 (8th Cir. 1977); Abel v. J.C. Penney Co., 488 F. Supp. 891, 896 (D. Minn. 1980) (dictum); Roberts v. May, 583 P.2d 305, 309 (Colo. App. 1978); Goods v. A.B. Chance Co., 39 Colo. App. 70, 78, 565 P.2d 217, 224 (1977); Caprara v. Chrysler Corp., 71 A.D.2d 515, 521, 423 N.Y.S.2d 694, 697-98 (1979) (appeal pending); Barry v. Manglass, 55 A.D.2d 1, 7-10, 389 N.Y.S.2d 870, 875-76 (1976); Shaffer v. Honeywell, Inc., 61 S.D. _____, _____, 249 N.W.2d 251, 257 n.7 (1976); Chart v. General Motors Corp., 80 Wis. 2d 91, 101, 258 N.W.2d 680, 683 (1977).

[57] 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 821 (1974).

[58] *See* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, _____, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1967); Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, C.J., concurring).

[59] *See* CAL. EVID. CODE § 1151 (West 1966).

[60] *See* Ault v. International Harv. Co., 13 Cal. 3d 113, 118, 528 P.2d 1148, 1150-51, 117 Cal. Rptr. 812, 814-15 (1974). The foundation of a products liability suit is the theory of strict liability in tort or implied warranty. *See* Stromsodt v. Parke-Davis & Co., 257 F. Supp. 991, 995 (D. N.D. 1966), *aff'd*, 411 F.2d 1390 (8th Cir. 1969); Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 882, 111 So. 305, 306 (1927); Worley v. Proctor & Gamble Mfg. Co., 253 S.W.2d 532, 537 (Mo. Ct. App. 1952); RESTATEMENT, *supra* note 30, § 402A. *See also* U.C.C. § 2-314(1) (1979).

[61] 13 Cal. 3d at 116, 528 P.2d at 1149, 117 Cal. Rptr. at 813.

[62] *Id.* at 117, 528 P.2d at 1150, 117 Cal. Rptr. at 814.

[63] *See* text accompanying notes 64 & 65 *infra.*

conduct" on the part of the manufacturer is not necessary under strict liability theory.[64] Second, the majority determined the public policy foundation supporting Section 1151 of encouraging post-injury repair was inapplicable in the products liability field because manufacturers' self-interest in effecting repairs provides sufficient incentive without the rule excluding subsequent repair evidence.[65] The reasoning of the majority opinion is relevant to a consideration of Rule 407 because of the Rule's similarity to Section 1151.[66]

In determining that the language "negligence or culpable conduct" in Section 1151 does not encompass strict liability, the California Supreme Court relied upon an interpretation of the section's legislative history.[67] The legislative history, however, does not explicitly indicate whether Section 1151 applies to strict liability.[68] By contrast, a federal circuit court interpretation of the same "negligence and culpable conduct" language in Rule 407 determined that the United States Congress intended the Rule to exclude evidence of subsequent repair in strict liability actions.[69] The disparate holdings illustrate the inevitability of conflicting statutory interpretations achieved when starting from ambiguous legislative histories,[70] and highlight the need to examine public policy considerations.

An examination of public policy provided the basis of the *Ault* court's second rationale.[71] In finding the public policy of encouraging post-accident repair inapplicable in strict products liability, the *Ault* majority relied on two arguments.[72] The majority asserted that a mass producer of defectively designed products has sufficient incentive to take remedial action in the threat of numerous potential lawsuits arising from the uncorrected defect.[73] The court reasoned that the manufacturer's or

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[64] *See* 13 Cal. 3d at 118, 528 P.2d at 1150-51, 117 Cal. Rptr. at 814-15.

[65] *See id.* at 120, 528 P.2d at 1151-52, 117 Cal. Rptr. at 815-16.

[66] *See* CAL. EVID. CODE § 1151 (West 1966). Section 1151 of the California Evidence Code is comparable to Rule 407 of the Federal Rules of Evidence. Advisory Committee's Note, FED. R. EVID. 407. By its terms § 1151 excludes evidence of subsequent remedial or precautionary measures when a plaintiff offers the evidence to prove negligence or culpable conduct. CAL. EVID. CODE § 1151 (West 1966).

[67] *See* 13 Cal. 3d at 121, 528 P.2d at 1152-53, 117 Cal. Rptr. at 816-17 (limitation of § 1151 to negligence causes of action deemed deliberate action on part of legislature and Law Revision Commission which drafted § 1151).

[68] *See Death Knell, supra* note 10, at 217-21. One commentator reviewed all relevant legislative materials in regard to adoption of the California Evidence Code and concluded that the legislative history yields no clear expression of legislative intent on the applicability of § 1151 to strict products liability. *See id.* at 221.

[69] *See* Werner v. Upjohn Co., 628 F.2d 848, 856-57 (4th Cir. 1980); *Remedial Measures, supra* note 30, at 678. *See also* text accompanying note 43 *supra.*

[70] *See Death Knell, supra* note 10, at 221.

[71] *See* 13 Cal. 3d at 120, 528 P.2d at 1151-52, 117 Cal. Rptr. at 815-16.

[72] *See* text accompanying notes 73 & 74 *infra.*

[73] *See* 13 Cal. 3d at 120, 528 P.2d at 1151-52, 117 Cal. Rptr. at 815-16. The *Ault* majority further reasoned that a failure to correct possibly would produce adverse publicity for the

producer's economic self-interest lies in improving or repairing defective products.[74] The *Ault* majority also argued that the application of Section 1151 to strict liability actions would be contrary to the public policy of encouraging the mass producer to market safer products in making recovery for the injured plaintiff more difficult.[75] Excluding evidence of subsequent repair to encourage future remedial action may preclude recovery under strict liability theory, which was itself designed to ensure safety in marketed products.[76]

The *Ault* court's reasoning has persuaded many courts,[77] legislatures, and commentators.[78] *Ault* and its supporters point to the policy of encouraging repair underlying the exclusion of subsequent remedial activity evidence in negligence actions and argue its ineffectiveness in a strict liability context.[79] With the admission of subsequent repair evidence the producer trades one case in which the court admits such evidence, against an unknown but potentially large liability if the producer continues to manufacture and market the defective goods.[80] Additionally, by failing to repair or correct when he has knowledge of a defect or hazard, a defendant manufacturer runs the risk that a subsequent plaintiff will use the failure to show the manufacturer's negligence[81] or to build the basis of a punitive damage claim.[82]

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mass producer. *See id.* at 120, 528 P.2d at 1152, 117 Cal. Rptr. at 816. The activities of watchdog consumer organizations and federal agencies present additional incentive to take remedial measures. *See Products Liability*, *supra* note 10, at 848-49.

[74] *See* 13 Cal. 3d at 120, 528 P.2d at 1152, 117 Cal. Rptr. at 816.

[75] *See id.* at 120, 528 P.2d at 1152, 117 Cal. Rptr. at 816.

[76] *See id.* n.4., 528 P.2d at 1152 n.4, 117 Cal Rptr. at 816 n.4 (quoting with approval *Products Liability*, *supra* note 10, at 848-50).

[77] *See* note 56 *supra*. *Contra*, Bauman v. Volkswagenwerk A.G., 621 F.2d 230, 233 (6th Cir. 1980) (Rule 407 expressly forbids use of subsequent measures to show design changed to remedy defect); Price v. Buckingham Mfg. Co., 110 N.J. Super. 462, 464, 266 A.2d 140, 141 (1970) (subsequent remedial measures not evidential in relation to issues of either negligence or strict liability).

[78] *See, e.g.*, ME. R. EVID. 407 (evidence of subsequent remedial measures admissible for any legitimate purpose including negligence actions); OKLA. R. EVID. 407 (specifically allowing subsequent repair evidence in strict liability cases); WYO. R. EVID. 407 (same); *Post-Accident Repairs*, *supra* note 15, at 491; LEMPERT & SALTZBURG, *supra* note 2, at 189 & n.21. *Contra*, MICH. R. EVID. 407 (Advisory Committee noting *Ault* with disapproval, stating Rule interpreted to exclude evidence of subsequent remedial measures in products liability cases); *Death Knell*, *supra* note 10, at 224.

[79] *See* Robbins v. Farmers Grain Terminal Ass'n, 552 F.2d 788, 792-93 (8th Cir. 1977); Ault v. International Harv. Co., 13 Cal. 3d at 120, 528 P.2d at 1152, 117 Cal. Rptr. at 816; *Products Liability*, *supra* note 10, at 847-48.

[80] *See* Lloyd, *supra* note 6, at 409-10; *Products Liability*, *supra* note 10, at 848-49. *Contra*, Rothstein, *supra* note 14, at 114.3. Manufacturers will not remedy mass-produced goods if a plaintiff can use the manufacturers' remedial activities as evidence against the manufacturers. *Id.*

[81] *See* WEINSTEIN'S EVIDENCE, *supra* note 2, ¶ 407 [02], at 407-10; Schwartz, *supra* note 2, at 6.

[82] *See* Note, *Punitive Damages in Mass Marketed Product Litigation*, 14 LOY. L.A. L. REV. 405, 408 (1981). In a strict liability and negligence action against Ford Motor Company

A further argument against excluding subsequent repair evidence under Rule 407 is that the rule is unlikely to achieve its ostensible objective because it is subject to so many exceptions.[83] Much evidence that otherwise would be barred by Rule 407 enters through one of its exceptions.[84] Rule 407 admits evidence of subsequent remedial measures to prove the feasibility of such measures, but only if the defendant controverts feasibility.[85] If plaintiff's counsel can maneuver a defendant's witness into suggesting that alternative designs were impractical, or that the defendant's place or product was as safe as possible, then a court would receive the subsequent repair evidence to impeach or show feasibility.[86] With Rule 407 subject to so many exceptions, plaintiffs often will find a justification for introducing evidence of subsequent repairs.[87] Indeed, some commentators have characterized the general rule excluding evidence of post-accident repair or change as one favoring admissibility except when offered solely to prove a defendant's negligence or culpable conduct.[88]

Despite the porous nature of Rule 407, forceful arguments for excluding evidence of subsequent repair in strict liability cases remain. Evidence of subsequent repair, though in some cases not probative of a product being unreasonably dangerous or unmerchantable, may become so in the eyes of juries incapable of limiting the evidence to its proper use.[89] As the dissenting opinion in *Ault* makes clear, changes in a product

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where Ford had 29 prior reports of a defective throttle, the fact that Ford issued no warnings to dealers or customers was sufficient to impose punitive damages. *See* Rinker v. Ford Motor Co., 567 S.W.2d 655, 667-68 (Mo. App. 1978). In a growing number of jurisdictions damage suits have coupled strict liability of manufacturers with the application of the doctrine of punitive damages. *See* Note, *Punitive Damage Awards in Strict Product Liability Litigation: The Doctrine, The Debate, The Defense*, 42 OHIO ST. L.J. 771, 771 (1981).

[83] *See* Oberst v. International Harv. Co., 640 F.2d 863, 870 (7th Cir. 1980) (exceptions to rule make exclusion uncertain). Courts admitting subsequent repair evidence in strict products liability cases generally rely upon an exception to the negligence exclusionary rule. *See, e.g.*, Mahoney v. Roper-Wright Mfg. Co., 490 F.2d 229, 232 (7th Cir. 1973) (post-accident design change evidence admissible on issue of available alternative design feasibility); Wallner v. Kitchens of Sara Lee, Inc., 419 F.2d 1029, 1032 (7th Cir. 1969) (post-accident changes admissible in either negligence or strict liability action to demonstrate duty to repair product); *Renovated Repair Rule*, *supra* note 3, at 156.

[84] *See* WEINSTEIN'S EVIDENCE, *supra* note 2, ¶ 407 [02], at 407-10; text accompanying notes 27-30 *supra*.

[85] *See* Werner v. Upjohn, 628 F.2d 848, 853 (4th Cir. 1980); FED. R. EVID. 407; Kennelly, *supra* note 2, at 78.

[86] *See* Daggett v. Atchison, T. & S.F. R.R., 8 Cal. 2d 655, 664, 313 P.2d 557, 563 (1957) (when defense witness induced to state that equipment in question safest available then court allowed in subsequent remedial activity evidence to impeach); WEINSTEIN'S EVIDENCE, *supra* note 2, ¶ 407 [02], at 407-11; Rossi, *The Ban on Evidence of Subsequent Remedial Measures: Why Does It Survive?*, 7 CORNELL L.F. 6, 7 (1981) [hereinafter cited as Rossi].

[87] *See Products Liability*, *supra* note 10, at 845.

[88] *See* Lloyd, *supra* note 6, at 402; *Renovated Repair Rule*, *supra* note 3, at 845.

[89] *See, e.g.*, Ortho Pharmaceutical Corp. v. Chapman, ____ Ind. App. ____, ____, 388 N.E.2d 541, 561 (1979) (jury influenced by hindsight evidence might apply artificially high standard of care); Ault v. International Harv. Co., 13 Cal. 3d 113, 126, 528 P.2d 1148,

frequently result from reasons unrelated to the remedial nature of the change.[90] Evidence of subsequent repair, however, potentially is prejudicial in nature when used against a manufacturer defendant.[91] One commentator has argued that the trier of fact cannot construe the evidence as an admission of the defendant's negligence because negligence is not an issue under a strict liability claim.[92] While this reasoning logically is faultless, jurors may inject the issue of fault or culpable conduct even when fault is not theoretically an issue.[93] Admission of subsequent repair evidence, therefore, runs the risk of jury misuse.[94]

A further problem of admitting subsequent repair evidence in strict liability actions arises whenever a plaintiff brings an action in both negligence and strict liability.[95] Admission of subsequent repair evidence

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1156, 117 Cal. Rptr. 812, 820 (1978) (Clark, J., dissenting) (juries may conclude change reflects admission of defect and give great weight to perceived admission); *Products Liability*, *supra* note 10, at 850-51.

[90] Ault v. International Harv. Co., 13 Cal. 3d at 125-26, 528 P.2d at 1156, 117 Cal. Rptr. at 820 (Clark, J., dissenting) (change in product frequently made for reasons including desires to decrease production costs or to increase efficiency or salability); Kennelly, *supra* note 2, at 78; text accompanying notes 19 & 20 *supra*.

[91] *See* Bauman v. Volkswagenwerk A.G., 621 F.2d 230, 233 (6th Cir. 1980) (evidence of subsequent remedial activity such as manufacturer's design change extremely damaging in jury case); 13 Cal. 3d at 126, 528 P.2d at 1156, 117 Cal. Rptr. at 820 (Clark J., dissenting) (in heat of product liability trials jury learning of subsequent change may give decisive weight to perceived admission of defect). The *Ault* dissent points out that in the first trial the jury could not reach a verdict, but the second trial, in which plaintiff's counsel constantly emphasized the defendant's remedial measure, resulted in a verdict for $700,000. 13 Cal. 3d at 128, 528 P.2d at 1157, 117 Cal Rptr. at 821 (Clark, J., dissenting).

[92] *See Renovated Repair Rule*, *supra* note 3, at 172-73.

[93] *See* Ortho Pharmaceutical Corp. v. Chapman, _____ Ind. App. _____, _____, 388 N.E.2d 541, 561 (1979); Rothstein, *supra* note 14, at 114; WEINSTEIN'S EVIDENCE, *supra* note 2, ¶ 407[03] at 407-14; *Products Liability*, *supra* note 10, at 850.

[94] *See* Kobayashi, *Products Liability Lawsuits: Admissibility Questions and Miscellaneous Evidentiary Developments—Part I*, 25 TRIAL LAW. GUIDE 297, 299 (1981) [hereinafter cited as Kobayashi]. Subsequent repair evidence, once admitted is highly persuasive, although not necessarily probative, and can be the basis for unduly prejudicial and erroneous inferences by the jury. *Id.* Two commentators writing together have changed their opinion regarding admissibility of subsequent repair evidence in strict liability actions, in a recent edition of the commentaries on the Federal Rules of Evidence. *Compare* S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 165 (2d ed. 1977) (advocating abandonment of exclusionary rule to allow admission of subsequent repair evidence in products liability actions) *with* S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 181-82 (3d ed. 1982) (Rule 407 and common law progenitor defensible as means to avoid jury confusion). The basis of the commentators' present opinion that Rule 407 and its common law progenitor make good sense is that a jury possibly is incapable of making proper use of subsequent repair evidence. *See* SALTZBURG & REDDEN, *supra* note 14, at 181-82.

[95] *See, e.g.*, Cann v. Ford Motor Co., 658 F.2d 54, 56 (2d Cir. 1981) (action on negligence, breach of warranty, and strict liability); Bauman v. Volkswagenwerk A.G., 621 F.2d 230, 231 (6th Cir. 1980) (action brought in negligence, strict liability and breach of implied warranty); Barry v. Manglass, 55 A.D.2d 1, 2, 389 N.Y.S.2d 870, 872 (1976) (action based upon

on a strict liability count in a suit combining strict liability and negligence claims might undermine the congressional mandate in Rule 407 to exclude such evidence as proof of negligence.[96] Additionally, many trial lawyers, commentators, and courts believe that proof offered on a strict liability theory is much the same as that offered on a negligence theory.[97] For example, the products liability area of defective design contains elements of both negligence and strict liability.[98] Admission of subsequent repair evidence in strict products liability actions that require proof similar to a showing of negligence potentially conflicts with the common law and Rule 407 requirement that such evidence not be admitted to show negligence or culpable conduct.[99]

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negligence and breach of warranty). The RESTATEMENT (SECOND) OF TORTS states that strict liability in tort is not to be an exclusive remedy for personal injury. *See* RESTATEMENT, *supra* note 16, § 402A, Comment a.

[96] *See* Werner v. Upjohn Co., 628 F.2d 848, 857-58 (4th Cir. 1980) (admission of subsequent repair evidence in case with both strict liability and negligence claims might override Rule 407).

[97] *See, e.g.*, Clark-Aiken Co. v. Cromwell-Wright Co., 367 Mass. 70, 83-84, 323 N.E.2d 876, 882-83 (1975) (discussing difficulty in determining whether standard of care should be strict liability or negligence in action for damage to property from collapsing wall); Micallef v. Miehle Co., 39 N.Y.2d 376, 386, 384 N.Y.S.2d 115, 121, 348 N.E.2d 571, 577 (1976) (articulating reasonable care standard that resembles simple negligence standard); Howes v. Deere & Co., 71 Wis. 2d 268, 274-75, 238 N.W.2d 76, 80 (1976) discussing difficulty in determining whether standard of care should be strict liability or negligence); Rothstein, *supra* note 14, at 114 (many trial lawyers believe proof for strict liability same as for negligence); *Subsequent Repair Doctrine*, *supra* note 10, at 496 (reasonable care in defective design standard much like simple negligence standard).

[98] *See, e.g.*, Smith v. Verson Allsteel Press Co., 74 Ill. App. 3d 818, 829, 393 N.E.2d 598, 606 (1979) (defect design area of products liability one in which concepts of negligence and fault remain pertinent); Rainbow v. Albert Elia Bldg. Co., 79 A.D.2d 287, 292-93, 436 N.Y.S.2d 480, 484 n.3 (1981) (firmer liability foundation than strict liability required for design defect cases); SALTZBURG & REDDEN, *supra* note 14, at 180 (proving defective design not much different from proving negligence). One court reviewing a design defect case ruled reversible error the admission of evidence of a manufacturer's subsequent repair, noting that the manufacturer's liability for a design defect is determined by the reasonable man test used in negligence actions. Bolm v. Triumph Corp., 71 A.D.2d 429, 435, 422 N.Y.S.2d 969, 973-74 (1979). The court reasoned that when the plaintiff's claim centered on defective design rather than a manufacturing defect evidence of subsequent remedial measures was inadmissible except as provided by the traditional exceptions to the rule excluding subsequent repair evidence. *Id.* at 437, 422 N.Y.S.2d at 974-75. *But see* Chart v. General Motors Corp., 80 Wis. 2d 91, 103-04, 258 N.W.2d 680, 684 (trial court did not err in admitting subsequent repair evidence in design defect cases). Another tort area in which courts are divided regarding whether a standard of strict liability or negligence applies is in claims arising from a defendant's inadequate warning of a dangerous condition. Werner v. Upjohn Co., 628 F.2d 848, 858 (distinction between strict liability and negligence lessens considerably in failure to warn cases). *Compare* Krueger v. Tappan Co., 104 Wis. 2d 199, 208, 311 N.W.2d 219, 224 (1981) (because duty to warn emphasizes manufacturer's conduct rule excluding subsequent repair evidence to prove culpable conduct renders manufacturer's revised product warnings inadmissible) *with* Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788, 793 (8th Cir. 1977) (upholding trial court admission of subsequent repair evidence in strict liability action involving defendant's failure to warn).

[99] *See* text accompanying notes 2-4 *supra*.

The genesis of the common law rule excluding evidence of subsequent repair occurred in negligence actions.[100] Rule 407 embodies the exclusionary rule which at common law was uniform.[101] The public policy and relevancy justifications for barring subsequent repair evidence lost much vitality with the relatively recent advent of strict liability theory,[102] the result of which is that within the context of strict liability actions some courts find the justifications unpersuasive while others continue to apply the traditional rule.[103] Although excluding subsequent repair evidence can no longer rest upon public policy and relevancy rationales,[104] prejudice or jury confusion becomes a consideration which in some circumstances revives the need to exclude subsequent repair evidence.[105]

One means with which to treat the problem of prejudice or jury confusion is the use of instructions issued to the jury by the presiding judge.[106] In the abstract, evidence may be admissible for one purpose and inadmissible for another.[107] Arguably, jury instructions allow for admission of such evidence but confine its use to prove only permissible inferences.[108] Courts and commentators have noted, however, that cautionary and limiting instructions provide only limited utility in aiding proper jury deliberations.[109] Instructions can serve to further confuse a jury,[110] or call the jury's attention to impermissible inferences.[111] Jury instructions, though in some instances useful and appropriate,[112] do not provide a comprehensive solution.

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[100] *See* Kobayashi, *supra* note 94, at 302; *Products Liability*, *supra* note 10, at 840.

[101] *See* Kobayashi, *supra* note 94, at 302; text accompanying note 2 *supra*.

[102] *See* PROSSER, *supra* note 8, § 75, at 494. Professor Prosser indicates that liability without fault has developed over the last hundred years. *See id.*; Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L. J. 1099, 1099-1114 (1960) (tracing development of strict liability theory). Another commentator traces liability without negligence back over the past several decades. *See Renovated Repair Rule*, *supra* note 3, at 149.

[103] *See* text accompanying notes 38-42 *supra*.

[104] *See* text accompanying notes 50-52 & 79-82 *supra*.

[105] *See* text accompanying note 120 *infra*.

[106] *See* Bauman v. Volkswagenwerk A.G., 621 F.2d 230, 233 (6th Cir. 1980) (ordering new trial for trial court's failure to issue limiting instructions about evidence of design change after accident).

[107] Werner v. Upjohn, 628 F.2d 848, 854 (4th Cir. 1980).

[108] *Id.*; *Products Liability*, *supra* note 10, at 850-51.

[109] *See* Werner v. Upjohn, 628 F.2d 848, 854 (4th Cir. 1980); Caprara v. Chrysler Corp., 52 N.Y.2d 114, 417 N.E.2d 545, 556, 436 N.Y.S.2d 251, 261-62 (1981); LEMPERT & SALTZBURG, *supra* note 2, at 141; Kobayashi, *supra* note 94, at 346.

[110] *See* Cann v. Ford Motor Co., 658 F.2d 54, 58-59 (2d Cir. 1981) (judgment reversed and remanded because of confusing special verdict questions on issues of negligence and strict liability). *But see* note 112 *infra*.

[111] *See* LEMPERT & SALTZBURG, *supra* note 2, at 141 (attorneys sometimes waive right to limiting instructions for fear will call jury's attention to impermissible inferences).

[112] *See* Jiminez v. Sears, Roebuck & Co., 4 Cal. 3d 379, 387, 482 P.2d 681, 686-87, 93 Cal. Rptr. 769, 775-76 (1971) (in many instances instructions on negligence helpful to jury and not confusing).

While the possibility of unfair prejudice from the use of subsequent repair evidence and the difficulties posed by mixed claims of negligence and strict liability are valid problems, the currently existing Federal Rules offer solutions. Rule 402 bars evidence that is irrelevant.[113] Rule 403 bars evidence when its unfair prejudice substantially outweighs its probative value.[114] In conjunction, Rules 402 and 403 can render Rule 407 superfluous by excluding subsequent repair evidence without ever reaching Rule 407.[115]

Using Rule 402, a court faced with the admissibility of subsequent repair evidence should ask whether the evidence is relevant under the substantive law.[116] If relevant, other evidence already admitted or admissible might be subject to less jury misuse.[117] Under Rule 403 the judge may exclude the evidence altogether if it is unfairly prejudicial.[118] The advantage of treating evidence of subsequent repair as governed by Rule 402 and 403 is the discretion the judge may exercise to treat each case and situation involving strict liability and subsequent repair evidence appropriately.[119]

With the discretion that Rules 402 and 403 permit, judges can be more responsive to the numerous factual postures in which evidence of subsequent repairs can arise. Thus, in strict liability actions that require proof akin to a negligence standard a judge can exclude subsequent repair evidence if either irrelevant or unfairly prejudicial without resorting to Rule 407.[120] When subsequent remedial activity, such as a recall

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[113] FED. R. EVID. 402.

[114] FED. R. EVID. 403.

[115] Rothstein, *supra* note 14, at 114.3.

[116] *Id.*

[117] *Id.* Before admitting evidence of subsequent repair a judge should be satisfied that the plaintiff cannot establish conveniently the fact to be inferred by other less prejudicial proof. *See* MCCORMICK, *supra* note 6, at 668; SALTZBURG & REDDEN, *supra* note 14, at 101. When considering admission of subsequent repair evidence a judge should balance the prejudicial effect of the evidence against the plaintiff's ability to prove a case without such evidence. *See* Caprara v. Chrysler Corp., 52 N.Y.2d 114, 133, 417 N.E.2d 545, 557, 436 N.Y.S.2d 251 (1981) (Jasen, Jones, and Meyer, J.J., dissenting); *Death Knell, supra* note 10, at 227-28.

[118] *See* Cann v. Ford Motor Co., 658 F.2d 54, 59 (2d Cir. 1981) (Rule 403 requires court to consider whether danger of unfair prejudice and confusion of subsequent remedial activity evidence outweighs probative value); Lindsay v. Ortho Pharmaceutical Corp., 637 F.2d 87, 94 (2d Cir. 1980) (same); Kobayashi, *supra* note 94, at 344 (defendant can use admission of subsequent repair evidence for persuasive arguments of variety of inferences, many of which improper in context of products liability); *State Variations, supra* note 10, at 341 (balancing test of Rule 403 justifies exclusion of prejudicial subsequent remedial measure evidence).

[119] *See* Knight v. Otis Elevator Co., 596 F.2d 84, 92 (3d Cir. 1975) (no abuse of discretion under Rule 403 in excluding evidence of subsequent repairs); Barry v. Manglass, 55 A.D.2d 1, 10, 389 N.Y.S.2d 870, 876 (1976) (relevance of recall letters outweighs any prejudice in letters' receipt); Haysom v. Coleman Lantern Co., 89 Wash. 2d 474, 483, 573 P.2d 785, 791 (1978) (fundamental problems in weighing relevance of subsequent change against potential prejudice in given factual setting).

[120] *See* text accompanying notes 95-99 *supra.*

campaign, occurs as a result of a statutory requirement[121] or agency directive[122] a judge can determine that evidence of the remedial activity has minimum probative value because the activity was compelled.[123] When a plaintiff's action includes both strict liability and negligence claims, a judge can offer a limiting instruction to the jury, if appropriate,[124] or exclude the repair evidence completely.[125]

A possible criticism of using a Rule 402 and 403 approach in place of Rule 407 will be that it will not exclude the same amount of material as an expanded Rule 407. Judges tend to decide doubtful questions of relevance and unfair prejudice on the side of admissibility.[126] However, increased admissibility of subsequent repair evidence in strict liability claims is consistent with the general policy of allowing convenient recovery for an injured consumer underlying the theory of strict liability.[127] The reluctance of some courts to admit evidence of subsequent repairs in a strict liability context may reflect a desire to limit convenient recovery, rather than the more often expressed rationale of encouraging safety

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[121] *See* 15 U.S.C. § 1411 (1976) (requiring notification of buyers by auto manufacturer of finding of defect).

[122] *See id.* § 1412 (authorizing Secretary of Transportation to order auto manufacturers to furnish notification of a defect or to remedy a defect).

[123] *See* Cepeda v. Cumberland Eng'r Co., 76 N.J. 152, _____, 386 A.2d 816, 836 (1978) (exclusionary rule should apply to products actions when measures required by official order); Kobayashi, *supra* note 94, at 349 (involuntariness of automobile recall letters required by statute may affect admissibility).

[124] *See* Bauman v. Volkswagenwerk A.G., 621 F.2d 230, 233 (6th Cir. 1980) (new trial ordered for failure of judge to offer limiting instruction); text accompanying notes 106-112 *supra.*

[125] *See* text accompanying notes 95-96 *supra.* Alternatively, if a court admits subsequent repair evidence the court can allow the defendant to explain the rationale for the repair. Smith v. Verson Allsteel Press Co., 74 Ill. App. 818, 829, 393 N.E.2d 598, 606 (1979) (evidence of reason for subsequent change improperly excluded when relevant to rebut possible admission of liability).

[126] *See* SALTZBURG & REDDEN, *supra* note 14, at 96 & 101 (under Rule 401 judges appear to decide doubtful questions of relevance on side of admissibility; under Rule 403 if probative value of evidence balances closely with its prejudicial effect judge should admit).

[127] *See* note 8 *supra.* Strict liability has made recovery easier by eliminating the need to prove negligence. *Id.* Under a strict liability theory a plaintiff may recover for damages caused by a defective or dangerous product even though he was not in privity with the defendant producer and has not established the defendant's departure from a reasonable standard of care. *See* Greenman v. Yuba Power Prods., 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1962) (manufacturer strictly liable when article he places on market knowing inspection for defect will not precede use proves to have injury causing defect); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 413, 161 A.2d 69, 100 (1969) (lack of privity does not prevent injury suit against defendant); RESTATEMENT, *supra* note 16, § 402A(2)(a) & (b). One commentator has argued that admissibility of subsequent repair evidence in products liability cases has the overall effect of expanding liability. *See* Anderson, *Subsequent Remedial Conduct: A No Win Situation?* 23 For Def. 14, 20 (August, 1981) (abandoning subsequent remedial conduct rule in products liability cases is a policy determination resulting in expanded recovery in products cases).

precautions.[128] In an action designed to tip the recovery balance in favor of the plaintiff, courts' exclusion of subsequent repair evidence through Rule 407 acts as an unwarranted counterweight.[129] To be sure, the doctrine of strict liability does not make manufacturers or sellers absolute insurers for all physical harm which occurs during use of the product,[130] nor should strict liability imply absolute liability.[131] With Rules 402 and 403 in place to protect against irrelevant and prejudicial subsequent repair evidence, Rule 407 becomes unnecessary in a strict liability setting.[132] In keeping with the policy underlying strict liability the plaintiff should be free to introduce all relevant, non-prejudicial evidence in a strict liability suit without having to overcome the hurdle of Rule 407.

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[128] *See* Rossi, *supra* note 86, at 9; *cf.* Kozlowski v. John E. Smith's Sons Co., 87 Wis. 2d 882, 902, 275 N.W.2d 915, 924 (1979) (recommending that legislature review problem of open ended product liability).

[129] *See Exclusion of Evidence*, *supra* note 24, at 813.

[130] *See* Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841, 863 (5th Cir. 1967) (manufacturers not absolute insurers for all physical harm which occurs during use of product); Simien v. S.S. Kresge Co., 566 F.2d 551, 559 (5th Cir. 1978) (doctrine of strict liability not intended to make sellers absolute insurers for all physical harm from use of product).

[131] *See* Howes v. Deere & Co., 71 Wis. 2d 268, 273, 238 N.W.2d 76, 80 (1976) (strict liability does not impose absolute liability); Rothstein, *supra* note 14, at 114 (same).

[132] *See* WEINSTEIN'S EVIDENCE, *supra* note 2, ¶ 407 [02], at 407-11 & 12 (preferable to abolish Rule 407 and treat subsequent repair evidence under general principles of relevancy, relying on Rule 403 for guidance).