

## ADMISSIBILITY OF SUBSEQUENT PRODUCT MODIFICATIONS

### *Indiana's Treatment in a Strict Liability Action*

by  
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Indiana Rule of Evidence (“IRE”) 407 generally precludes admission of evidence of subsequent remedial measures. In strict liability claims, some jurisdictions have determined that evidence of subsequent remedial repairs or modifications taken by a defendant is admissible. The primary reasoning for allowing such evidence is that Rule 407 excludes evidence of subsequent remedial measures only when offered to prove “negligence or culpable conduct.” According to some jurisdictions, because negligence is not an element of a strict liability claim, evidence of subsequent remedial measures is admissible. Indiana appears to follow the rule that evidence of subsequent repairs or modifications taken by a defendant after an accident are inadmissible, even in a strict liability action; however, the question has not been addressed since the enactment of Indiana’s Product Liability Act (“IPLA”).

IRE 407, like Federal Rule of Evidence (“FRE”) 407 and that of many states, provides as follows:

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.

IRE 407. The primary rationale for the exclusionary rule is that exclusion of subsequent remedial measures is necessary to avoid deterring individuals from making improvements or repairs after an accident occurs. *Ault v. International Harvester Co.*, 528 P.2d 1148, 1151 (Cal. 1974).

Several jurisdictions, interpreting a substantially similar rule of evidence, have found that evidence of subsequent modifications is admissible, even if feasibility is not controverted, on the basis that negligence is not an element of a strict liability claim. *Porchia v. Design Equip. Co., a Div. of Griffith Labs.*, 113 F.3d 877, 880 (8th Cir. 1997) (“[FRE] 407 . . . does not require the exclusion of evidence of subsequent remedial measures in strict liability cases [brought in Eighth Circuit].”); *Herndon v. Seven Bar Flying Service, Inc.*, 716 F.2d 1322 (10th Cir. 1983); *Ford Motor Co. v. Fulkerson*, 812 S.W.2d 119 (Ky. 1991) (finding that reasons for excluding evidence of subsequent remedial measures in negligence actions do not apply to strict products liability cases); *Sanderson v. Steve Snyder Enters., Inc.*, 491 A.2d 389 (Conn. 1985); *Ault*, 528 P.2d at 1151.

Other courts, however, preserve the exclusionary rule in strict liability actions. See *Krause v. Am. Aerolights, Inc.*, 762 P.2d 1011 (Or. 1988); *Davis v. International Harvester Co.*, 521

N.E.2d 1282 (Ill. Ct. App. 1988) (holding that the general rule of inadmissibility of subsequent remedial measures applies in products liability as well as negligence actions, since to hold otherwise would reduce defendant's incentive to adopt safety measures); *Troja v. Black & Decker Mfg. Co.*, 488 A.2d 516 (Md. Ct. Super. App. 1985); *Haysom v. Coleman Lantern Co.*, 573 P.2d 785 (Wash. 1978).

For those courts including evidence of subsequent remedial measures, inclusion is justified on several bases. First, inclusion is justified under the plain language of the rule. Rule 407 seeks to exclude evidence of subsequent remedial measures only when offered to prove “negligence or culpable conduct.” Because strict liability is unconcerned with the reasonableness of the defendant’s conduct, only the defective nature of the product, Rule 407 does not require exclusion. Second, as noted by the California Supreme Court in *Ault*, the public policy reasons justifying exclusion are not applicable to strict liability claims:

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

*Ault*, 528 P.2d at 1151-52.

Articulating the opposite view, the Seventh Circuit rejected *Ault*’s reasoning in *Flaminio v. Honda Motor Company, Ltd.*,

[W]e agree with the majority view that the rule does apply to strict liability cases. We are not persuaded by the purely semantic argument to the contrary that since “culpable conduct” is not the issue in such a case -- the defendant is liable, at least prima facie, even if he is not blameworthy in the sense of being willful or negligent, provided that he caused the plaintiff’s injury -- the rule is inapplicable by its own terms. Wisconsin law rejects this argument in holding that a defendant’s blameworthiness must, under the state’s comparative-negligence statute, be compared with the plaintiff’s blameworthiness in strict liability cases, even though the defendant was not blameworthy in a negligence sense. *See Dippel v. Sciano, supra*, 37 Wis. 2d at 461-62, 155 N.W.2d at 64-65 (dictum). A major purpose of Rule 407 is to promote safety by removing the disincentive to make repairs (or take other safety measures) after an accident that would exist if the accident victim could use those measures as evidence of the defendant’s liability. One might think it not only immoral but reckless for an injurer, having

been alerted by the accident to the existence of danger, not to take steps to correct the danger. But accidents are low-probability events. The probability of another accident may be much smaller than the probability that the victim of the accident that has already occurred will sue the injurer and, if permitted, will make devastating use at trial of any measures that the injurer may have taken since the accident to reduce the danger.

733 F.2d 463, 468-69 (7<sup>th</sup> Cir. 1984).

Although not explicitly holding that IRE 407 does apply to strict liability actions brought under the IPLA, Indiana courts have not looked favorably upon the California interpretation. *See Ragsdale v. K-Mart Corp.*, 468 N.E.2d 524 (Ind. App. 1984), *superceded on other grounds by statute as recognized in Koshe v. Townsend Eng'g Co.*, 551 N.E.2d 437 (Ind. 1990); *Ortho Pharm. Corp. v. Chapman*, 388 N.E.2d 541, 560 (Ind. App. 1979) (disagreeing with *Ault*).

In *Ortho*, which was decided before the adoption of the IPLA, the plaintiff was injured by taking Ortho-Novum. She brought suit under theories of negligence, strict liability, and implied warranty. At trial, the plaintiff did not contend that there was any fault in the design or manufacture of Ortho-Novum, but rather that the lack of adequate warnings rendered it unreasonably dangerous. The case proceeded to trial and the jury found for the plaintiff. Ortho appealed, contending in part that the trial court erred in admitting certain FDA-mandated warnings and advertising materials dated after the incident. The trial court had admitted the warnings with a cautionary instruction that the warnings were to be considered for feasibility purposes only. Before reaching its conclusion with respect to the admissibility of the warnings, the court engaged in a lengthy discussion of failure-to-warn claims and whether strict liability or negligence principles should apply. Ultimately, the court concluded that there was no practical difference between strict liability and negligence for purposes of the jury's decision. Addressing the question of admissibility, the court of appeals held that the warnings should not have been admitted:

As its second ground for the admissibility of this evidence, Chapman relies on *Ault v. International Harvester Co.* for the proposition that the exclusionary rule is inapplicable in strict liability cases. The reasoning of that case is, in essence, that the rule relates to proof of negligence, the reasonableness of the defendant's conduct, whereas strict liability theory is concerned only with product defects regardless of negligence. In addition, it is reasoned that the policy underlying the rule loses force where "contemporary corporate mass producer[s]" are concerned, therefore the rule operates only as a shield to liability.

The first argument is beside the point. The defect attributable to the product in this case is not in the design or manufacture of the drug, but in the failure to adequately warn of the dangers in its use. Thus, inquiry must focus on the conduct of the defendant:

[W]here the duty to warn is under consideration, the standard of strict liability is essentially similar to the standard for establishing

negligence. The rule imposing obligation on the manufacturer or seller to give suitable warning of a dangerous propensity of an article produced or sold, and the rule conditioning liability on the fact of knowledge or reason to acquire knowledge of a dangerous propensity, are the rules fixing the duties of care and are part of the law of negligence.

*Ortho*, 388 N.E.2d at 560 (internal citation omitted). The *Ortho* court addressed the California Supreme Court's reasoning in *Ault*, ultimately concluding that even though evidence of subsequent warnings may be admissible under a strict reading of Rule 407, the evidence should have been excluded by operation of IRE 403:

Although such evidence may be admissible under the modern, more liberal test of relevance, the attendant danger that a jury would misconstrue and misapply it to the prejudice of the accused is so great as to require exclusion. A danger particularly relevant to the present case is that a jury, influenced by hindsight evidence, might apply an artificially high standard in determining the adequacy of warnings.

*Id.* at 561 (internal citation omitted). Thus, while *Ortho* did not expressly determine that evidence of subsequent remedial measures is inadmissible in a strict liability action, it did exclude evidence of subsequent remedial measures in a failure-to-warn claim, which it had treated identically to a strict liability action.

In *Ragsdale*, which was also decided before the enactment of the IPLA, the plaintiff was injured by the blades of a lawnmower while attempting to unclog the chute. The plaintiff proceeded to trial solely on the theory of strict liability, contending that its defective design and/or lack of warnings caused her injuries. Before trial, the defendant obtained an order to exclude evidence of governmental regulations in the lawnmower industry promulgated after the design and manufacture of the lawnmower, any model changes in the design of the lawnmower, and any technological developments. On appeal, the plaintiff contended that the information was admissible to show the feasibility of the precautions. The court disagreed:

The caution rule is employed in defective design cases to show the feasibility of taking certain precautions by showing such precautions were subsequently taken. It was developed as a part of an evidentiary exception which allows evidence of subsequent remedial action for purposes of rebuttal or impeachment. As such, the caution rule is applicable in a defective design case where the plaintiff must prove the product as designed necessarily creates the injury complained of, there is an alternative design which would eliminate the danger of injury, and that alternate design is feasible. However, before the rule may be invoked, feasibility must be contested.

*Id.* at 528. Thus, *Ragsdale*, while proceeding under a strict liability theory for defective design prior to the enactment of the IPLA, maintained the rule that in order for subsequent remedial measures to be admissible, one of the exceptions, such as feasibility being contested, must apply.

Additional support for the suggestion that Indiana would likely apply the exclusionary rule in a strict liability action can be found both in the language of the IPLA and in the application of comparative fault principles to strict liability claims. Under the IPLA, a product may be defective due to a manufacturing defect, design defect, or by containing inadequate warnings. Ind. Code § 34-20-2-1 *et seq.* However, design defect and failure-to-warn claims must be analyzed under general negligence principles. *Id.* § 34-20-2-2. Strict liability may be imposed only for alleged manufacturing defects. *Id.* Thus, even if a court found that subsequent remedial measures were not excluded by operation of IRE 407, the likelihood of such evidence implicating IRE 403 concerns when a claim presents multiple theories of recovery is high. In addition, Indiana applies comparative fault principles to claims arising under the IPLA, including strict liability claims of manufacturing defect. *Id.* §§ 7-1, 8-1. As such, the jury is tasked with comparing the fault of the defendant with the fault of others. *Id.* § 34-20-8-1. Therefore Indiana, like Wisconsin as noted in *Flaminio*, has arguably tacitly acknowledged that “culpable conduct” is at issue in IPLA cases.

Indiana courts have not addressed whether IRE 407 would operate to exclude evidence of subsequent remedial measures in a strict liability claim arising under the IPLA. Nonetheless, Indiana appears disinclined to adopt the approach articulated by some jurisdictions that such evidence is admissible.

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