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The admissibility of subsequent remedial measures in strict liability tort actions has become an intriguing subject for many legal theorists and commentators. However, the topic is of far greater significance to judges who must decide whether the evidence pertaining to subsequent remedial measures should be admitted. Since the 1977 ruling in *Chart v. General Motors Corp.*, Wisconsin courts have admitted evidence of subsequent remedial measures in products liability actions alleging strict liability. In *Chart* the Wisconsin Supreme Court affirmed the trial court's admission of evidence related to changes made by General Motors in its suspension system design of the 1964 and 1965 Corvair. Other jurisdictions have taken positions both consistent with and contrary to that taken in *Chart*.

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1. 80 Wis. 2d 91, 258 N.W.2d 680 (1977).
2. The court stated that the applicable statute was Wis. Stat. § 904.07 (1981-82), which 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 section 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 or proving a violation of s. 101.11.

Recently, in *D.L. v. Huebner*, the Wisconsin Supreme Court expanded the principles in *Chart* relating to the applicability of the exclusionary rule in products liability actions which governs the admissibility of subsequent remedial measures. *Huebner* addressed for the first time the applicability of the exclusionary rule in products liability actions that allege both negligence and strict liability. The court held that evidence of remedial measures was admissible to prove Huebner's liability.

This note will analyze the *Huebner* decision and its reasoning. Part I will explore the theoretical foundation for the exclusionary rule and discuss its role in a products liability context. Part II will present the *Huebner* facts, the court's decision and its rationale. Part III will analyze the significance of *Huebner* to future products liability litigants.

App. 2d 43, 355 N.E.2d 533 (1976); Shaffer v. Honeywell, Inc., 249 N.W.2d 251 (S.D. 1976); Caldwell v. Yamaha Motor Co., 648 P.2d 519 (Wyo. 1982). Nine circuits have addressed the issue. With the exception of the Court of Appeals for the Eighth Circuit, the majority of circuits conclude that evidence of subsequent remedial measures is inadmissible in a products liability action based upon strict liability in tort. See infra notes 67 & 68.


5. The exclusionary rule is the common name given to Fed. R. Evid. 407 which 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.

6. For a complete discussion of the state rules which have codified the exclusionary rule, see generally Defense Research Institute, Product Liability Trial Notebook 22-29 (1983).

7. *Huebner*, 110 Wis. 2d at 594, 329 N.W.2d at 898. In *Chart*, General Motors argued that the plaintiff had tried the action, at least as it related to General Motors, on the theories of negligence and strict liability. Reply Brief of Appellant at 7, *Chart* v. General Motors Corp., 80 Wis. 2d 91, 258 N.W.2d 680 (1977). The court determined the case had been tried on solely a strict liability theory, which it referred to as a defective design. *Chart*, 80 Wis. 2d at 98-99, 258 N.W.2d at 682-683. Therefore, the issue of whether the exclusionary rule applied in actions involving both negligence and strict liability theories was unresolved until *Huebner*. 
I. HISTORY OF THE EXCLUSIONARY RULE

A. Theoretical Justification

The exclusionary rule bars the use of evidence of a manufacturer’s subsequent remedial action. Three arguments are generally asserted in support of the rule: (1) the evidence is irrelevant on the issue of prior negligence; (2) admissibility of evidence concerning subsequent remedial measures would discourage individuals from taking remedial measures; and (3) those who take post-accident safety measures act as responsible citizens should act.

The first argument has received wide acceptance. "[C]ourts [have] reasoned that taking precautions against future harm could not be construed as an admission of responsibility for the past and did not prove the defendant's conduct was culpable." Furthermore, the argument continues, the evidence is not sufficiently probative to outweigh the danger of confusing, misleading or unduly prejudicing the jury. Therefore, even if the evidence was deemed relevant to the issue of negligence, Rule 403 of the Federal Rules of Evidence, which balances probative value against risks of prejudice or confusion, would probably lead to its inadmissibility.

As early as 1892, the United States Supreme Court discussed relevancy as a ground for excluding evidence. However, "[t]his relevancy ground . . . is generally considered to be the weaker of the . . . rationales and most com-

9. 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, 214 (1980).
10. Fed. R. Evid. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."
11. The United States Supreme Court recognized that: [T]he evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create prejudice against the defendant. Columbia & P.S.R.R. Co. v. Hawthorne, 144 U.S. 202, 207 (1892).
mentators recognize that it would not be strong enough on its own to support the exclusionary rule.”

Moreover, under the modern and broad definition of relevancy, evidence is considered relevant if it has “any tendency” to make the existence of a material fact more or less probable than it would be without the evidence. Therefore, evidence of a subsequent remedial measure may be relevant “because an admission of negligence is a possible inference from the evidence.” In addition, it is argued that evidence of a subsequent remedial measure “may be relevant as a circumstance tending to show consciousness that the situation called for additional safety precautions.”

The second argument advanced in support of the exclusionary rule is based upon public policy favoring voluntary corrective action by manufacturers. Those who support the public policy argument reason that admission of evidence concerning remedial measures would discourage individuals or corporations from taking remedial measures. Thus, “[i]t is thought that precluding evidence of repairs at trial will encourage a person to make repairs . . . after an accident.”

However, various commentators have criticized the public policy argument on a number of grounds. First, they suggest that “most potential defendants, particularly manufacturers, have a sufficient self-interest that they would take corrective measures to avoid unfavorable publicity and consumer backlash regardless of the admissibility of evidence to those measures.” But this viewpoint is rebutted by the fact that some manufacturers may determine that the unfavorable public exposure is economically outweighed by the expenses associated with altering a product the manufacturer considers safe. Furthermore, critics of the public policy argument note that most potential defendants do not

15. Note, supra note 8, at 374.
17. Note, supra note 9, at 216.
even know of the existence of the exclusionary rule, and if they are aware of the rule, they are probably also aware of the various exceptions to the rule. Critics have also emphasized that "insurers who recognize [the] economic reality are likely to encourage or require remedial measures regardless of the evidentiary rules." This last criticism deserves comment. It ignores the fact that manufacturers may be less concerned with the public policy considerations given their growing movement toward either retaining large funds for future legal expenses or selecting self-insured status. Thus, after performing a cost-benefit analysis, many manufacturers might be more willing to forego remedial changes and continue to sell a product which may be unsafe to consumers.

The third rationale underlying the exclusionary rule is a relatively recent emphasis on fundamental notions of fair play. Fair play suggests that "people who take post-accident safety measures are doing exactly what good citizens should do. In these circumstances, so long as the relevancy of the activity is not great, courts do not wish to sanction procedures that appear to punish praiseworthy behavior." The fairness argument has drawn little attention from critics of the exclusionary rule. One reason why it is not widely espoused may be the public's lack of sympathy for large corporations. The public generally is not offended when large corporations are held to a "looser" standard of fairness if the standard results in the corporation assuming the financial burden for injuries caused by its products.

B. Exceptions

Although broad in scope, the exclusionary rule has sev-
eral exceptions. The list of exceptions includes "proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment." This list is illustrative, not exhaustive. Thus, evidence of subsequent remedial measures will be deemed admissible when offered for a purpose other than to prove negligence or culpable conduct. However, if the evidence is admitted for another purpose, the defendant is entitled to a limiting jury instruction to the effect that the evidence may only be considered for the purpose for which it was admitted.

The number of exceptions to the exclusionary rule has limited the benefit defendants usually derive from it. But Rule 403 of the Federal Rules of Evidence still gives courts broad discretion to exclude even relevant evidence. The court may exclude evidence that is prejudicial, misleading to the jury or confusing to the issues. Thus, a determination that certain evidence falls within an exception to the exclusionary rule does not ensure that the evidence will be admitted.

C. The Role of the Exclusionary Rule in Products Liability

In the past the exclusionary rule was steadfastly applied by courts faced with products liability actions based upon negligence. However, it was not as clear whether the rule applied to products liability actions based upon strict liability in tort.

In products liability negligence actions, the focus is the conduct of the defendant. The factfinder must determine the

23. FED. R. EVID. 407. For text of FED. R. EVID. 407, see supra note 5.
Instead of excluding most evidence of subsequent repairs, courts appear willing, if not eager, to admit such evidence. With the rule so restricted in its application and subject to many exceptions, it will be a rare plaintiff who cannot find a justification for introducing evidence of subsequent repairs, particularly when several defendants have been joined in the action.

Id.
27. For text of FED. R. EVID. 403, see supra note 10.
foreseeability of the harm and the actions a reasonable person would have taken under similar circumstances. However, in a products liability action based upon strict liability, the focus is on the product’s defective condition and the defendant's control over the product. Thus, it can be argued that evidence of subsequent remedial measures is highly relevant on the issue of defective condition. Also, since negligence is not at issue, the likelihood that the evidence will be misdirected to establish the defendant's prior misconduct is minimized. Therefore, it is less likely that the jury will misconstrue the evidence as an admission of negligence.

Some courts suggest that the policy underlying strict liability in tort is advanced by the admission of evidence concerning subsequent remedial measures. "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturer who put such products on the market, rather than by the injured persons who are powerless to protect themselves." Thus, the admission of facts tending to prove a manufacturer's liability encourages the theory's principal objective of protecting the public from unreasonably dangerous products. Commentators also suggest that admission of evidence concerning subsequent remedial measures supports the cost-spreading rationale underlying strict liability because "the manufacturer is in the best position to spread the cost of the accident and absorb the loss."

Those commentators who argue that the exclusionary rule is inapplicable in products liability actions based upon strict liability also assert that "[r]elevant evidence should not be excluded from a products liability case by an obsolete evidentiary rule when modern legal theories, accompanied by economic and political pressures, will achieve the desired policy goals." In other words, the exclusionary rule should

29. Defense Research Institute, supra note 6, at 40. See also Note, supra note 26, at 846.
31. Note, supra note 26, at 841.
32. Defense Research Institute, supra note 6, at 41.
33. Note, supra note 26, at 850.
only apply in those actions involving allegations of negligence. However, supporters of the exclusionary rule in products liability actions based upon strict liability stress the public policy argument, as well as numerous practical difficulties, which would result if the evidence were admitted. They argue that evidence of subsequent remedial measures will unduly prejudice and mislead the jury. Fearing that juries will infer an admission of liability on the part of the defendant from the subsequent changes, those who favor the exclusionary rule suggest that juries should not be permitted to find the defendant liable only on evidence of subsequent remedial measures. Moreover, when determining liability, juries should consider other essential elements of the plaintiff's case such as proximate cause, legal defectiveness of the product, and control by the defendant.

Another problem perceived by supporters of the exclusionary rule in strict liability actions is the fact that plaintiffs usually advance multiple theories. A products liability action may be based upon several theories of liability. Examples include strict liability, negligence and breach of warranty. Supporters of the exclusionary rule argue that, in multiple theory actions, the admission of evidence of remedial measures under a single theory unduly prejudices and confuses the jury. Thus, commentators suggest that such evidence be totally excluded from cases in which negligence is one of the allegations.

II. The Huebner Decision

A. The Facts and Holding

In D.L. v. Huebner the plaintiff, a minor, brought an action for personal injuries he sustained while working on a

34. Defense Research Institute, supra note 6, at 41.
35. Note, supra note 26, at 850. The author notes: "Juries should not be permitted to find the defendant liable on such evidence alone in disregard of such other essential elements of the plaintiff's case as proximate cause, legal defectiveness of the product, and control by the defendant." Id.
36. Id.
37. Id. at 852.
38. 110 Wis. 2d 581, 329 N.W.2d 890 (1983).
The plaintiff was injured when he attempted to extricate a canvas which was caught on the rear of a forage wagon. The complaint against Huebner Implement alleged two theories of liability: (1) strict liability in tort for both selling an unreasonably dangerous machine and failing to warn of the machine's danger; and, (2) negligence in designing, manufacturing, and selling a machine that failed to provide a safety feature that would prohibit a user from inserting his arm into the area of the sprockets and chains.

The trial court, over the defendant's objections, admitted into evidence safety improvements made by the defendant in forage wagons manufactured after the wagon used by the plaintiff was produced. The Wisconsin Supreme Court considered whether the exclusionary rule was applicable in a products liability action that alleged both negligence and strict liability. The court, in a decision authored by Justice Abrahamson, affirmed the trial court's ruling and held that based upon the theories of negligence and strict liability, evidence of remedial measures was admissible to prove Huebner Implement's liability.

B. The Court's Rationale

Huebner Implement argued that remedial measures are inadmissible on three grounds. First, it argued that the evidence was inadmissible on the negligence theory of liability because section 904.07 of the Wisconsin Statutes excludes

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39. Plaintiff, a thirteen year old boy, and Huebner Implement, argued that once the jury determined the employer violated the child labor laws, as a matter of law, the employer was absolutely liable for the plaintiff's injuries. Id. at 629, 329 N.W.2d at 912. The supreme court held that this position was consistent with the state's case law and legislative policy. Id.

40. Id. at 590, 329 N.W.2d at 894.

41. Id. at 591, 329 N.W.2d at 894. The complaint alleged two other negligent acts by the defendant: (1) negligence in failing to warn or give adequate notice of the danger; and, (2) negligence in designing the wagon so the board attached to its rear looked like, but was not, a safety guard. Id.

42. Id. at 614, 329 N.W.2d at 905. Furthermore, the court reversed the judgment dismissing plaintiff's allegations against his employer and directed that judgment be entered to reflect the employer's liability under the doctrine of absolute liability. Id. at 646, 329 N.W.2d at 620.

43. Huebner also argued that the circuit court erred in giving the absent witness instruction; however, the court concluded the error was harmless. D.L. v. Huebner, 110 Wis. 2d 581, 595, 329 N.W.2d 890, 896 (1983).
such evidence to prove negligence or culpable conduct, and the evidence did not fall within any of the exceptions contained in the exclusionary rule.44 In addition, the defendant argued that the holding in Chart v. General Motors Corp.,45 allowing evidence of subsequent remedial measures in strict liability cases, did not apply to actions in which there were allegations of both negligence and strict liability.46 Finally, Huebner contended that if Chart applied, it should be limited to cases involving only "large" manufacturers.47

The court began its discussion by focusing on the defendant's contention that the evidence of remedial action was wrongfully admitted as to the negligence theory of liability. The court cited section 904.07 of the Wisconsin Statutes,48 which is substantially the same as Rule 407 of the Federal Rules of Evidence.49 The court noted that the rule of exclusion is narrow, and the list of exceptions is merely illustrative, not exhaustive.50 However, the court agreed with the plaintiff's argument that the evidence of subsequent remedial measures was admissible under the impeachment exception to the exclusionary rule.51 But the court did not rest its decision solely on the impeachment rationale. Because it feared creating a broad exception, the court stated that "courts must exercise great care in admitting evidence under the impeachment exception to prevent the exception from destroying the rule of exclusion."52

On the impeachment issue, the plaintiff argued that since the defendant's witnesses testified that the wagon was safely manufactured the plaintiff was entitled to impeach the witnesses by admitting evidence that challenged their credibility. Plaintiff argued, in effect, that the defendant "opened the door" to admitting the impeachment evidence by denying that it was negligent and by introducing evidence of its

44. Id. at 598, 329 N.W.2d at 898.
45. 80 Wis. 2d 91, 258 N.W.2d 680 (1977).
46. Huebner, 110 Wis. 2d at 599, 329 N.W.2d at 898.
47. Id.
49. For text of Fed. R. Evid. 407 see supra note 5.
50. Huebner, 110 Wis. 2d at 600, 329 N.W.2d at 898.
51. Id.
52. Id. at 600, 329 N.W.2d at 899.
reasonable care.\textsuperscript{53}

In its analysis of the admissibility of remedial measures through impeachment, the court pointed to differing reviews concerning the scope of the impeachment exception and concluded that the "inclination to admit post-event remedial measures" stemmed from the broad scope of the impeachment right, the number of exceptions to the exclusionary rule and the rule's "weak theoretical underpinnings."\textsuperscript{54} Although the court acknowledged the criticisms leveled at the exclusionary rule, it did not propose to eliminate it.\textsuperscript{55} Instead, the rule would continue to exist and be subject to the impeachment exception. The court noted that the limiting instruction was available and its adequacy was a proper factor for the trial court to consider under section 904.03 when determining whether the prejudice inherent in the admissibility of remedial measures through impeachment was outweighed by its relevance.\textsuperscript{56} Finally, the court cautioned trial courts to use discretion in excluding evidence admissible under the impeachment exception when the evidence "proves negligence under the guise of impeachment."\textsuperscript{57}

Declining the plaintiff's invitation to rest its decision entirely on the impeachment exception, the court examined the proper scope of its holding in \textit{Chart}. The court merely took note of the defendant's arguments in opposition to extending \textit{Chart}, and then concluded that "\textit{Chart} [is extended] to apply to cases in which negligence, as well as strict liability is pleaded . . ."\textsuperscript{58} The court based its holding on the theory that to limit \textit{Chart} to actions in which only strict liability was pleaded "would seriously undermine the efficacy of products liability actions in Wisconsin."\textsuperscript{59} This is a particular danger in Wisconsin, since a plaintiff need not elect between presenting the two theories to the jury and, therefore, plaintiffs often base their products liability actions upon both the-

\textsuperscript{53} \textit{Id.} at 601, 329 N.W.2d at 899.
\textsuperscript{54} \textit{Id.} at 605, 329 N.W.2d at 901.
\textsuperscript{55} \textit{Id.} at 607-08, 329 N.W.2d at 902.
\textsuperscript{56} \textit{Id.} at 608, 329 N.W.2d at 902.
\textsuperscript{57} \textit{Id.} See also 10 J. Moore, Moore's Federal Practice \$ 407.04, at iv-159 (2d ed. 1982).
\textsuperscript{58} Huebner, 110 Wis. 2d at 609, 329 N.W.2d at 903.
\textsuperscript{59} \textit{Id.}
Moreover, the court stated, "[l]imiting the plaintiff's proof when both theories are presented would limit the plaintiff's ability to prove the strict liability allegation, even though a purpose of adopting the doctrine of strict liability was to aid the plaintiff in proving his case." Finally, the court addressed the defendant's contention that the holding in Chart should be limited to "large" manufacturers. The court summarily dismissed this issue, declining to base a holding regarding the admissibility of evidence of post-event remedial measures on relative differences in corporate size.

III. Analysis

D.L. v. Huebner is significant to future Wisconsin litigants because it may affect the forum in which litigants choose to bring products liability actions, and because it may lead to legislative action to clarify the applicability of the exclusionary rule in strict liability actions.

A. Choice of Forum: Federal or State Court?

The Huebner decision, which extended Chart v. General Motors Corp. to products liability actions involving both negligence and strict liability, has little support from either federal appellate courts or the proposed Products Liability Act of 1983. Although the Wisconsin Supreme Court has taken what may be a judicially logical step, the court has now expressly declined to follow the trend established by the majority of federal circuits.

Federal appellate courts have generally agreed that Rule 407 of the Federal Rules of Evidence is applicable to a products liability action predicated upon both negligence and

60. Id. at 609-10, 329 N.W.2d at 903.
61. Id. at 610, 329 N.W.2d at 903.
62. Id. at 612, 329 N.W.2d at 904.
63. 110 Wis. 2d 581, 329 N.W.2d 890 (1983).
64. 80 Wis. 2d 91, 258 N.W.2d 680 (1977).
65. See infra note 67.
66. The proposed Products Liability Act of 1983 parallels the majority of federal jurisdictions in providing that evidence of subsequent remedial measures is inadmissible except when "offered to impeach a witness for the manufacturer or product seller who has expressly denied the feasibility of such a measure." Products Liability Act of 1983, S.44, 98th Cong., 1st Sess. § 14 (1983).
strict liability. Among the circuits which have addressed this issue, the Courts of Appeals for the Eighth and Tenth Circuits are the lone dissenters. As one commentator has noted, "[f]rom the defendant's viewpoint, this may make federal court a more attractive forum within which to try a products liability lawsuit."

In contrast to the majority of federal courts, Huebner provides an opening for Wisconsin plaintiffs to introduce evidence of subsequent remedial measures through the impeachment exception to the exclusionary rule. The Huebner court took a broad view of the impeachment exception. Although Justice Abrahamson acknowledged the existence of authority to support the view that the evidence was not admissible under the impeachment exception, she suggested that weighing the rule's numerous exceptions and its weak theoretical underpinnings against the broad scope of impeachment under the modern rules, the evidence was admissible. She reasoned that impeachment was applicable because a representative of Huebner Implement testified that the product was safe as manufactured. Despite the authority cited by the court for its decision, one wonders whether the reasoning was valid. Why, after a lapse of approximately twenty years, should a manufacturer be punished for testifying that its product was safe as manufactured? The Wisconsin Supreme Court has expressed its view that it will seek to hold a manufacturer liable, even though it requires a broad interpretation of the exceptions enumerated in the exclusionary rule.

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68. See Herndon v. Seven Bar Flying Service, Inc., __ F.2d __ (10th Cir. 1983); DeLuryea v. Winthrop Laboratories, 697 F.2d 222 (8th Cir. 1983); Robbins v. Farmer's Union Grain Terminal Ass'n, 552 F.2d 788 (8th Cir. 1977).

69. DEFENSE RESEARCH INSTITUTE, supra note 6, at 36.

70. See Huebner, 110 Wis. 2d at 607-08, 329 N.W.2d at 902.

71. Id. at 604-07, 329 N.W.2d at 901.

72. Id. at 601, 329 N.W.2d at 899.
The court’s decision to use the impeachment exception to admit evidence of subsequent remedial measures has implications for the practitioner. Because the court phrased its decision so as to provide a broad interpretation of the impeachment exception, the practitioner is left with a general outline by which the Wisconsin Supreme Court will decide future cases that present similar issues. In addition, the court’s use of the impeachment exception in *Huebner* extends the avenues by which a plaintiff can successfully admit evidence of subsequent remedial measures in a products liability action.

The *Huebner* decision has answered the practitioner’s question as to the admissibility of subsequent remedial evidence in a products liability action based upon both negligence and strict liability. However, the court failed to address what may, in time, become a major concern to the practitioner: how will this decision impact upon a manufacturer who has not made a “remedial” change in the product, but has made a change for some other purpose? In other words, how will the court resolve a dispute in which the manufacturer has altered the product to provide a less costly, more efficient means of production or to update the product solely to achieve state-of-the-art status? These questions will undoubtedly remain unanswered until the right factual case is posed.

Wisconsin is not the only state to disagree with the federal courts on the applicability of the exclusionary rule to strict products liability actions.\(^73\) *Huebner*, as the Wisconsin Supreme Court stated,\(^74\) is an extension of *Chart v. General Motors Corp.*,\(^75\) which followed the lead established by a California case, *Ault v. International Harvester Co.*\(^76\) Although California and Wisconsin apply different rules to the area of strict tort liability in a products liability case,\(^77\) in *Chart*, the Wisconsin Supreme Court failed to distinguish the rationale of *Ault*. The California rule of strict liability in

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\(^73\) See supra note 3.

\(^74\) *Huebner*, 110 Wis. 2d at 607-08, 329 N.W.2d at 902.

\(^75\) 80 Wis. 2d 91, 258 N.W.2d 680 (1977).


\(^77\) The Wisconsin Supreme Court adopted the Restatement (Second) of Torts § 402A (1979) in *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).
a products case is a no-fault doctrine. In *Ault* the California Supreme Court said the exclusionary rule was inapplicable because strict liability does not involve the proof of negligence or culpable conduct. In contrast, Wisconsin adopted the Restatement (Second) of Torts, section 402A. Therefore, Wisconsin law provides that establishing the elements of section 402A compels a finding of negligence per se.

In summary, state and federal courts differ on the application of the exclusionary rule to products liability actions. It seems likely that the Wisconsin Supreme Court will continue to favor the admissibility of subsequent remedial measures in products liability actions based upon both negligence and strict liability. The precedent established by *Huebner* has provided a viable method by which plaintiffs can admit evidence of subsequent remedial changes in order to prove the defendant's liability. However, it will benefit a defendant to remove the lawsuit to federal court, since, as discussed above, the majority approach in the federal court system is to apply the exclusionary rule to both negligence and strict liability actions.

78. *Ault*, 13 Cal. 3d at __, 528 P.2d at 1150, 117 Cal. Rptr. at 814.
79. *Id.* at __, 528 P.2d at 1150-53, 117 Cal. Rptr. at 814-17.
80. Restatement (Second) of Torts § 402A (1979) provides:

(1) 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

(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 brought the product from or entered into any contractual relation with the seller.

81. See Defense Research Institute, *supra* note 6, at 37, in which the author states:

Before the adoption of the Federal Rules of Evidence, under the *Erie* doctrine the question of admissibility of evidence was generally held to be one of state law. With the adoption of the Federal Rules of Evidence, state law is generally no longer held applicable to evidentiary issues, unless the federal rule so specifies.

However, unlike the more "procedural" rules of evidence, Fed. R. Evid. 407 is based primarily upon social policy considerations — nondiscourage-
B. Legislative Reform

Legislative enactments are another means by which jurisdictions can determine the applicability of the exclusionary rule to a strict liability action. Various state legislatures have enacted statutes that purportedly answer questions about the use of the exclusionary rule in a products action based upon strict liability. However, the Wisconsin Legislature has not followed suit. Consequently, section 904.07 of the Wisconsin Statutes remains intact.

One solution would be to amend section 904.07 to include the manufacture or sale of a defective product in the definition of negligence. Other states have chosen this course. Nebraska, for example, has adopted the following:

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. . . . Negligence or culpable conduct, as used in this rule, shall include, but not be limited to, the manufacture or sale of a defective product.

IV. Conclusion

The exclusionary rule is well-recognized, and the exceptions to the rule provide an adequate basis for the admission of subsequent remedial measures if the plaintiff can prove
the evidence is being offered for a purpose other than to prove negligence or other culpable conduct. In addition, Rule 403 of the Federal Rules of Evidence, and its state counterparts, provide sufficient protection to defendants in a products liability action if the probative value of the evidence is determined to be outweighed by the possibility of unfair prejudice, confusion of the issues, or misuse by the jury.

D.L v. Huebner has provided plaintiffs with a substantial exception to the exclusionary rule that will, most assuredly, act as a precedent and guideline for future similar products liability actions. Although cogent arguments exist which support the inapplicability of the exclusionary rule to strict products liability actions, adherence to the rule in products liability actions alleging both strict liability and negligence seems to be the better approach. The well-established arguments supporting the applicability of the exclusionary rule to strict products liability actions, as well as the general consensus among those federal courts which have addressed the issue, provide a substantive framework by which the judicial system can efficiently operate. To accomplish this goal in Wisconsin, perhaps the legislature should follow the lead of Arizona, Idaho and Nebraska, and amend section 904.07 of the Wisconsin Statutes to include a provision concerning the admissibility of subsequent measures in products liability actions based upon strict liability in tort. Legislative action would, most definitely, clear up what has become a very murky area of the law in Wisconsin.

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86. See supra note 5.
87. See supra note 10 for text of FED. R. EVID. 403.
88. 110 Wis. 2d 581, 329 N.W.2d 890 (1983).
89. See supra note 67.
90. See supra notes 84-85.