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Product Liability and Admissibility of Subsequent Remedial Measures: Resolving the Conflict by Recognizing the Difference between Negligence and Strict Tort Liability

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I. INTRODUCTION

Most jurisdictions have long recognized the rule that evidence of subsequent repairs which have been made or precautions which have been taken after an accident or the infliction of an injury is not admis-

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sible to prove antecedent fault.[1] This evidentiary rule originated at a time when negligence was the basis for most personal injury and property damage litigation. The rule remains eminently sensible in that context. While fault based tort actions held center stage in the first three-quarters of this century, the rule did not seem to be of great concern to the Bar. Perhaps this was because a proponent of fault could not introduce evidence of subsequent remedial measures in his case-in-chief and, even though there were certain exceptions to the rule, the evidence still could not be introduced until the opponent controverted some matter other than fault. The latter made the evidence admissible by virtue of its relevance to the other nonfault matters, but it was still inadmissible as proof of antecedent fault.[2] With the advent of "product liability" theories, however, there has been considerable controversy[3] and a serious split in authority[4] as to the applicability of the rule in this relatively new area of litigation. Although there has

1. *See* C. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 275 (1972); J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 407 (1982); J. WIGMORE, EVIDENCE § 283 (1979).
2. The opponent is entitled to an instruction upon request limiting the use of the evidence to the issue upon which it is admitted. *See, e.g.*, Werner v. Upjohn Co., 628 F.2d 848, 854 (4th Cir. 1980); Trent v. Atlantic City Electric Co., 334 F.2d 847, 861 n.9 (3d Cir. 1964); Powers v. J.B. Michael & Co., 329 F.2d 674, 677 (6th Cir. 1964).
3. For works arguing for the exclusion of evidence of subsequent remedial measures in product liability cases, see Anderson, *Subsequent Remedial Conduct and Strict Liability in Tort*, 56 WIS. B. BULL. 20 (1983); Costello & Weinberger, *The Subsequent Repair Doctrine and Products Liability*, 51 N.Y. ST. B.J. 463 (1979); Kobayashi, *Products Liability—Part I: Admissibility Questions and Miscellaneous Evidentiary Developments*, 1981 TRIAL LAW. GUIDE 297, 344-47; Comment, *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 (1975); Note, *Evidence—California Supreme Court Holds Evidence of Subsequent Design Change Admissible to Prove Design Defect—Ault v. International Harvester Co.*, 1975 U. ILL. L.F. 208. For those arguing for admissibility, see R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 186 (1977); Davis, *Evidence of Post-Accident Failures, Modifications and Design Changes in Product Liability Litigation*, 6 ST. MARY'S L.J. 792 (1975); Lloyd, *Admissibility of Post Accident Repairs: The Graying of a Black-Letter Rule*, 25 DRAKE L. REV. 400 (1975); Comment, *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 (1979); Comment, *Exclusion of Evidence of Subsequent Repairs in Drug Products Liability Actions—An Unnecessary Resurrection of an Obsolete Rule*, 31 MERCER L. REV. 801 (1980); Comment, *Evidence of Subsequent Repairs: Yesterday, Today and Tomorrow*, 9 U.C.D. L. REV. 421 (1975); Note, *Post-Accident Design Modification and Strict Products Liability in New York*, 45 ALB. L. REV. 386 (1981); Note, *Products Liability and Evidence of Subsequent Repairs*, 1972 DUKE L.J. 837; Note, *Post-Accident Repairs and Offers of Compromise: Shaping Exclusionary Rules to Public Policy* 10 LOY. U. CHI. L.J. 487 (1979); Note, *Chart v. General Motors Corp.: Did It Chart the Way for Admission of Evidence of Subsequent Remedial Measures in Products Liability Actions?*, 41 OHIO ST. L.J. 211 (1980); Note, *The Admissibility of Subsequent Remedial Meas-*

been a great deal of judicial and scholarly[5] discussion regarding the Rule's applicability in product liability cases, the courts do not seem to have focused very clearly on the issue that lends itself to a ready resolution of the problem. In fact, a number of courts seem bent on forcing a square peg into a round hole.

This Article advances the thesis that the rule has continued vitality in negligence cases, but that it should not be applied to exclude evidence of subsequent remedial measures in true strict tort liability cases involving products.[6] If this is a sound thesis, much of the confusion in the cases disappears, or at least can be explained, once the substantive law regarding modern product liability litigation is properly understood.

Some so-called product liability cases involve true strict tort liability while others continue to employ a negligence standard. The law has been in a constant state of evolution for a number of decades now. In some cases, it has become no mean feat to discern whether the court is applying strict tort liability theories rather than negligence theories. During this period there have been a number of different formulations of the test for determining liability.[7] Moreover, there are changes yet to come in many jurisdictions because of the fitful na-

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ures in Strict Liability Actions: Some Suggestions Regarding Federal Rule of Evidence 407, 39 WASH. & LEE L. REV. 1415 (1982).

4. Eleven states and two United States Courts of Appeals, either by court decision, statute or rule, have taken the position that evidence of subsequent remedial measures is admissible in a products liability case. Five states and seven United States Courts of Appeals have taken the opposite position. These cases, statutes and rules will be reviewed later in this article. *See infra* pp. 16-20.

5. In addition to the works listed previously, *supra* note 3, see L. FRUMER & M. FREIDMAN, PRODUCTS LIABILITY § 12.04 (1978); D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 164 (1978); C. MCCORMICK, *supra* note 1, at § 275 (2d ed. Supp. 1978); S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 177-87 (3d ed. 1982); J. WEINSTEIN & M. BERGER, *supra* note 1, at ¶ 407[03]; C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE & PROCEDURE § 5285 (1980); Clark, *Post-Accident Design Changes: The Emasculation of Caprara*, 14 TRIAL LAW. Q. 37 (1982); Schmertz, *Impact of Federal Rules of Evidence on the Trial of a Products Case*, 13 TRIAL LAW. Q. 8 (1980); Schwartz, *The Exclusionary Rule on Subsequent Repairs—A Rule in Need of Repair*, 7 FORUM 1 (1971); Twerski, *Post-Accident Design Modification Evidence in Manufacturing Defect Setting: Strict Liability and Beyond*, 4 J. PROD. LIAB. 143 (1981); Weinberger, *Caprara Over the Rainbow—New York Grapples with Post-Accident Design Changes in Products Liability Actions*, 46 ALB. L. REV. 132 (1981); Comment, *Federal Rule of Evidence 407 and Its State Variations: The Courts Perform Some "Subsequent Remedial Measures" of Their Own in Products Liability Cases*, 49 UMKC L. REV. 338 (1981); Note, *Admissibility of Post-Accident Design Change in Products Liability Actions*, 5 AM. J. TRIAL ADVOC. 369 (1981).

6. This approach was recognized, without elaboration, as a possible way of resolving the conflict in G. JOSEPH, EMERGING PROBLEMS UNDER THE FEDERAL RULES OF EVIDENCE, 1983 A.B.A. SEC. ON LITIGA. 74, 75 (1983).

7. *See* W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 95 (5th ed. 1984).

ture of the common law process. Thus, it is important for the courts to be able to recognize product liability cases involving theories of strict liability in order to properly apply the rule with regard to subsequent remedial measures. This Article will examine the decisions of the state courts as well as those of the United States Courts of Appeals, with particular attention paid to the decisions of the Eighth Circuit, currently viewed as a renegade by most of the other circuits. The situation in Nebraska also requires comment because the state has attempted to amend its rule regarding the admissibility of evidence of subsequent remedial measures in product liability cases, but the attempt appears to have added little to the rule that would not, in any event, be confirmed under the thesis advanced in this Article. At the very least, it is arguable that the Nebraska version of the rule in question does not have the effect ascribed to it by some.[8]

II. SUBSEQUENT REMEDIAL MEASURES AND PRODUCT LIABILITY THEORY

A. Policies Underlying Federal Rule 407 and Similar State Rules

The rule adopted by Congress in 1975 dealing with admissibility of subsequent remedial measures is familiar:

> 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.[9]

This rule has been adopted *verbatim* by about a dozen states and in substance by a number of others.[10] It clearly states the majority rule in the United States.[11] The Advisory Committee's Note to the Federal Rules of Evidence provides a concise explanation of the policy considerations underlying the rule:

> The rule incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault. The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. Or, as Baron Bramwell put it, the rule rejects the notion

8. The Nebraska statute, NEB. REV. STAT. § 27-407 (1979), amending the rule with regard to subsequent remedial measures, has been said to exclude such evidence in product liability cases. *See, e.g.*, J. WEINSTEIN & M. BERGER, *supra* note 1, at 407-15; Twerski, *Rebuilding the Citadel—The Legislative Assault on the Common Law*, 15 TRIAL 55, 58 (1979). It is submitted that this interpretation is too broad and that the amendment only excludes such evidence in product liability cases based on negligence theories. *See infra* notes 88-94 and accompanying text.

9. FED. R. EVID. 407.

10. J. WEINSTEIN & M. BERGER, *supra* note 1, at ¶ 407[08].

11. *See supra* note 1.

> that "because the world gets wiser as it gets older, therefore it was foolish before." *Hart v. Lancashire & Yorkshire Ry. Co.*, 21 L.T.R. N.S. 261, 263 (1869). Under a liberal theory of relevancy this ground alone would not support exclusion as the inference is still a possible one. (2) The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety. The courts have applied this principle to exclude evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees, and the language of the present rule is broad enough to encompass all of them. *See* Falknor, *Extrinsic Policies Affecting Admissibility, 10* RUTGERS L. REV. 574, 590 (1956).[12]

The rule and the accompanying note, at least with a literal reading, attempts to state that evidence of subsequent remedial measures is not admissible to prove "negligence or culpable conduct."[13] Despite the attempt to clarify this point, considerable controversy has arisen over whether the rule applies in product liability cases in general, even though "product liability" involves a field of law in which two different bases of liability are employed—one involving fault and one devoid of fault.[14]

The line of authority illustrates this controversy. Cases admitting such evidence in situations involving products sidestep the rule on the theory that the policy reasons do not apply to this field of law. The most common reasons being that the evidence is more probative than in a negligence case[15] and manufacturers will not be discouraged from recalling products, making design changes, and so on.[16] On the other

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12. WEST'S FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES 32-33 (1979).
13. The issue of whether "culpable conduct" also includes intentional wrongdoing has surfaced in several contexts. *See* C. WRIGHT & K. GRAHAM, *supra* note 5, at 124.
14. *See* W. PROSSER & W. KEETON, *supra* note 7, § 95, at 678-79.
15. *See, e.g.*, Sutkowski v. Universal Marion Corp., 5 Ill. App. 3d 313, 319, 281 N.E.2d 749, 753 (1972); Caprara v. Chrysler Corp., 52 N.Y.2d 114, 123-27, 417 N.E.2d 545, 549-51, 436 N.Y.S.2d 251, 255-57 (1981).
16. *See, e.g.*, Ault v. International Harvester Co., 13 Cal. 2d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1975). *Ault* is often cited as the leading case on admissibility, utilizing the following quote in the process:

> When the context is tranformed from a typical negligence setting to the modern products liability field, however, the "public policy" assumptions justifying this evidentiary rule are no longer valid. The contemporary corporate mass producer of goods, the normal products liability defendant, manufactures tens of thousands of units of goods; it is manifestly unrealistic to suggest that such a producer will forego making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse effect upon its public image, simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the improvement. In the products liability area, the exclusionary rule of section 1151 does not affect the primary conduct of the mass producer of goods, but serves merely as a shield against potential liability. In short, the purpose of section 1151 is not applicable to a strict liability case and

hand, the position of the cases holding that the evidence is not admissible involves several arguments. The major argument is that manufacturers, will actually be deterred from taking corrective action with regard to defective products and, therefore, the basis for the rule is equally applicable to product cases.[17] It is also argued that the evidence is no more probative in product cases;[18] that it is largely irrelevant and will confuse the jury;[19] that admitting such evidence might completely erode the rule in negligence actions;[20] and that in many product cases there are allegations of negligent conduct as well as allegations concerning strict liability.[21] The validity of these arguments, pro and con, would seem to turn on the standards of liability employed in product cases and, in the final analysis, on the different social policies underlying those standards. Thus, a brief review of product liability theories and their underlying social policies is in order.

B. Product Liability Theories and Underlying Policies

Product liability is a field of law which has come to encompass theories of strict liability as well as those of fault. The evolutionary process was fascinating as the courts engaged in a ritual of embracing contract notions and, in turn, tort notions to achieve the desired results in deciding cases in this volatile field.[22] This evolutionary pro-

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hence its exclusionary rule should not be gratuitously extended to that field.

Id. at 120, 528 P.2d at 1151-52, 117 Cal. Rptr. at 815-16.

17. *See* Werner v. Upjohn Co., 628 F.2d 848, 856-58 (4th Cir. 1980).
18. *See* Grenada Steel Indus. v. Alabama Oxygen Co., 695 F.2d 883, 887-88 (5th Cir. 1983).
19. *See id.* at 888.
20. Werner v. Upjohn Co., 628 F.2d 848, 857-58 (4th Cir. 1980).
21. Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981).
22. Grant Gilmore, in his usual engaging style, described this phenomenon in 1968:

> "Products Liability" is a term that has come into use only in recent years. Lawyers used to talk, more cumbersomely, of liability for breach of warranty, without bothering to make clear whether they were talking about liability in contract or liability in tort. Warranty law indeed has always had one foot in contract and the other foot in tort and this ambiguous straddle over the great legal divide has done a great deal to keep the legal discussion open-ended. Whenever a particular state of doctrine on one side or the other of the divide has seemed to present a roadblock to further progress, it has been possible to get around the obstacle by pointing out that the action is really in tort (if the roadblock is on the contract side) or really in contract (if the roadblock is on the tort side). In days when the courts took the concept of "negligence" more seriously than they do now, the escape from carrying the burden of proof on that issue was to emphasize the absolute promissory nature of contract warranties; in the course of that demonstration there developed the vast and intricate structure of the law of implied warranties. In this century the roadblocks have been located mostly on the contract side—the defenses of privity of contract, of disclaimer, of the plaintiff's failure to give timely notice of the defect—so that we have become accustomed to

cess has resulted in most jurisdictions recognizing two basic liability theories for product cases: (1) negligence and (2) strict liability. The former is illustrated by the common law negligence theory that was the basis of the cause of action in the celebrated case of *MacPherson v. Buick Motor Co.*,[23] while the latter has involved various formulations of warranty concepts, express and implied,[24] as well as strict tort liability.[25] The warranty theories, however, are giving way in many jurisdictions to the argument that they should be limited to loss of bargain situations involving pure economic loss and that tort law is the proper province of strict liability for physical harm to persons and tangible things.[26]

The development of strict tort liability for certain product cases is said to be based on essentially three policy arguments: (1) the costs to the victims of accidents attributable to defectively dangerous products can and should be distributed through the market mechanism by first charging those costs to sellers and manufacturers of the product who in turn will pass those costs on to purchasers;[27] (2) the imposition of strict liability will serve the cause of accident prevention by inducing improvements in products and in the information provided about those products;[28] and (3) the burden of proving fault or negligence, which is often present in defective product situations, is too difficult and expensive where the manufacturing process is not open to public view and, in many cases, not readily understandable without expert testimony.[29] These policy arguments led the American Law Institute to adopt Section 402A of the *Second Restatement of Torts*.[30] Thus, in general, modern product liability litigation involving physical harm to

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thinking of tort as providing the escape route. But if the going were to become rough in tort—if, for example, by judicial reversal or statutory reform, a meaningful concept of fault as a condition of recovery in the tort action were reintroduced—we would no doubt revert almost instinctively to emphasizing the contract nature of the action.

Gilmore, *Products Liability: A Commentary*, 38 U. CHI. L. REV. 103, 109-10 (1970).

23. 217 N.Y. 382, 111 N.E. 1050 (1916).
24. W. PROSSER & W. KEETON, *supra* note 7, § 97, at 690-92.
25. *Id.* at § 98.
26. *See, e.g.*, National Crane Corp. v. Ohio Steel Tube Co., 213 Neb. 782, 332 N.W.2d 39 (1983).
27. Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962).
28. Phillips v. Kimwood Mach. Co., 269 Or. 485, 503-04, 525 P.2d 955, 962-63 (1976).
29. Phipps v. General Motors Corp. 278 Md. 337, 352-53, 363 A.2d 955, 963 (1976).
30. The section is presented in full below:

    § 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer:

    (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

persons and tangible things really involves the two tort theories of negligence and strict liability. It would seem simple enough to be able to distinguish between those two theories in product cases, but the legal world has not been so blessed.

The reason for the confusion in discerning whether a particular product liability theory involves a standard of negligence or one of strict liability stems from the difficulty that courts have experienced in establishing a standard for determining when a product is defective in the sense of being unreasonably dangerous.[31] It is said that there are three types of defects which can make a product unreasonably dangerous.[32] One of the three always involves a standard of strict liability. Another, under orthodox case law, always involves a standard of negligence. The third can involve either strict liability or negligence, depending on the point in time when some or all of the elements of the standard are measured.

The first and easiest type of defect to recognize is commonly called a manufacturing defect. This involves an abnormality or condition that was unintended, such as a flaw, and can be readily identified in most cases by comparing the allegedly defective product with other products in the same line and, in most instances, from the same manufacturer.[33] If there is an abnormality or flaw and if this condition causes physical harm, the product is unreasonably dangerous. Even though the defect may have occurred because of negligence, care in manufacturing and marketing is irrelevant and not part of the inquiry. The manufacturer is subject to liability without regard to the care or the diligence employed to prevent defects. Thus, the standard for manufacturing defects is clearly one of strict liability.

The second type of defect deals with information about a product—warnings, instructions, and similar communications. Although it is possible to hold a manufacturer or seller liable for inadequate infor-

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(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS, § 402A (1965).

31. *See* Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559 (1969); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973).

32. *See* W. PROSSER & W. KEETON, *supra* note 7, § 99, at 694-702.

33. *See, e.g.*, Kohler v. Ford Motor Co., 187 Neb. 428, 191 N.W.2d 601 (1971) (involving a flawed sector gear in the steering apparatus of an automobile).

mation without regard to fault,[34] the orthodox view seems to require a showing of fault.[35] The latter view seems sensible because the former permits the unnecessary pyramiding of liability counts. Proof of a manufacturing defect is sufficient to sustain liability. To entertain an additional count, charging that the manufacturer should be strictly liable for failing to warn about the unknowable defect, is unnecessary. Allowing the additional count to be brought would, in effect, permit the claimant to double-up on the same defect, a classic case of beating a dead horse. This is also true in the context of the third type of defect which is next discussed.[36]

The most troublesome, and controversial, area encountered by the courts in defining what is meant by a defective product involves design defects.[37] A design defect, unlike a manufacturing defect, is not self-proving because there is no abnormality. The particular product is just like every other product in the line. The product is manufactured exactly as it was intended. However, the product line may prove to be unreasonably dangerous because of the design. Essentially two different, but somewhat related, tests have been employed to evaluate whether a product design is unreasonably dangerous.[38] The first test, referred to as the "consumer expectation" test, is based on comment (i) of section 402A of the *Restatement (Second) of Torts*. The comment states that the product must be dangerous to an extent beyond that

34. *See, e.g.*, Beshada v. Johns-Manville Prod. Corp., 90 N.J. 191, 209, 447 A.2d 539, 549 (1982).

35. W. PROSSER & W. KEETON, *supra* note 7, § 99, at 697.

36. It appears that all cases which hold that strict tort liability exists for failure to warn involve design type defects. *See, e.g.*, Jackson v. Coast Paint & Lacquer Co., 499 F.2d 809 (9th Cir. 1974) (labels must adequately warn of paint's flammability); Beshada v. Johns-Manville Prod. Corp., 90 N.J. 191, 447 A.2d 539 (1982) (use of asbestos requires warning); Freud v. Cellofilm Properties, Inc., 87 N.J. 229, 432 A.2d 925 (1981) (spilled chemical highly flammable if allowed to dry into dust); Phillips v. Kimwood Mach. Co., 269 Or. 485, 525 P.2d 1033 (1974) (sanding machine defective in absence of warning); Little v. PPG Indus., Inc., 19 Wash. App. 812, 579 P.2d 940 (1978) (chemical fumes deadly in poorly ventilated area), *modified*, 92 Wash. 2d 118, 594 P.2d 911 (1979). Once the test for strict tort liability for design defects is understood, strict liability for failure to warn and similar informational deficiencies concerning unknowable design hazards would seem to be unnecessary. However, there does seem to be justification for strict liability for informational deficiencies concerning known product hazards. For example, where a manufacturer's instructions or warning are erroneous or omitted completely, in the sense of not communicating what was intended to be communicated, a plaintiff should not have to prove that the error or omission occurred as the result of negligence. This is nothing more than a manufacturing defect and ought to be so treated.

37. For an excellent catalog of the many articles discussing the appropriate test for design defects, see Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521, 521 n.1 (1982).

38. W. PROSSER & W. KEETON, *supra* note 7, at 698-700.

which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. The second test is referred to as the "risk-utility" test and contemplates that a product is defective as designed if, but only if, the magnitude of the danger outweighs the utility of the product.[39]

The "consumer expectation" test has been criticized as being inadequate for design defect cases.[40] As a result, some courts have adopted the "risk-utility" test, either exclusively[41] or in conjunction with the "consumer expectation" test,[42] for this type of defect. In any event, both tests can embody strict liability because the manufacturer/designer may be held liable in situations where due, or even utmost, care would not have prevented the design hazard. However, there is still considerable ambiguity, if not confusion, in the area of design defects as the courts come to grips with the problem of the appropriate standard or standards to be applied. In some instances it is not clear whether a negligence or a strict tort liability standard is being employed even though a court may say that it is utilizing the latter.[43] However, as the following will hopefully illustrate, this occurs under both of the two tests mentioned.

One of the criticisms of the "consumer expectation" test is that the meaning is ambiguous and that it is very difficult to apply to discrete problems.[44] More specifically, the ambiguity stems from the inability of a jury to ascertain what an ordinary consumer would expect about a product. In a sense, as it has been pointed out, that the ordinary consumer cannot reasonably expect that anything more than reasonable care in the exercise of the skill and knowledge available to the designers has been utilized.[45] Implicit in this formulation is the notion that the manufacturer/designer did all that was reasonable *at the time of manufacture/design*. If this is the actual standard that the jury applies in the deliberations under a charge employing the "consumer expectation" test, it would seem to be nothing more than the familiar negligence standard.

It is even more clear that the "risk-utility" test is merely one of negligence when that test is applied to the date of manufacture/design

39. *See* Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 37-38 (1973); Wade, *supra* note 31, at 837.
40. *See* W. PROSSER & W. KEETON, *supra* note 7, § 99, at 698-99.
41. *See, e.g.*, Turner v. General Motors Corp., 584 S.W.2d 844, 849-51 (Tex. 1979).
42. *See, e.g.*, Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 422-34, 573 P.2d 443, 450-57, 143 Cal. Rptr. 225, 231-39 (1978).
43. *See generally*, Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593 (1980).
44. W. PROSSER & W. KEETON, *supra* note 7, § 99, at 699.
45. Schwartz, *Foreword: Understanding Products Liability*, 67 CALIF. L. REV. 435, 479 (1979).

as compared to a later date such as the date of sale, accident, or trial. To inquire whether the risks associated with a product line outweigh its utility and benefits, and then to limit the jury's consideration to that information known about the product at the date of manufacture/design, including forseeable dangers, is to ask whether an ordinarily prudent manufacturer/designer would have produced and sold the product as it was produced and sold. Negligence by any other name is still negligence.

So what does all this have to do with the admissibility of subsequent remedial measures in product liability litigation? Quite simply it means that courts could exclude such evidence if the product liability case is brought on a theory of negligence and admit it when the theory is one of strict liability.[46] If this is defensible, it underscores the importance of being able to identify the theory as being one of negligence or as being one of strict liability. It also highlights the problem of ambiguity in the "consumer expectation" test embodied in comment (i) and argues for abandonment of that test in favor of the "risk-utility" test or, at the very least, further judicial interpretation in an effort to give more explicit content to what it is that jurors should consider in applying the "consumer expectation" test. It is submitted that the latter endeavor will eventually result in a risk-utility approach which will either be a negligence standard or a strict liability standard, depending on the point in time at which the test is applied. When ascertaining danger, risk appreciation is inherent in the endeavor. When ascertaining unreasonableness, utility has to be balanced against risk. Short of imposing an insurer's liability on a manufacturer/designer, there is no avoiding an appraisal of risks and benefits. Of course, courts could also continue either to admit or exclude evidence of subsequent remedial measures in product liability litigation in general. Thus, the real question is posed—is there something unique about product liability cases that calls for a particular application of the rule regarding subsequent remedial measures, or should the application turn on whether a test of negligence or strict liability is being utilized, regardless of whether the case involves so-called products liability?

C. Subsequent Remedial Measures and Tort Theories—Recognizing the Difference

The development of the negligence concept and its role in tort law has been adequately covered elsewhere.[47] It suffices to say that it was

46. This, of course, is the solution proposed in this article. *See infra* Subsection C of text.

47. *See* Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 LA. L. REV. 1 (1970). *See generally* G. WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY (1980).

a reflection, and result, of social values that emerged with the industrialization of England and America. Increased activity, particularly on the highways and in industry, brought about new benefits as well as new risks of injury. The emerging society could not tolerate rules of liability so simplistic as not to take into account benefits that were the goal of the new activities and weigh them against the risks involved. Thus, the negligence concept evolved to meet the need for a more sophisticated rule to govern when losses from personal injuries and property damage should or should not be shifted from a particular victim to a particular actor. Losses were to be transferred, in the main, only when the actor was at fault and the victim was free from fault. The scheme was designed to maximize beneficial activities while minimizing the risks involved. While compensation and deterrence were serious policy goals, risk control seemed to be the paramount consideration. If the risk could not be controlled through reasonable efforts, losses were not to be shifted to the risk creator. This certainly served as a brake on compensating victims.

Contrast that system with the one that evolved for products some decades later. In choosing strict liability for products, the courts have opted for a system under which compensation for victims is broadened when compared to the negligence system. Although risk control is important, risk distribution is paramount.[48] Even where risks cannot be controlled with reasonable efforts, losses will be shifted initially to the risk creator. Courts clearly intend for more product accident victims to be compensated by manufacturer/designers and this, in turn, leads to the basic reason why evidence of subsequent remedial measures should be admitted in true strict liability cases.

In a true strict liability scheme, unlike a negligence scheme, it is irrelevant whether the manufacturer/designer knew or should have known in the exercise of ordinary care at the time of manufacture/design that there were certain dangers or risks associated with the product. In negligence, the question is central to the liability issue. Admitting evidence of subsequent remedial measures in a negligence case runs counter to the basic notion of liability—the foreseeability of risk or harm. The possibility of hindsight eroding the basic premise of liability is very real indeed.

In a strict liability situation, however, the problem does not seem as serious for two reasons. First, hindsight is already part of the strict liability test. The dangers or risks that are actually known to have caused the injury are weighed against other factors in determining whether the design is now *unreasonably* dangerous. This is the one common denominator that has been recognized by all courts that have

48. *See* Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

adopted true strict liability.[49] Thus, introduction of subsequent remedial measures, to the extent that such evidence is probative on the "danger or risk" factor, is not subject to abuse as it is in a negligence case. Second, the plaintiff must also adduce evidence as part of the case-in-chief that the product could have been designed or marketed differently by an ordinarily prudent manufacturer who was aware of the actual risks or dangers.[50] This involves the feasibility factor—the manufacturer/designer's "ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility."[51] Evidence of subsequent remedial measures may be crucial to the plaintiff's ability to discharge the burden of proof on this issue. In short, strict liability calls for an examination of all the available and relevant information concerning the product in order to determine if it is unreasonably dangerous. This examination requires the trier of fact to focus on information and knowledge that is developed subsequent to the date of manufacture/design. The strongest case for admissibility exists under the product rule which permits the trier of fact to weigh all relevant information as of the time of trial; but, the same result should occur when the product rule utilizing the date of sale or accident is employed as a cut-off point. An example may help illustrate the point.

Assume that a manufacturer develops a new drug that is very useful in arresting the progress of a particularly serious disease. The manufacturer places the drug on the market after years of testing and complying with all governmental regulations. It is not disputed that the manufacturer took great care in developing and testing the drug. The drug is extremely effective in combating the disease, but after a

49. *See* Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 435, 573 P.2d 443, 457, 143 Cal. Rptr. 225, 239 (1978); Cepeda v. Cumberland Eng'g Co., 76 N.J. 152, 171-76, 386 A.2d 816, 825-27 (1978); Phillips v. Kimwood Mach. Co., 269 Or. 485, 501 n.16, 525 P.2d 1033, 1040 n.16 (1974); Turner v. General Motors Corp., 584 S.W.2d 844, 847 n.1 (Tex. 1979).

50. In California, the burden has been shifted to the defendant on this issue under the risk-utility test. *See* Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 432, 573 P.2d 443, 455-56, 143 Cal. Rptr. 225, 237-38 (1978).

51. This is Dean Wade's fourth factor in a list of seven that he suggests should be considered in determining whether a particular design is not duly safe. Wade, *supra* note 31, at 837-38. Dean Keeton also recognizes this as a factor to be considered in his formulation of the appropriate test for design defects:

> It [the product] is unnecessarily dangerous if a reasonable person would conclude that the magnitude of the scientifically perceivable danger *as it proved to be at the time of trial* outweighed the benefits of the way the product was so designed and marketed. Under the heading of benefits one would include anything that gives utility of some kind to the product; one would also include the infeasibility and additional cost of making a safer product.

Keeton, *supra* note 39, at 38 (emphasis in original). *See also* cases cited *supra* note 49.

few years it is learned that the drug produces a serious side effect—blindness—in a significant number of patients when used under certain conditions. This unexpected and unforeseen side effect was unknowable at the time of manufacture and design. Subsequently, the company changes the formulation or design of the drug to eliminate the hazard when the particular condition exists. Plaintiff—blinded by the drug—contends that had the side effects been knowable at the time of original manufacture/design, the design change could have been made to eliminate the problem because the technology was available, the cost was minimal, and the effectiveness of the product would not have been significantly altered. If a court were to apply true strict tort liability in the form of a risk-utility test,[52] should the design change be admitted in the plaintiff's case-in-chief as proof of the contention that the drug was unreasonably dangerous and therefore defective?

Unlike the situation where the negligence test is employed, the risk of an unknowable but curable (had it been known) design hazard is placed on the manufacturer and the victim is to be compensated if the burden of proof is discharged. Under negligence, the risk would rest with the victim and there would be no compensation. The test under the strict tort liability standard, however, measures the danger associated with the product by "hindsight." Information that the drug causes blindness came to light only after several years of use. This aspect—the danger or harm causing aspect—of the risk utility equation may be proved without resort to subsequent remedial measures.

The subsequent design change would seem to have little, if any, relevance to the magnitude of the danger. This is a function of the number of people harmed and the severity of the harm. However, the feasibility aspect of the equation may be proved, at least in part, by the introduction of such evidence. Feasibility consists of at least two components: (1) mechanical or physical reality and (2) economic reality. For example, evidence of the subsequent design change could be quite relevant in an attempt to convince the jury that the technology was previously available[53] by showing what the manufacturer actually did in making the change. The same evidence would lead to other information about the costs involved. The cost and the impact of the actual change on the effectiveness and desirability of the product would be

52. For example, the Supreme Court of Texas has approved the following jury instruction for use in product design cases: "By the term 'defectively designed' as used in this issue is meant a product that is unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use." Turner v. General Motors Corp., 584 S.W.2d 844, 847 n.1, 851 (Tex. 1979).

53. For an enlightening exposition on "scientific knowability" see Funston, *The "Failure to Warn" Defect in Strict Products Liability: A Paradigmatic Approach to "State of the Art" Evidence and "Scientific Knowability,"* 51 INS. COUNS. J. 39 (1984).

evidence that a reasonable manufacturer, had the danger been known, would or would not have changed the design of the product. In addition, the evidence could be very important to the victim because it gives a concrete example, a model as it were, of what could have been done at the time of manufacture/design had the danger been known rather than relegating the victim to proof of a relatively abstract hypothetical.

Feasibility is part of the plaintiff's burden of proof and a change in design may be some of the best evidence on that point. In a negligence case there is also an aspect of feasibility in the ordinary prudent manufacturer/designer standard, but permitting the introduction of subsequent remedial measures creates a risk that the jury will also use the evidence to decide whether the "danger or risk" aspect was or should have been known. This risk of jury misuse does not exist in the strict liability test posed. Thus, it would seem unfair to place such a burden on the plaintiff under a strict liability test and then deny resort to evidence of subsequent remedial measures in the case-in-chief, regardless of whether manufacturers/designers are discouraged from making changes.

It is very doubtful that subsequent remedial changes would not take place given the rather powerful incentives to undertake such changes under the circumstances. Liability for the unchanged product eventually could be ruinous if the manufacturer continues to distribute the product and, indeed, punitive damages would seem to be very much in order for such a flagrant disregard of the public interest. Of course, this also would be the result were the court to utilize a negligence standard rather than strict tort liability. However, as mentioned above, in that instance the evidence of subsequent remedial measures would not go merely to prove feasibility of change at the date of manufacture/design, but would, without a limiting instruction, permit the jury to infer that a mythical manufacturer/designer knew or should have known of the danger. Even with the instruction, the danger is great that the jury would misuse the evidence by impermissibly imputing the wisdom garnered by hindsight to the mythical manufacturer/designer.[54] On balance, this would seem to be reason enough to deny admission of the evidence under a negligence standard for products.[55] Because there is no similar peculiar risk of abuse by the

54. A similar problem arises where the plaintiff chooses to plead different counts involving negligence and strict liability. In that instance, the court might put the plaintiff to a choice of theories before ruling on the admissibility of subsequent remedial measures. If the plaintiff insists on proceeding on both counts, the court then should consider invoking its discretion in refusing to admit such evidence under FED. R. EVID. 403, or the equivalent state rule, on the grounds that its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

55. In particular, the evidence should not be admitted in failure to warn cases which,

trier of fact under a strict tort liability standard, the evidence should be admitted in that type of case. However, it is submitted that the better practice would be to adhere to the letter of the rule by excluding such evidence in negligence cases unless, of course, one of the stated exceptions to the rule is met.[56]

III. REVIEWING THE CASE LAW

The leading authority by a state court of last resort on the admissibility of subsequent remedial measures in product liability cases has been *Ault v. International Harvester Co.*,[57] decided by the Supreme Court of California in 1975. It is of particular significance because Federal Rule 407 was derived from the California Rule of Evidence on the subject.[58] *Ault*, which utilized a true strict tort liability test and was correctly decided under the thesis of this article—evidence of subsequent remedial measures should be admissible in the case-in-chief in true strict product liability cases—has been followed by a number of other state courts[59] and by the United States Courts of Appeals for the Eighth and Tenth Circuits in product cases. However, it appears that not enough attention was paid in some of these cases as to whether the basis of liability was one of negligence or strict liability. This inattention has produced some anomalous results, particularly in the Eighth Circuit.

There are several cases decided by the Eighth Circuit Court of Appeals ostensibly dealing with the rule regarding admissibility of subsequent remedial measures: *Robbins v. Farmers Union Grain Terminal Ass'n*;[60] *Farner v. Paccar, Inc.*;[61] *Unterburger v. Snow Co.*;[62] and

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under the orthodox view, clearly employ a negligence standard. *See supra* note 35 and accompanying text.

56. For a different view, i.e., that the admissibility of evidence of subsequent remedial measures should be determined under general rules of relevancy, with FED. R. EVID. 403 as a guideline, rather than Rule 407, see J. WEINSTEIN & M. BERGER, *supra* note 1, at 407-12. *See also* C. WRIGHT & K. GRAHAM, *supra* note 5, at 144.
57. 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1975).
58. C. MCCORMICK, *supra* note 1, at 82 (Supp. 1978).
59. Caterpillar Tractor Co. v. Beck, 624 P.2d 790, 793-94 (Alaska 1981); Roberts v. May, 41 Colo. App. 82, 87, 583 P.2d 305 (1978) (decided prior to the effective date of COLO. REV. STAT. § 13-21-404 (1977) (prohibiting such evidence)); Millette v. Radosta, 84 Ill. App. 3d 5, 19-20, 404 N.E.2d 823, 834 (1980) (see other Illinois Appellate Court cases cited in this opinion); Caprara v. Chrysler Corp., 52 N.Y.2d 114, 122-28, 417 N.E.2d 545, 549-51, 436 N.Y.S.2d 251, 255-57 (1981); Shaffer v. Honeywell, Inc., 249 N.W.2d 251, 257 (S.D. 1976); Chart v. General Motors Corp., 80 Wis. 2d 91, 100-04, 258 N.W.2d 680, 683-85 (1977); Caldwell v. Yamaha Motor Co., 648 P.2d 519, 523-25 (Wyo. 1982). *See also* Ginnis v. Mapes Hotel Corp., 86 Nev. 408, 415-16, 470 P.2d 135, 139-40 (1970) (standing for the same proposition as *Ault* but decided earlier).
60. 552 F.2d 788 (8th Cir. 1977).
61. 562 F.2d 518 (8th Cir. 1977).
62. 630 F.2d 599 (8th Cir. 1980).

DeLuryea v. Winthrop Laboratories.[63] Ironically, *Paccar* is the only case among the four that allegedly involved a true design defect in which strict liability might have been applied, but Federal Rule 407 was not held to be applicable because the remedial change that was made subsequent to the accident in question was not made by the defendant.[64] It was made by a third party truck owner who was not involved in the litigation and was not barred in any event under the majority view of the rule.[65]

The other three cases, although clearly involving Rule 407, were negligence cases rather than true strict liability cases, despite the latter characterization by the courts. *Robbins* involved allegations of failure to warn,[66] which necessarily invoked a negligence standard unless the court was prepared to hold that a manufacturer/designer was subject to liability for failing to warn about a defect that was unknowable at the time the warning was allegedly required.[67] *DeLuryea* was a failure to warn case involving a drug and, similarly, involved a negligence standard.[68] *Unterburger*, a grain auger case, involved both a failure to warn and a design defect;[69] however, one cannot determine the actual standard of liability employed in the jury instructions from the opinion. The Eight Circuit Court of Appeals did cite Section 402A of the *Second Restatement of Torts*, but it also cited two Minnesota Supreme Court cases which clearly did not employ a test of strict tort liability as the basis of liability for design defects.[70] Moreover, the court in *Unterburger* seemed to overlook the fact that the design change in question took place approximately eight years before the accident.[71]

Most courts interpret the "event," subsequent to which the inadmissible changes are made, to mean the occasion of the accident and not the occasion of manufacture/ design.[72] Otherwise, evidence of a design change would never be admissible in those cases rejecting the

63. 697 F.2d 222 (8th Cir. 1983). *See also* Kehm v. Proctor & Gamble Mfg., 724 F.2d 613, 621 (8th Cir. 1983) (elaborating on the discussion of Rule 407 found in DeLuryea v. Winthrop Labs., 697 F.2d 222, 227-29 (8th Cir. 1983)).
64. Farner v. Paccar, Inc., 562 F.2d 518, 528 (8th Cir. 1977).
65. *See* W. LOUISELL & C. MUELLER, *supra* note 5, at 245 n.71.1; J. WEINSTEIN & M. BERGER, *supra* note 1, at 407 n.1.
66. Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788, 789-90 (8th Cir. 1977).
67. This is a distinct minority position. *See* W. PROSSER & W. KEETON, *supra* note 7, § 99, at 697.
68. DeLuryea v. Winthrop Labs., 697 F.2d 222, 223-24 (8th Cir. 1983).
69. Unterburger v. Snow Co., 630 F.2d 599, 601-02 (8th Cir. 1980).
70. *Id.* at 603. The two cases are Magnuson v. Rupp Mfg., Inc., 285 Minn. 32, 171 N.W.2d 201 (1969), and McCormack v. Hankscraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967). Both appear to be using a negligence standard for design defects.
71. Unterburger v. Snow Co., 630 F.2d 599, 602 (8th Cir. 1980).
72. *See, e.g.*, Rozier v. Ford Motor Co., 573 F.2d 1332, 1343 (5th Cir. 1978).

Ault position. In any event, it is submitted that the Eighth Circuit should review its holdings on the basis of the liability standard employed in product cases and limit admissibility to those cases involving true strict liability. The occasion for jury abuse in negligence cases would seem to argue strongly for exclusion in product cases employing such a fault based standard.

The Tenth Circuit Court of Appeals recently followed the lead of the Eighth Circuit by holding that evidence of subsequent remedial measures is admissible in a product liability case.[73] The case involved an airplane crash allegedly caused by a defective trim switch and the admissibility of a bulletin issued by the manufacturer after the accident explaining to owners how to modify the switch so that it would not stick. The court, relying on a previous decision by the Tenth Circuit,[74] held "where there is any purpose for admitting evidence of subsequent repairs besides proving defendant's negligence, the jury should be allowed to hear and consider that evidence."[75] In particular, the court ruled that while the evidence was not admissible on the negligence count,[76] it was relevant and admissible on the strict liability count. The court, accordingly, recognized the distinction argued for in this Article. However encouraging that might be, the case is still troublesome because there was no clear articulation of the standard employed in defining strict liability.[77] In any event, the case is a step in the right direction and should be helpful in leading to the correct solution of the problem by other circuits in the future.

Unlike the Eighth and Tenth Circuits, the other seven United States Courts of Appeals addressing the issue of admissibility of subsequent remedial measures in product cases profess to have rejected the

73. Herndon v. Seven Bar Flying Serv., Inc., 716 F.2d 1322 (10th Cir. 1983).

74. Rimkus v. Northwest Colo. Ski Corp., 706 F.2d 1060 (1983).

75. Herndon v. Seven Bar Flying Serv., Inc., 716 F.2d 1322, 1331 (10th Cir. 1983).

76. In *Herndon*, the trial court did not give the jury an instruction which would have precluded consideration of the service bulletin as evidence of negligence or culpability. The Court of Appeals noted, however, that had the manufacturer submitted a limiting instruction at the appropriate time or objected with the required specificity to the jury instructions, the trial court should have added such limitations to its charge to the jury. *Id.* at 1330.

77. The case was a diversity case and presumably the court applied New Mexico law on the strict liability issue as it did with regard to other substantive issues. *Id.* at 1331. However, New Mexico is not one of the jurisdictions that has made clear that the test for design defects is one of true strict liability. See, for example, Skyhook Corp. v. Jasper, 90 N.M. 143, 560 P.2d 934 (1977), where the court took the position that there was no distinction between defective manufacture and defective design and employed a test of "unreasonably dangerous within the contemplation of the ordinary consumer or user of such a . . . [product] when used in the ordinary ways and for the ordinary purposes for which such a . . . [product] is used. *Id.* at 147, 560 P.2d at 938. As previously mentioned, this test is subject to an interpretation that embodies a negligence rather than strict liability standard.

Ault rationale.[78] To the extent these professions are true, the opposite problem from that created by the Eighth Circuit obtains. Where strict liability is imposed, a product victim is denied use of some of the most probative evidence available, even though there is little risk of jury abuse. However, it does not appear that all of these seven circuits have squarely faced the issue of admissibility in a true strict liability case involving products. For example, the product cases decided by the First and Fourth Circuits involving Rule 407 appear to be negligence cases.[79] In addition, the standard for liability in the Sixth and Seventh Circuit cases is not apparent from the opinions.[80] Thus, it is difficult to determine if the courts really focused on the difference between negligence and strict liability.

The Second, Third, and Fifth Circuits all decided against admissibility in the context of strict product liability theories, but the Second Circuit decision may have since been undermined. The Second Circuit applied the substantive law of New York in deciding *Cann v. Ford Motor Co.*,[81] in which it held that evidence of subsequent remedial measures was inadmissible. Since that date the New York Court of Appeals has held that such evidence is admissible in a product liability case involving a test of strict liability.[82] If the Second Circuit applies the evidentiary rule adopted by the Court of Appeals in diversity cases involving products tried under New York law, the original decision in *Cann* will no longer apply.[83] This leaves only the Third and Fifth Circuits having squarely decided the issue in the negative, and they could

78. Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883 (5th Cir. 1983); Josephs v. Harris Corp., 677 F.2d 985, 990-91 (3d Cir. 1982); Cann v. Ford Motor Co., 658 F.2d 54, 59-60 (2d Cir. 1981); Oberst v. International Harvester Co., 640 F.2d 863, 866 (7th Cir. 1980); Werner v. Upjohn Co., 628 F.2d 848, 857 (4th Cir. 1980); Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230, 232-33 (6th Cir. 1980); Roy v. Star Chopper Co., 584 F.2d 1124, 1134 (1st Cir. 1978).

79. Roy v. Star Chopper Co., 584 F.2d 1124 (1st Cir. 1978), involved an electroplating machine without guards for pinch rollers. The court applied the substantive law of Rhode Island with regard to products liability which purported to be strict liability, but it appears that a "time of manufacture" or foresight test was employed for determining whether the manufacturer knew or should have known of the danger rather than a hindsight test. The case also involved a failure to warn count that clearly was based on a negligence concept. *See id.* at 1132 n.7 (jury instructions). Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980), also involved a failure to warn and the court correctly characterized the issue as being the same as negligence. *Id.* at 858.

80. Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230, 232-33 (6th Cir. 1980); Oberst v. International Harvester Co., 640 F.2d 863, 866 (7th Cir. 1980).

81. 658 F.2d 54, 60 (2d Cir. 1981).

82. Caprara v. Chrysler Corp., 52 N.Y.2d 114, 122-28, 417 N.E.2d 545, 549-51, 436 N.Y.S.2d 251, 255-57 (1981).

83. The proposition that federal courts should apply the state rule on admissibility of subsequent remedial measures in product diversity cases because of the substantive impact is urged in J. WEINSTEIN & M. BERGER, *supra* note 1, at 407-12. *But see* Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883, 885 (5th Cir.

well be affected by state positions on the issue, as only five states have refused to admit such evidence in product cases,[84] and two of those involved cases where the standard of liability appears to have been that of negligence.[85]

Finally, the Fifth Circuit, took the position that exclusion "rests more firmly on the proposition that evidence of subsequent repair or change has little relevance to whether the product in question was defective at some previous time."[86] This proposition, at best, is highly debatable.[87] Thus, insofar as the holdings are concerned, the situation is not as hopeless as it appears at first blush. If the thesis of this Article is defensible, there still is ample opportunity for the courts to come to a consensus on the issue of the admissibility of subsequent remedial measures in product liability cases.

IV. ADMISSIBILITY OF EVIDENCE OF SUBSEQUENT REMEDIAL MEASURES IN NEBRASKA

Nebraska has long recognized the evidentiary rule that evidence of subsequent repairs made, or precautions taken, after an accident or the infliction of an injury is not admissible to prove antecedent fault. In *Pribbeno v. Chicago, B. & Q. Ry.*,[88] plaintiff alleged that the embankment built by the defendant railway was negligently constructed in that sufficient provision was not made to permit flood waters to escape. Over defendant's objection, plaintiff was permitted to prove that subsequent to the flood in question defendant changed the embankment so that the water could escape. The Supreme Court of Nebraska acknowledged that "the overwhelming weight of authority is against permitting proof that subsequent to the injury defendant made

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1983) (federal rules apply). *See generally* D. LOUISELL & C. MUELLER, *supra* note 5, at § 166 (discussing conflicts of state and federal rules with the *Erie* doctrine).

84. The five states are Arizona, Colorado, Michigan, New Jersey and Washington. The first three states accomplished this result by statute. *See* ARIZ. REV. STAT. § 12-686 (1978); COLO. REV. STAT. § 13-21-404 (1977); MICH. COMP. LAWS ANN. § 600.2946(3) (West 1978). The last two involved court decisions. *See infra* note 85. It has been said that Kentucky and Virginia have enacted product liability legislation which contains an exclusionary rule for subsequent repairs. *See* J. WEINSTEIN & M. BERGER, *supra* note 1, at 407-15, n.11. However, the statutes cited do not appear to effect that result. *See* KY. REV. STAT. ANN. § 411.330 (1978); VA. CODE § 8.01-418.1 (1978). Alaska, Hawaii and Maine have adopted rules which make the evidence admissible. *See* J. WEINSTEIN & M. BERGER, *supra* note 1, at ¶ 407[08].

85. Price v. Buckingham Mfg. Co., 110 N.J. Super. 462, 464-65, 266 A.2d 140, 141 (1970); Haysom v. Coleman Lantern Co., 89 Wash. 2d 474, 482-84, 573 P.2d 785, 790-91 (1978).

86. Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883, 887 (5th Cir. 1983).

87. The Tenth Circuit Court of Appeals came to the opposite conclusion in Herndon v. Seven Bar Flying Serv., 716 F.2d 1322, 1328 (10th Cir. 1983).

88. 81 Neb. 657, 116 N.W. 494 (1908).

repairs or changed the condition of the machinery, or immovables, responsible for the injuries the subject of the suit" and held:

> We believe logic, reason, and sound public policy direct that we follow the rule adopted by the majority of the state courts. The testimony would naturally impel the jurors to believe the railway company had ascertained its fault and was endeavoring to repair its dereliction, hence without question it had admitted its negligence.[89]

In 1975, the common law rule was embodied in Rule 407 of the *Nebraska Revised Statutes* when Nebraska adopted the *Federal Rules of Evidence*. Initially, the Nebraska version of the rule dealing with subsequent remedial measures was identical to that contained in the Federal Rules. However, in 1978, the Nebraska Legislature amended the rule by adding a sentence. The current version of the rule, with the additional sentence italicized, is as follows:

> Rule 407. Subsequent remedial measures. 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. *Negligence or culpable conduct, as used in this rule, shall include, but not be limited to, the manufacture or sale of a defective product.*[90]

Does the amended version of Rule 407 foreclose the possibility of admitting evidence of subsequent remedial measures in product liability cases in Nebraska?[91]

It is arguable that the current wording of the Nebraska Rule 407 does not preclude evidence of subsequent remedial measures in cases involving theories of strict tort liability for products.[92] Under a literal interpretation, the rule only prevents the admissibility of such evi-

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89. *Id.* at 659, 116 N.W. at 495.

90. NEB. REV. STAT. § 27-407 (1979) (emphasis added). For the only case interpreting the rule, see Kurz v. Dinklage Feed Yard, Inc., 205 Neb. 125, 128-29, 286 N.W.2d 257, 260 (1979) (a negligence case dealing with the feasibility exception).

91. Evidence of subsequent remedial measures is admissible under the exceptions provided in the second sentence of Rule 407: "This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility or precautionary measures, if controverted, or impeachment." FED. R. EVID. 407. However, it is admissible only on rebuttal, not in the case-in-chief. This is also true where a defendant introduces "state of the art at time of sale" evidence as a defense under NEB. REV. STAT. § 25-21,182 (1979). It would appear that feasibility has been placed in issue and the plaintiff should be entitled to introduce evidence of subsequent remedial measures taken by defendant—before or after date of sale. It is admissible in the former case because it directly rebuts the state of the art defense and should be admissible in the latter case on the same grounds if it shows that the technology to make the product safer was available prior to sale. *See* Hancock v. Paccar, Inc., 204 Neb. 468, 488, 283 N.W.2d 25, 39 (1979).

92. This position has weight despite the following statement of intent to an earlier proposed amendment to Nebraska Rule 407:

dence in product liability cases based on negligence theories. Rule 407, by including "manufacture or sale of a defective product" in the phrase "culpable or negligent conduct," limits the rule to the culpable or negligent manufacture or sale of a defective product. Had the legislature intended to include nonculpable or nonnegligent manufacturing or selling, as requisites of the rule, it easily could have done so. Thus the rule, as drafted, is subject to an interpretation that the legislature purposely omitted strict tort liability cases involving products and that evidence of subsequent remedial measures should be admissible in such cases. In any event, the Supreme Court of Nebraska ultimately must decide the matter as the meaning is not clear. An example will show how the problem might come up.

Assume that a defendant designs a line of products called Widgets and begins to distribute them through the marketing chain. On January 1, 1983, a Widget is sold to a consumer and the consumer is injured by the Widget on July 1, 1983. Defendant learns of the injury on August 1, 1983, and subsequently, on October 1, 1983, alters the design to correct the problem. However, the defendant, through no fault of his own, has not been able to recall all units of the Widget as originally designed or notify all dealers of the danger and another original Widget is sold on November 1, 1983, after the design change. The second original Widget sold injures the purchaser and suit is brought alleging strict tort liability.[93] Should the design change on October 1, 1983, be admissible in the law suit by the second purchaser? Under the thesis of this article, the admissibility of such evidence should turn on the

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> Finally, the act clears up any ambiguity in one of the rules of evidence and specifically conforms it to its intended purpose. It provides that subsequent remedial measures taken by a manufacturer shall not be used as substantive proof of liability in "strict liability in tort" actions. Most lawyers believe that this has always been the intent of the rule. However, a few courts have refused to extend the rule beyond negligence actions even though the rule presently says "negligence or culpable conduct." This change makes it clear that the words "culpable conduct" include within their meaning the sale of a defective product.

Statement of Intent by the Chairman of the Banking, Commerce and Insurance Committee to LB 665 (1978). If the chairman was referring to true strict liability cases, the amendment simply does not accomplish what he said it would. The quotation marks around the words "strict liability in tort" also can be construed to mean that the words were being used in a special way. At the time of the amendment, it appears that design defect cases in Nebraska were being tried on a negligence theory. *See, e.g.*, Friedrich v. Anderson, 191 Neb. 724, 731-33, 217 N.W.2d 831, 836 (1974). It was not until 1979 that the Nebraska Supreme Court clearly articulated that strict liability was the basis of liability for design defect cases. *See* Hancock v. Paccar, Inc., 204 Neb. 468, 483-84, 283 N.W.2d 25, 37 (1979).

93. Note that the Nebraska Product Liability Act speaks of the state of the art defense as applying "at the time the specific product involved in the action was first sold to any . . . [consumer]." NEB. REV. STAT. § 25-21,182 (1979). Thus, the state of the art has changed before the time of sale of the second Widget, i.e., November 1, 1983, and the defendant probably will not resort to that defense.

basis of liability. If Nebraska has truly adopted strict tort liability for design defects, as it says it has,[94] then the evidence should be admissible, unless Nebraska Rule 407 is construed to bar such evidence under the 1978 amendment.

V. CONCLUSION

Courts are divided over the admissibility of subsequent remedial measures in product liability litigation. It is important, given the national nature and effect of such litigation, that a universal rule insofar as possible be adopted. It makes little sense for manufacturers, or for that matter plaintiffs, to be subjected to different rules on this matter in the various states and court systems in this country. It seems that the crucial issue in resolving the conflict is whether true strict liability or negligence is or will be applied with regard to all or some product accidents. That is a decision to be made by the states or, perhaps, the country as a whole.[95] Regardless of how that issue is resolved, it should not affect the result argued for in this article.

The orthodox rule denying admissibility of evidence of subsequent remedial measures to prove antecedent fault should apply in product cases as well as other cases where negligence is the basis of liability. Even though, as a practical matter, manufacturers/designers may not be in a position where they could risk not making design or other changes after learning of a hazard associated with a product, regardless of the basis of liability, it would appear that on balance there is still reason to deny the evidence in negligence cases. The probative force of the evidence on the issue of antecedent fault is weak, and the risk is great that jurors will give it more weight than it deserves in a fault based test. An instruction limiting the use of evidence to the feasibility aspect of the negligence formula does not seem to be a very practical solution either. On the other hand, the evidence is quite probative as to feasibility on the strict liability issue and there is no unique risk of jury abuse. There is still ample opportunity for the courts to address the issue, but it is crucial, if the thesis of this Article is adopted, for courts to recognize whether the test for a design defect is one of true strict liability or one of negligence. Absent federal legislation on the subject,[96] the trend will probably continue towards true

94. Hancock v. Paccar, Inc., 204 Neb. 468, 483-84, 283 N.W.2d 25, 37 (1979).

95. The proposed legislation on products liability pending in the United States Congress would impose a negligence standard in all design defect and failure to warn cases and a strict liability standard for manufacturing defects. *See* S. 44, 98th Cong., 1st Sess. (1983). The bill also precludes the admissibility of subsequent remedial measures except in an action alleging that a product was unreasonably dangerous in design or formulation. However, such evidence is admissible in that instance only if offered to impeach a witness for the manufacturer or product seller who has expressly denied the feasibility of such a measure. *Id.* § 14.

96. *Id.*

strict liability for this type of defect. However, to the extent that negligence remains the basis of liability in design defect and information defect type cases, evidence of subsequent remedial measures should be excluded unless one of the recognized exceptions to the rule is met.