Evidence Of Subsequent Repairs: Yesterday, Today, And Tomorrow

After an accident a person may undertake repairs or other remedial measures to ensure that the accident is not repeated. Such subsequent repairs include activities as diverse as receiving additional training[1] or establishing safety procedures,[2] as well as more conventional repairs.[3]

In theory, evidence of subsequent repairs is excluded in all United States jurisdictions by a rule forbidding its use to prove negligence.[4] In practice, however, the evidence is often admitted. Thus, a threshold question in examining the treatment of evidence of subsequent repairs is to what extent there is an exclusionary rule.

This article examines the scope of the exclusionary rule and its rationales in light of modern tort and evidence policies. While much of the discussion applies to all jurisdictions, the focus is on California law.[5] This article first explains when evidence of subsequent repairs will be admitted. Next, it considers whether the reasons for the rule justify the exclusion of evidence of subsequent repairs. The article then discusses the modern policies that favor the admission of this evidence. Finally, this article explores the treatment of repair evidence without the exclusionary rule.

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[1] *See, e.g.*, Wilson v. Gilbert, 25 Cal. App. 3d 607, 102 Cal. Rptr. 31 (1st Dist. 1972), which involved medical malpractice. Defendant-doctor subsequently took additional training in giving the treatment he had improperly rendered plaintiff.

[2] *See, e.g.*, Southern Ry. Co. v. Simpson, 131 Fed. 705 (6th Cir. 1904), in which the railroad company established a new procedure of blowing the train's whistle at the crossing where plaintiffs had been injured.

[3] *See, e.g.*, Helling v. Schindler, 145 Cal. 303, 78 P. 710 (1904), in which the blades on the machine plaintiff had been operating were sharpened after his accident.

[4] All United States jurisdictions other than Kansas had such an exclusionary rule at common law. Annots., 170 A.L.R. 7 (1947), 64 A.L.R. 2d 1296 (1959). Recently, Kansas has adopted the exclusionary rule when it codified its rule of evidence by adopting the Model Code of Evidence. KANS. CODE CIV. PROC. § 60-451. Most other jurisdictions codifying their evidence law, also relying on the Model Code or the Uniform Rules of Evidence, have similarly included the exclusionary rule. *See* CAL. EVID. CODE § 1151 (West 1968), set out at note 50, *infra*; 28 U.S.C. FED. R. EVID. 407 (1975) [hereinafter cited as FED. R. EVID.]; and NEW JERSEY EVID. R. 51 (1976). Maine, however, has expressly abandoned the rule in its recent codification of evidence law. ME. R. EVID. 407(a) (effective Feb. 2, 1976).

[5] For cases in other jurisdictions, *see* Annots., 170 A.L.R. 1 (1947), 64 A.L.R.

I. THE EXCLUSIONARY RULE

In 1869, the English Exchequer Court excluded evidence of post-accident repairs offered to prove the negligence that caused the accident.[6] This developed into a rule that rested on the notion that evidence of later repairs was irrelevant to the question of defendant's negligence at the time of the accident.[7] Other courts embroidered on this theme and declared that admitting such evidence would distract the jury with collateral issues and unduly prejudice the defendant.[8] These courts also noted that even if it were relevant, the evidence should be excluded on grounds of the policy of encouraging repairs.[9]

It is now generally acknowledged that evidence of subsequent repairs is often relevant to the issue of negligence[10] and not invariably prejudicial[11] or collateral.[12] Courts and legislatures, however, have retained the exclusionary rule as a matter of public policy because the exclusion of this evidence is thought to encourage the making of repairs after an accident has occurred.[13]

Notwithstanding the exclusionary rule, admission of evidence of subsequent repairs is often permitted.[14] First, courts have limited the

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2d 1283 (1959).

[6] Hart v. Lancashire & Yorkshire Ry. Co., 21 L.T.R. N.S. 261 (1869).

[7] In Morse v. Minneapolis & S. L. Ry. Co., 30 Minn. 465, 16 N.W. 358, 359 (1883) the court stated that: "[Evidence of subsequent repairs] afford no legitimate basis for construing such an act as an admission of previous neglect of duty."

[8] *See, e.g.*, Columbia & Puget Sound R. Co. v. Hawthorne, 144 U.S. 202, 207 (1892), where the court upheld exclusion of repair evidence because, ". . . [the evidence] is calculated to distract the minds of the jury from the real issue and to create a prejudice against the defendant."

[9] Sappenfield v. Main Street & Agri. Park R. Co., 91 Cal. 48, 62-63, 27 P. 590, 593 (1891).

[10] E. CLEARY *et al.*, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 275 at 666 (2d ed. 1972) [hereinafter cited as MCCORMICK (2d ed.)].

[11] *E.g.*, Brunger v. Pioneer Roll Paper Co., 6 Cal. App. 691, 695, 92 P. 1043, 1045 (2d Dist. 1907). *See also* text accompanying notes 19-42, *infra*, for a description of the many purposes for which repair evidence is admissible.

[12] *See* text accompanying notes 67-79, *infra*.

[13] In California, this rationale of public policy was first expressed in Sappenfield v. Main Street & Agri. Park R. Co., 91 Cal. 48, 63, 27 P. 590, 593 (1891):

> To hold that the adoption of such new appliances which experience has demonstrated are more efficient than those previously in use, or which invention has developed from observing the defects in those originally adopted, shall be an admission that [the defendant] was negligent prior thereto, would prevent the very conduct in employers which they should be urged to follow.

This is the rationale for the current codifications of the exclusionary rule. *See, e.g.*, CAL. EVID. CODE § 1151, Law Rev. Comm'n Comment (West 1968), and text accompanying notes 80-87, *infra*.

[14] MCCORMICK (2d ed.), *supra* note 10, § 275 at 667-68. *See also*, 2 J. WEINSTEIN AND M. BERGER, WEINSTEIN'S EVIDENCE ¶ 407[02] at 407-10, 11 (1975) [hereinafter cited as WEINSTEIN].

protection of the rule to the person making the repairs.[15] The evidence is therefore admissible whenever the repairs are made by someone other than the defendant. Second, and most important, courts have recognized purposes[16] for which the evidence is admissible pursuant to the doctrine of limited admissibility.[17] Under this doctrine, the evidence will be admissible[18] whenever it is offered to prove an issue other than negligence.

A. ADMISSIBLE PURPOSES

Many admissible purposes have been recognized.[19] They may be classified into three general categories. The first is the use of the evidence *to rebut or explain other evidence*, such as physical evidence, photographs, and testimony. In *Brunger v. Pioneer Roll Paper Co.*,[20] for example, defendant introduced into evidence the machine that allegedly caused the injury. The court held that such evidence implied that the machine was in the same condition as when the accident occurred. Plaintiff was therefore allowed to show that the machine had been repaired after the accident. Similarly, in *Northern Pacific R. Co. v. Alderson*,[21] the court held that plaintiff could use evidence of subsequent repairs to explain that a photo shown the jury differed from conditions at the time of the accident.

Witnesses have been permitted to testify about repairs to clarify their testimony. In *Dyas v. Southern Pacific Co.*,[22] plaintiff's witness testified that the timbers in the structure that collapsed were rotted. The witness knew this because he was present while the structure was

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[15] MCCORMICK (2d ed.), *supra* note 10, § 275 at 667, note 17; 2 WEINSTEIN *supra* note 14, ¶ 407[01] at 407-7. *See also* Brown v. Quick Mix Co., 75 Wash. 2d 833, 454 P.2d 205 (1969), which held that evidence of repairs by someone other than defendant was not excluded by Washington's exclusionary rule.

[16] The permitted uses of evidence of subsequent repairs are technically admissible purposes, rather than "exceptions" to the exclusionary rule. *See* 2 WEINSTEIN, *supra* note 14, ¶ 407[01] at 407-6; MCCORMICK (2d ed.), *supra* note 10 at 667-68. *But see* B. WITKIN, CALIFORNIA EVIDENCE § 385 (2d ed. 1968) and 2 WEINSTEIN, *supra* note 14, ¶ 407[03], which use the term "exceptions" to describe the permitted uses.

[17] *E.g.*, CAL. EVID. CODE § 355 (West 1968) (LIMITED ADMISSIBILITY.):

> When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly.

See also, FED. R. EVID. 105.

[18] In this article, "admissible" means that the evidence is not barred by the exclusionary rule. Other rules, such as the requirement of relevance, may still prevent admissible evidence from being admitted.

[19] For cases in other jurisdictions, *see* ANNOTS., 170 A.L.R. 1 (1947), 64 A.L.R. 2d .283 (1959).

[20] 6 Cal. App. 691, 92 P. 1043 (2d Dist. 1907).

[21] 199 Fed. 735 (9th Cir. 1912).

[22] 140 Cal. 296, 73 P. 972 (1903).

being torn down. Further, a plaintiff has been permitted to mention a subsequent repair to explain to the jury why he is unable to present certain evidence. For example, in *Osrowitz v. Market Investment Co.*,[23] plaintiff told the jury he would like to be able to give the allegedly defective guardrails to the jury to examine, but could not because the rails had been thrown away when new ones were installed. Thus, evidence of subsequent repairs will be admissible even to explain a failure to present physical evidence, as well as to explain or rebut physical evidence and testimony offered at trial.

The second category of admissible purposes is *to impeach both lay and expert witnesses.* To impeach a lay witness with evidence of subsequent repairs, two preliminary conditions must be met. First, the witness must testify that he believes the conditions were safe at the time of the accident. Second, the witness must be the person who made or authorized the subsequent repairs.[24] In *Hatfield v. Levy Bros.*,[25] for example, defendant's manager testified that he thought the floor on which plaintiff had slipped was safe at the time of the accident. Plaintiff was permitted on cross-examination to impeach the manager with proof that, after the accident, the manager had ordered the store maintenance personnel not to wax the floor in question.

In contrast, expert witnesses can be impeached with evidence of subsequent repairs whenever the repairs are inconsistent with the expert's opinion.[26] Thus, in *Daggett v. Atchison, Topeka & Santa Fe R. Co.*,[27] defendant's safety expert had given his opinion that the wigwag signal in use at the time of the accident was the safest possible type of signal. Evidence that the signal had been replaced after the accident by one with flashing lights was admissible to impeach the expert.[28]

Admissibility of repair evidence under these two categories of admissible purposes hinges on what evidence or testimony is offered at trial. It is therefore difficult for counsel to know before discovery and trial whether repair evidence will be admitted.[29] The consequent

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[23] 40 Cal. App. 2d 179, 104 P.2d 681 (1st Dist. 1940).

[24] *See* Pierce v. J.C. Penney Co., 167 Cal. App. 2d 3, 8, 334 P.2d 117, 120-21 (2d Dist. 1959), where this has been called "impeachment by evidence of previous conduct inconsistent with the fact or belief asserted by the witness on the stand."

[25] 18 Cal. 2d 798, 809-10, 117 P.2d 841, 847-48 (1941).

[26] Pierce v. J.C. Penney Co., 167 Cal. App. 2d 3, 12-13, 334 P.2d 117, 123-24 (2d Dist. 1959).

[27] Daggett v. Atchison, Topeka & Santa Fe R. Co., 48 Cal. 2d 655, 313 P.2d 557 (1957), 64 A.L.R.2d 1283 (1959).

[28] *Id.* at 664, 313 P.2d 557, 563, 64 A.L.R.2d 1283, 1291.

[29] 2 WEINSTEIN, *supra* note 14, ¶ 407[02] at 407-10:

> . . . Even if the defendant is as cold blooded as the rule suggests, his awareness of the many exceptions to the general rule would make it risky to refrain from making the needed repairs . . . As Professor

unpredictability of the rule means that a defendant cannot rely on the protection of the rule in making repairs. This is a significant limitation on the rule's effectiveness.

The third category of purposes for which evidence of subsequent repairs is admissible seems to be in direct conflict with the exclusionary rule.[30] Although the rule prohibits the use of repair evidence to prove negligence, the evidence has been admitted *to prove an element of negligence.*[31] The elements of negligence are: duty to conform to a reasonable standard of care; breach of that duty; a causal relation between defendant's breach and plaintiff's injury; and damage to plaintiff.[32]

"Duty" is determined by balancing the foreseeability and seriousness of the risk with the difficulty or feasibility of guarding against it. Evidence of subsequent repairs is a relevant factor in this balancing process, and has been admitted to prove duty in a number of cases. For example, plaintiffs have been permitted to use repair evidence to demonstrate the feasibility of having made the item safer. Thus, in *Johnson v. United States*,[33] defendant installed an additional barrier on the fence that plaintiff's child had climbed over. Plaintiff was allowed to use the repair evidence to show that the additional safeguard was practical.

Similarly, the unsafe condition of the instrumentality that caused the injury can be shown by repairs made shortly thereafter. Thus, in *Brunger v. Pioneer Roll Paper Co.*,[34] plaintiff showed the dull and unsafe condition of the blades of the paper-cutter he operated by the fact that immediately after his accident his supervisor sharpened the blades. And in *Wilson v. Gilbert*,[35] evidence that, after the alleged malpractice, defendant doctor took additional training in the treatment rendered plaintiff was permissible to show the condition of the doctor's expertise at the time of the injury.

Another question pertinent to the element of duty is "whose duty is it?" Repair evidence has been permitted to establish who owed the

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Slough observed: "Opportunities for circumscribing the purpose of the rule are legion, and it is quite evident that admission or exclusion will be judged on the basis of subtle trial maneuvers . . ."

[30] *Id.* at 407-11 (1975).

[31] Judge Weinstein apparently believes that the courts have allowed the evidence for every element of negligence other than proving breach of duty. *Id.* at 407-18, 19 (1975). In some situations, however, the use of repair evidence to prove prior unsafe condition—where defendant's duty was to maintain the premises in a safe condition—amounts to proof of breach of duty. *Cf.* Brunger v. Pioneer Roll Paper Co. 6 Cal. App. 691, 92 P. 1043 (2d Dist. 1907).

[32] W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30 at 143 (4th ed. 1971) [hereinafter cited as PROSSER (4th ed.)].

[33] 270 F.2d 488 (9th Cir. 1959). *See also,* Baldwin Contracting Co. v. Winston Steel Works, Inc., 236 Cal. App. 2d 565, 46 Cal. Rptr. 421 (1st Dist. 1965).

[34] 6 Cal. App. 691, 92 P. 1043 (2d Dist. 1907).

[35] 25 Cal. App. 3d 607, 102 Cal. Rptr. 31 (1st Dist. 1972).

duty. In *Moorehouse v. Taubman Co.*,[36] defendant contended that it was not its obligation to keep the construction site in safe condition. Plaintiff was permitted to prove that it was defendant's duty, not someone else's, by showing that defendant had subsequently installed handrails at the point where plaintiff had fallen.

Repair evidence is also often relevant to the element of cause-in-fact. In *Dow v. Sunset Tel. & Tel. Co.*,[37] plaintiff, a telephone line repairer, received a serious electrical shock while working on a telephone line. Plaintiff was permitted to prove that an employee of defendant electric company had uncrossed electric and telephone lines near the accident, to establish that the lines had been crossed and that defendant's electricity was the cause of the injury.[38]

While many courts have recognized and allowed this class of admissible purposes,[39] none has attempted to explain why admission to prove an element of negligence is not the prohibited proof of negligence.[40] This category, moreover, has created a confusing situation. Under the doctrine of limited admissibility, the party against whom the evidence is admitted is entitled, upon request, to an instruction limiting the use of the evidence to the appropriate, permissible purpose.[41] Thus, a defendant might be entitled to an instruction limiting the use of evidence of repairs to the question of duty. But the concept of duty is integral to the theory of negligence; this inconsistency will probably confuse the jury, and render the limiting instruction futile.[42]

B. STRICT LIABILITY

These same principles governing admissibility in negligence actions generally have been applied in the admission of evidence of subse-

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[36] 5 Cal. App. 3d 548, 85 Cal. Rptr. 308 (1st Dist. 1970). *But see*, Runyon v. City of Los Angeles, 40 Cal. App. 383, 180 P. 837 (2d Dist. 1919).

[37] 157 Cal. 183, 106 P. 587 (1910).

[38] Another situation in which repair evidence will establish cause-in-fact occurs whenever a continuing injurious condition ceases when the repair is made. Thus in Texas & New Orleans R. Co. v. Anderson, 61 S.W. 424 (Tex. Civ. App. 1901), evidence that the water flooding plaintiff's premises ran off after defendant removed an obstruction to a drainage ditch was admissible to show that the obstruction caused the flooding.

[39] For additional examples of the use of repair evidence to prove elements of negligence, *see* Annots., 170 A.L.R. 7 (1947), 64 A.L.R. 2d 1296 (1959).

[40] An analysis of this inconsistency is beyond the scope of this article. One explanation advanced is that these are specific, narrow applications where evidence of subsequent repairs is so relevant that the policy considerations are outweighed. 2 WEINSTEIN, *supra* note 14, ¶ 407[03] at 407-13.

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

[42] 2 WEINSTEIN, *supra* note 14, ¶ 407[02] at 407-19. As to the futility of jury instructions in general, *see* 1 WEINSTEIN, *supra* note 14, ¶ 105[05] at 105-36; J. FRANK, LAW AND THE MODERN MIND 195-99 (Anchor ed. 1963).

quent repairs in strict liability actions.[43] In *Ault v. International Harvester Co.*,[44] however, the California Supreme Court concluded that the exclusionary rule does not apply to strict liability actions. *Ault* involved a suit for damages for injuries sustained in a crash allegedly caused by a defective auto part.[45] Plaintiff offered evidence that, since the accident, defendant auto manufacturer had begun using a stronger metal in making the part. Defendant objected to the evidence on the grounds that it was evidence of subsequent repairs barred by the exclusionary rule, and that the evidence was prejudicial.[46] Plaintiff argued that the evidence was admissible to prove the feasibility of making the repairs.[47] The court admitted the evidence. On appeal, the California Supreme Court could have affirmed the decision as properly admitted pursuant to the established purpose of proving feasibility.[48] Instead, the court affirmed by holding that the exclusionary rule did not apply in strict liability actions.

The basis for the decision was that California's unique version of strict liability does not technically come within the language of the codified exclusionary rule.[49] The exclusionary rule, as codified in section 1151 of the California Evidence Code, prohibits the use of evidence of subsequent repairs to prove "negligence or culpable con-

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[43] 2 WEINSTEIN, *supra* note 14, ¶ 407[01] at 407-5.

[44] 10 Cal. 3d. 337, 515 P.2d 313, 110 Cal. Rptr. 369 (1973) *vacated, rev'd on rehearing*, 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1975). On first hearing, the California Supreme Court reversed the plaintiff's $700,000 verdict because of the admission of repair evidence. The trial court had admitted it to show "the change had been made," and not for an admissible purpose. R.T. 195, as quoted in plaintiff's PETITION FOR REHEARING at 19. The 6-1 decision on rehearing is the subject of this discussion.

[45] Plaintiff contended that the allegedly defective gearbox broke, causing the International Harvester Scout in which he was riding to leave the roadway. 13 Cal. 3d at 117, 528 P.2d at 1150, 117 Cal. Rptr. at 814. Defendant contended that the Scout left the road through driver negligence or as a result of some other cause, and that the gearbox was broken in the crash. 10 Cal. 3d 337, 339, 515 P.2d 313, 315, 110 Cal. Rptr. 369, 371 (1973).

[46] R.T. 194-95, as quoted in plaintiff's PETITION FOR REHEARING at 18-19.

[47] At trial, plaintiff offered the evidence "to show prior feasibility by way of usage," R.T. 177, and "that it was a defective design and selection and usage of material for this particular . . . vehicle," R.T. 179, as quoted in plaintiff's PETITION FOR REHEARING at 18-19.

[48] *See* criticism of the decision on this basis in 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). Such a decision was reached on similar facts in Price v. Buckingham Mfg. Co., 110 N.J. Super. 462, 266 A.2d 140 (1970). *See* discussion of the distinction between California and New Jersey law *infra*, note 51.

[49] The Ault case was the first involving the exclusionary rule in the strict liability context to come before the court since its 1972 decision in Cronin v. J.B.E. Olsen Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972). In Cronin, the court explained that California's version of strict liability was different from the RESTATEMENT OF TORTS, SECOND, version. *See* note 51, *infra*.

duct."[50] Under California's strict liability theory,[51] the *Ault* court found that using repair evidence to prove that a product was merely

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[50] CAL. EVID. CODE § 1151 (West 1968) (*Subsequent Remedial Conduct*):

> When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event.

[51] Specifically, the *prima facie* case for strict liability in California consists of the following:

(1) That the seller placed the equipment on the market for use under circumstances where he knew that such equipment would be used without inspection for defects;

(2) that there was a defect in the manufacture or design of the equipment involved;

(3) that the user was not aware of said defect;

(4) that the equipment was being used for the purpose for which it was designed and intended to be used;

(5) that the injuries and damage complained of were proximately caused by the said defect; and

(6) the nature and extent of the injuries and damages sustained by the plaintiff.

Cronin v. J.B.E. Olsen Corp., 8 Cal. 3d 121, 130, 501 P.2d 1153, 1158, 104 Cal. Rptr. 433, 438 (1972). *See also* CAL. JURY INSTRUCTIONS--CIVIL (BAJI) 9.00 (West Supp. 1973), note.

This is in contrast to the version of strict liability adopted in most other jurisdictions based on the RESTATEMENT OF TORTS, SECTION § 402A (1965), which provides:

> (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
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> (a) the seller is engaged in the business of selling such a product, and
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> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
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> (2) The rule stated in Subsection (1) applies although
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> (a) the seller had exercised all possible care in the preparation and sale of his product, and
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> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

The marketing of an "unreasonably dangerous" product contains an element of fault and thus one court has held constitutes "culpable conduct." Price v. Buckingham Mfg. Co., 110 N.J. Super. 462, 266 A.2d 140 (1970). At that time, New Jersey had both a statute like California's exclusionary rule and presumably the RESTATEMENT, SECOND, version of strict liability. In 1973, however, New Jersey adopted the Cronin approach and dispensed with the "unreasonably dangerous" requirement. Glass v. Ford Motor Co., 123 N.J. Super, 599, 304 A.2d 562 (1973). New Jersey courts are now reconsidering the "unreasonably dangerous" requirement. Turner v. International Harvester Co., 133 N.J. Super. 277, 336 A.2d 62 (1975). For a general discussion of the "unreasonably dangerous" requirement and the consequences of its elimination, *see* Comment, *Elimination of "Unreasonably Dangerous" From § 402A — The Price of Consumer Safety?*, 14 DUQUESNE L.REV. 25 (1975).

In other jurisdictions where the exclusionary rule has not been codified, the problems of defining strict liability as culpable conduct do not exist. Since the common law rule excludes repair evidence only when it is offered to prove negligence, it would be enough to say that strict liability is not negligence.

defective, regardless of reasonableness, was not using the evidence to prove "culpable conduct."[52] The court concluded that the statute excluding repair evidence when offered to prove "negligence or culpable conduct" did not apply to strict liability actions.

The court then considered whether the rule ought to be judicially extended to apply to strict liability actions.[53] The court decided that the policy of encouraging repairs, which is the statutory rationale for the rule,[54] would not be furthered by extending the rule. First, the substantive law of strict liability is itself designed to encourage repairs through the imposition of liability. The exclusionary rule would hamper this imposition of liability by shielding defendants from relevant evidence.[55] Second, even if the rule did encourage repairs, it is not needed because there are other adequate incentives for the manufacturer to market safer products. The court cited economic and political pressure wielded by consumer groups and government agencies as producing such impetus.[56] An even greater incentive, the court argued, was the manufacturer's desire to avoid additional lawsuits over subsequent injuries and their adverse effect upon its public image.[57] In California, then, evidence of subsequent repairs may be admitted in strict liability actions if it is relevant and if it is otherwise admissible.

The *Ault* decision was reached as a result of the interaction of two factors. The first is that the exclusionary rule is codified in California.[58] The court therefore had to consider the applicability of the rule to strict liability actions in terms of the specific language of the statute. The second factor is California's unique version of strict liability, which allowed the court to get around the troublesome language.[59] Whether other jurisdictions will follow the *Ault* decision

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[52] 13 Cal. 3d at 118, 528 P.2d at 150-51, 117 Cal. Rptr. at 814-15 (1975).

[53] *Id.* at 118-21, 528 P.2d at 1151-53, 117 Cal. Rptr. at 815-17.

[54] CAL. EVID. CODE § 1151, Law Rev. Comm'n Comment (West 1968):

> The admission of evidence of subsequent repair would substantially discourage persons from making repairs after the occurrence of an accident.

See text accompanying notes 80-81, *infra.*

[55] *See* text accompanying notes 98-117, *infra.*

[56] 13 Cal. 3d at 119-20, 528 P.2d at 1152, 117 Cal. Rptr. at 816.

[57] *Id.*

[58] *See* CAL. EVID. CODE § 1151 (West 1968) set out at note 50, *supra.* The only other jurisdictions that have codified the exclusionary rule are New Jersey, N.J. EVID. R. 51; Kansas, KANS. CODE CIV. PROC. § 60-451; and the federal courts, FED. R. EVID. 407, *supra* note 5.

In contrast, when the Maine Supreme Judicial Court promulgated its Rules of Evidence, the exclusionary rule was expressly abandoned. ME. R. EVID. 407(a) 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 *admissible.* (Emphasis added.)

See Field, *The Maine Rules of Evidence*, 27 MAINE L. REV. 203, 217-19 (1975).

[59] *See* note 51, *supra.* Pennsylvania and New Jersey are the only jurisdictions that

for policy reasons remains to be seen.[60]

In summary, the general rule seems to be one of admission rather than exclusion. In California, evidence of subsequent repairs will usually be admissible despite the exclusionary rule. If strict liability is pled, the evidence is always admissible.[61] If only negligence is pled, the evidence usually can be admitted for numerous purposes other than proof of negligence.[62] These many admissible purposes have rendered the rule unpredictable because admission often depends on events at trial.[63] When the repair evidence is admitted pursuant to one of these purposes, moreover, the doctrine of limited admissibility requires the court to make limiting instructions to the jury.[64] This can result in great confusion, particularly when the instruction is to consider the evidence as proof of an element of negligence, but not as proof of negligence itself.[65]

If the exclusionary rule serves an important purpose, these extensive inroads should not be permitted. Rather, the admissible purposes should be curtailed and the rule literally enforced.[66] On the other hand, courts may have narrowed the rule in recognition that either the rule failed to serve its purpose or that the purpose was not as important as objectives that could be served by admitting the evidence.[67] The next section considers whether the reasons for the rule justify its continued existence.

II. RATIONALES FOR THE RULE

The rule excluding evidence of subsequent repairs evolved under two distinct rationales. Some early courts said that evidence of re-

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have followed the Cronin decision. *See*, Berkebile v. Brantly Helicopter Corp., 337 A.2d 893 (Pa. 1975), discussed in Comment, *Elimination of "Unreasonably Dangerous" from § 402A—The Price of Consumer Safety?*, 14 DUQUESNE L. REV. 25 (1975), and Glass v. Ford Motor Co., 123 N.J. Super, 599, 304 A.2d 562 (1973).

[60] *See* text accompanying notes 53-57, *supra*, and notes 51, 59, *supra*.

[61] Ault v. International Harvester Co., 13 Cal. 3d 113, 528 P.2d 1143, 117 Cal. Rptr. 812 (1975).

[62] *See* text accompanying notes 19-42, *supra*.

[63] Counsel may not be able to predict, for example, whether evidence will be presented that can be explained or rebutted by evidence of a subsequent repair. *See* text accompanying notes 20-23, *supra*. Similarly admission of this evidence to impeach a lay witness depends on the ability to elicit specific testimony from the person who made the repairs. *See* text accompanying notes 24-25, *supra*.

[64] *See* text accompanying notes 17 and 41-42, *supra*.

[65] 2 WEINSTEIN, *supra* note 14, ¶ 407[03] at 407-19.

[66] This was suggested by Justice Clark in his dissent, 13 Cal. 3d at 126, 528 P.2d at 1154, 117 Cal. Rptr. at 818 (1975). *See also* 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, 222-29 (1975); Note, *Evidence—California Supreme Court Holds Evidence of Subsequent Design Changes Admissible to Prove Design Defect*, 1975 UNIV. ILL. L. FORUM 288 (1975).

[67] In speaking of this exclusionary rule, Professor Slough said, "Enfeebling ex-

pairs made after an accident was irrelevant to the question of defendant's negligence at the time of the accident.[68] Other courts reasoned that the admission of such evidence would discourage the making of repairs after an accident.[69] Neither rationale has validity today.

A. LEGAL RELEVANCE

At the time the exclusionary rule was developed, the standard by which circumstantial evidence was determined to be admissible was "legal relevance."[70] That doctrine had two aspects. First, evidence had to be more than merely logically relevant to the proposition for which it was offered. This "plus value" requirement reflected the notion that there is some legal minimum quantity of probative value required for admission of circumstantial evidence.[71] Some courts went so far as to say that the evidence had to make the proposition "more likely than not."[72] Evidence of subsequent repairs was thought

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ceptions are known to point up the invalidity of a general rule." Slough, *Relevancy Unraveled*, 5 U. KAN. L. REV. 675, 709 (1956).

[68] *E.g.*, "The negligence of the employer which renders him responsible for the accident depends upon what he did and knew before the accident, and must be established by facts and circumstances which preceded it, and not by acts done by him after its occurrence . . . [the defendant] may have exercized all the care which the law requires, and yet in the light of a new experience, after an unexpected accident has occurred, he may adopt additional safeguards." Sappenfield v. Main Street & Agri. Park R. Co., 91 Cal. 48, 63, 27 P. 590, 593 (1891). And, in the words of Baron Bramwell, "[Admitting the evidence] would be . . . to hold 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).

[69] *E.g.*, "To hold that the adoption of such new appliances which experience has demonstrated are more efficient than those previously in use, or which invention has developed from observing the defects in those originally adopted, shall be an admission that he was negligent prior thereto would prevent the very conduct in employers which they should be urged to follow." Sappenfield v. Main Street & Agri. Park R. Co., 91 Cal. 48, 63, 27 P. 590, 593 (1891).

[70] 1 J. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS ON COMMON LAW § 12 at 39-40 (1st ed. 1904) [hereinafter cited as WIGMORE (1st ed.)] *See also* State v. Lapage, 57 N.H. 245, 288 (1876) where the court stated that:

> [A]lthough undoubtedly the relevance of testimony is originally a matter of logic and common-sense, still there are many instances in which the evidence of particular issues has been . . . so often ruled upon, that the united logic of a great many judges and lawyers may be said to furnish evidence of the sense common to a great many individuals, and therefore, the best evidence of what may be properly called common-sense, and thus to acquire the authority of law. It is for this reason that the subject of the relevancy of testimony has become, to so great an extent, matter of precedent and authority, and that we may with entire propriety speak of its legal relevancy.

[71] Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VANDERBILT L. REV. 385, 391-92 (1952).

[72] *Id.* at 390.

to lack the required minimum probative value, because inferences other than negligence were possible.[73]

The second aspect of the doctrine of legal relevance was that the "plus value" of kinds of evidence was determined by precedent rather than based upon the logical relation between the evidence and the fact that it was offered to prove in the particular case. Thus, once one appellate court had determined that a particular item of evidence lacked the requisite "plus value" of relevance, that determination governed subsequent decisions as to similar evidence.[74] Subsequent courts therefore focused on categories of evidence rather than any analysis of evidentiary principles, such as similarity of probative values or dangers.[75]

The doctrine of legal relevance has been rejected by most modern scholars[76] and all modern codes.[77] Thayer presented the now prevailing view that logic and experience, not precedent, determine whether a particular item of evidence is relevant to the proposition for which it is offered.[78] Thus, the categories and exceptions upon exceptions thereto that determined admissibility in the past have been replaced

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[73] 2 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 283, at 151 (3d ed. 1940) [hereinafter cited as 2 WIGMORE (3d ed.)].

[74] WIGMORE (1st ed.) note 70, at 391, 412. As Professor Trautman has noted:

> The concept of legal relevancy when applied literally excludes logically relevant evidence unless legal precedent authorizes admission.

[75] *Id.* at 391:

> When the spurious notion that there is a legal minimum quantity or probative value required in order to admit an item of circumstantial evidence is added to the . . . theory that legal precedent determines relevancy, it is not difficult to understand how the basic principles for determining the admissibility of circumstantial evidence have been so far relegated to the background as to be almost forgotten; and a vast morass of legal precedent presented in their stead, classified first in terms of the many different types of evidence offered, and secondly in terms of the type of probandum to be proved. A workable basic theory of admissibility should provide a method for solving all of the cases, and since the factual detail presented at trial of each case is always somewhat different, the results arrived at in previous cases should be of secondary importance.

[76] For example, Professor Trautman said:

> Because it [the legal relevance doctrine] depends entirely upon the digesting and classifying of cases in each state it results in a large number of cumbersome rules with exceptions and exceptions to the exceptions. Efficient trial administration requires a sound and efficient principle by which admissibility of circumstantial evidence may be determined. *Id.* at 412.

See also, MCCORMICK (2d ed.), *supra* note 10, § 185, and 1 WEINSTEIN, *supra* note 14, ¶ 401[06] at 401-19, 20.

[77] *See, e.g.*, CAL. EVID. CODE §§ 210, 350-52 (West 1968) set out at note 103, *infra*; FED. R. EVID. 401-02, *supra* note 4; UNIFORM RULES OF EVIDENCE, Comment on rule 1, paragraph 12.

[78] J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 265 (1898).

by the general principle that all evidence is admissible if it has "any tendency in reason" to prove the proposition for which it is offered.[79] Moreover, the "plus value" requirement of legal relevance has also been discarded. Evidence is no longer excluded simply because it has only a slight probative value.[80]

B. PUBLIC POLICY

Although the repair rule is the product of the discarded doctrine of legal relevance, the rule was retained in the modern codes because of the extrinsic policy of encouraging repairs. This rationale for the rule arose from the belief that it was unfair to use evidence of repairs against the repairer because such conduct benefitted society.[81] This belief led to the further reasoning that admission of evidence of subsequent repairs was a penalty that would discourage the making of repairs.[82]

This rationale has been criticized for a number of reasons.[83] First, other incentives that encourage repairs are generally sufficient to overcome the impact of admitting such evidence. For example, many defendants will make repairs to be able to use the injury-causing equipment or premises safely themselves. Another important motivation, as pointed out in the *Ault* opinion, is the desire to avoid additional accidents.[84] This may be a purely altruistic effort to prevent subsequent serious injuries, or a more self-interested purpose of avoiding additional lawsuits. Repairs would thus be made even if they led to the imposition of liability in one case, to avoid additional injuries. Another evidence rule, moreover, threatens liability for failure to repair. Evidence of the original accident would be admissible in such a subsequent lawsuit to prove the defendant knew of—and failed to repair—the dangerous condition.[85] These provide the tortfeasor with strong incentives to make repairs.

The modern widespread use of liability insurance is a second basis

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[79] CAL. EVID. CODE § 210 (West 1968).

[80] MCCORMICK (2d ed.), *supra* note 10, § 185.

[81] *See* note 69, *supra*. *See also* Morse v. Minneapolis & St. Louis Ry. Co., 30 Minn. 465, 16 N.W. 358 (1883).

[82] In *Sappenfield*, for example, the California Supreme Court said:

> It would be a harsh rule to hold that in all cases of accident resulting from defective appliances the employer is to be held accountable for a negligence which is established solely by his efforts to avoid its recurrence . . .

91 Cal. 48, 62, 27 P. 590, 593. *See also* cases cited in Annot., 170 A.L.R. 20-25 (1947).

[83] *See, e.g.*, 2 WEINSTEIN, *supra* note 14, ¶ 407[02] at 407-9, 10; Schwartz, *The Exclusionary Rule on Subsequent Repairs—A Rule in Need of Repair*, 7 FORUM 1, 6-7 (1971); Davis, *Evidence of Post-Accident Failures, Modifications and Design Changes in Product Liability Litigation*, 6 ST. MARY'S L.J. 792 (1975).

[84] 13 Cal. 3d at 120, 528 P.2d at 1152, 117 Cal. Rptr. at 816 (1975).

[85] *Id. See also*, Comment, *Similar Facts Evidence: Materiality, Logical Relevance and Discretionary Exclusion*, this volume.

for criticism of the rationale of encouraging repairs. The exclusionary rule presumes repairs are encouraged if defendants believe that evidence of the repairs will not be admitted against them. Liability insurance, however, insulates the negligent from liability and therefore renders unnecessary the incentive that is provided by the exclusionary rule. Moreover, the insurance company, which is directly affected by liability, will require its insured to make repairs to avoid additional accidents and their concomitant liability. Thus, the exclusionary rule fails to encourage repairs by the insured defendant.[86]

Finally, it is doubtful that the exclusionary rule could accomplish its objective. The many admissible purposes created by the courts undermine any impact the rule might have in encouraging repairs.[87] Defendants cannot rely on such an unpredictable rule. As it now exists, therefore, the rule quite probably does not encourage repairs.[88]

III. POLICIES FAVORING ADMISSIBILITY

A. TORT POLICIES

Not only does the rule not encourage repairs, but important tort policies can only be served if evidence of subsequent repairs is freely admissible. Courts and legislatures have taken many approaches to the goal of encouraging safe conduct. The exclusionary rule was such an attempt. Unfortunately, the rule now seriously interferes with other policies designed to enhance safety.

The most significant judicial efforts to encourage safety are developments in substantive tort law. Tort law is a system for deciding who should bear the burden of an injury caused by the actions of another.[89] One basis for the allocation-of-loss decision in negligence theory is responsibility or "fault." The basic premise of negligence law is that the one who is responsible for the injury should pay for it.[90] The concept of responsibility has been broadened so as to include increasingly more defendants. Examples of judicial extension of liability include the abolition of the automobile guest law,[91] the development of strict liability,[92] and the adoption of comparative

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[86] 2 WEINSTEIN, *supra* note 14, ¶ 407[02] at 407-10.
[87] *See* text accompanying notes 19-42, *supra*.
[88] *See* text accompanying notes 83-86, *supra*.
[89] PROSSER (4th ed.), *supra* note 32, § 1 at 6.
[90] *Id.* §§ 29 at 142. Under negligence theory, defendants are "responsible for damage done only if they have been at fault . . . ."
[91] Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).
[92] Greeman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 691 (1963). Similarly, the California Supreme Court has rejected the narrow categories of "licensee" and "invitee" in determining and limiting the scope of the duty of a landowner to an injured person. Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

negligence.[93] This continuing policy of expanding liability can be seen to encourage safety because the threat of liability for causing harm is an incentive to be safety conscious.[94]

A major basis for allocating the burden of injuries in strict liability theory is that of "capacity to bear the loss."[95] This policy encourages safety in two ways. First, the threat of liability again operates as an incentive to make safe products.[96] Second, by punishing the defendant who is best able to bear the burden of losses or avoid similar injuries, the likelihood of safety measures is enhanced.[97] For example, manufacturers are thought best able to bear the loss of product-caused injuries or avoid them because they can distribute the costs of liability for a prior injury or safety measures to prevent future accidents to society at large through prices.[98] A product that is socially desirable but unavoidably dangerous would command a higher price, to include the amount paid to injured users. Similarly, and more importantly, costly safety measures that avoid subsequent liability will also be financed through higher prices.[99]

Thus, tort law can encourage safety only when liability is imposed on the proper party. The exclusionary rule interferes with this allocation process because it keeps from the trier of fact relevant evidence that might lead to the imposition of liability. The exclusionary rule is thus inconsistent with the very policy it is intended to serve.

B. EVIDENCE LAW POLICIES

Changes in evidence law also favor the admissibility of evidence of subsequent repairs. At the time the rule arose, admissibility of evidence was determined according to precedent.[100] This led to the development of a large body of rigid rules of admission and exclusion.[101] In contrast, modern evidence law minimizes the role of precedent and allows the trial court to determine admissibility on the merits of the evidence before it.[102] The modern view is that all logically rele-

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[93] Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

[94] Ault v. International Harvester Co., 13 Cal. 3d 113, 120, 527 P.2d 1148, 1152, 117 Cal. Rptr. 812, 816 (1975).

[95] Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

[96] Ault v. International Harvester Co., 13 Cal. 3d 113, 120, 527 P.2d 1148, 1152, 117 Cal. Rptr. 812, 816 (1975).

[97] PROSSER (4th ed.), *supra* note 32, § 4 at 22.

[98] *Id.*

[99] *Id.*

[100] *See* text accompanying notes 74-80, *supra.*

[101] TRAUTMAN, *supra* note 71, 391-92 (1952).

[102] *Id.* at 393-94.

vant evidence should be admitted unless there is some reason to exclude it.[103]

The development of the rule against evidence of subsequent repair is a good illustration of the former approach to admissibility. In 1869, in *Hart v. Lancashire & Yorkshire Ry. Co.*,[104] the only evidence plaintiff offered of defendant's negligence was of its subsequent repair.[105] The Exchequer court held that the verdict for the plaintiff was improper because evidence of the repairs made *after* the accident was not relevant to the defendant's duty *before*. This language was seized on by other courts and solidified into a "rule" of excluding repair evidence.[106] Because one appellate court had weighed such evidence in one case and found it lacking, other courts did not reweigh the evidence as a class.[107] The various admissible purposes were developed and followed in the same manner.[108]

Most rules excluding categories of evidence have been replaced by a general rule of admission and a case-by-case evaluation of any need to exclude a given item of evidence.[109] The modern and code approach requires the trial court to make these determinations, reviewable only for abuse of discretion.[110] This approach is based on the recognition that the trial is an adversary process involving factors

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[103] *See, e.g.*, CAL. EVID. CODE §§ 350-52 (West 1968):

§ 350. (*Only relevant evidence admissible.*)
No evidence is admissible except relevant evidence.

§ 351. (*Admissibility of relevant evidence.*)
Except as otherwise provided by statute, all relevant evidence is admissible.

§ 352. (*Discretion of court to exclude evidence.*)
The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, or confusing the issues, or of misleading the jury.

[104] 21 L.T.R. N.S. 261 (1869) (England).

[105] The accident occurred when an engineer collapsed while taking an engine to coal; there was no empty track to which the runaway train could be switched. The subsequent repair undertaken by the railroad was the addition of a short, dead-end line near the coal shed to which other runaways could be switched.

[106] Slough, *Relevancy Unraveled*, 5 U. KAN. L. REV. 675, 705-06; MCCORMICK (2d ed.), *supra* note 10, § 275 at 666; Comment, *The Repair Rule: Maine Rule of Evidence 407(a) and the Admissibility of Subsequent Remedial Measures in Providing Negligence*, 27 MAINE L. REV. 225, 227 (1975).

[107] *See, e.g.*, Columbia & Puget Sound R. Co. v. Hawthorne, 144 U.S. 202 (1892) and Morse v. Minneapolis & St. Louis R. Co., 30 Minn. 465, 16 N.W. 358 (1883). The public policy rationale was developed at the same time; the existence of two rationales for the rule probably encouraged courts to not closely examine either one. Thus, McCormick criticized this evidence law basis for the rule but accepted without comment the public policy rationale. MCCORMICK (2d ed.), *supra* note 10, § 275 at 666.

[108] TRAUTMAN, *supra* note 71 at 412 (1952).

[109] *See, e.g.*, CAL. EVID. CODE §§ 210 and 350-52 (West 1968) and FED. R. EVID. 401, 403, *supra* note 4.

[110] 1 WEINSTEIN, *supra* note 14, ¶ 401[01] at 401-7 (1975).

that the appellate court does not have the opportunity to evaluate.[111] The purpose of the modern evidence approach is to ensure that all relevant evidence is available to the trier of fact unless some circumstance requires its exclusion.[112] This broad presumption of the admissibility of relevant evidence is counterbalanced with the trial judge's discretion to exclude relevant evidence for reasons of prejudice or other policies of exclusion.[113]

Despite the modern trend to admit all relevant evidence, all jurisdictions, except Maine, have retained the rule excluding evidence of subsequent repairs.[114] It is generally believed that there is "some reason to exclude" repair evidence; that reason is the policy of encouraging repairs.[115] That rationale is invalid, however, because the exclusionary rule is ineffective in encouraging repairs.[116] Tort policies that seek to encourage repairs require the admissibility of repair evidence.[117] The policy of the modern evidence law is to admit all relevant evidence unless policy reasons require its exclusion. The exclusionary rule deprives the trier of fact of relevant evidence for reasons of precedent rather than policies of excluding flawed evidence.[118] Thus, modern evidence law policies also favor the admissibility of repair evidence.

IV. DISCARDING THE EXCLUSIONARY RULE

The exclusionary rule and its admissible purposes represent a long established procedure for treating a class of evidence. A rule that has lasted over a hundred years should not be discarded without first examining how the evidence would be treated if there were no rule. Any alternative treatment of repair evidence should attempt to accomplish the exclusionary rule's objectives, yet not create the same problems.

The original reason for excluding repair evidence was that evidence of what occurred after an accident was irrelevant to the question of prior negligence. The concept of irrelevance then included the notion that evidence should be excluded for probative dangers or low probative value. These problems of irrelevance, probative dangers, and low probative value afflict all evidence. There is no reason to suppose that the general requirement of relevance,[119] the trial court's discre-

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[111] *Id.* at 401-7, 8.
[112] Advisory Committee's Note to FED. R. EVID. 401 (1975).
[113] *See* CAL. EVID. CODE § 352 (West 1968), set out at note 103, *supra* and FED. R. EVID. 403, *supra* note 4
[114] *See* note 4, *supra.*
[115] *E.g.*, MCCORMICK (2d ed.), *supra* note 10, § 275 at 666.
[116] *See* text accompanying notes 19-42 and 83-86, *supra.*
[117] *See* text accompanying notes 89-99, *supra.*
[118] *See* text accompanying notes 101-13, *supra.*
[119] *See* CAL. EVID. CODE § 350 (West 1968), set out at note 103, *supra*, and

tionary power to exclude relevant evidence,[120] and the trier of fact's ability to weigh evidence would fail to adequately screen repair evidence for these evils.[121]

The second rationale for the rule was that of public safety. That, too, can be better served if the rule were abandoned.[122] When the repair evidence is relevant, its admission will aid the trier of fact in imposing liability on the proper party.[123] It is the imposition of liability—not the infrequent and unpredictable exclusion of relevant evidence—that can encourage defendants to engage in safer conduct. Every purpose the rule was intended to accomplish will be served as well or better if the rule is abandoned.

Additionally, the problems of the exclusionary rule can be avoided if the rule were abandoned. One difficulty with the rule is its unpredictable, almost capricious, application.[124] Without the rule, relevant evidence of subsequent repair would be *prima facie* admissible under the modern evidence law.[125] Attorneys can better predict the admission of repair evidence based on this threshold test of relevance. Admission would no longer be predicated on the chance occurence of opportunities to explain other evidence or impeach a witness at trial.[126]

Without the exclusionary rule, jurors would no longer have to contend with confusing and probably futile limiting instructions.[127] Evidence of subsequent repairs would not need to be limited to a specific purpose. Thus, the problems associated with the rule can be avoided by discarding the rule.

It is important to realize that the abandonment of the exclusionary rule will not inequitably affect defendant's interests. The *Ault* situation illustrates how this can be advantageous to defendants in several respects. First, the vast array of admissible purposes now often allow the evidence, despite the rule, as in *Ault* where the evidence could have been admitted on the issue of feasibility.[128] As a general rule, then, defendants would not be in a different position if the exclusionary rule were discarded. Second, the debate over whether the

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FED. R. EVID. 401, *supra* note 4.

[120] *See* CAL. EVID. CODE § 352 (West 1968), set out at note 103, *supra*, and FED. R. EVID. 403, *supra* note 4.

[121] In fact, because the many admissible purposes so often circumvent the exclusionary rule, these general principles usually govern repair evidence admissibility today.

[122] *See* text accompanying notes 89-99, *supra*.

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

[124] *See* text accompanying notes 19-29, *supra*.

[125] TRAUTMAN, *supra* note 71 at 413 (1952).

[126] *See* text accompanying notes 19-29, *supra*.

[127] *See* text accompanying notes 41 and 42, *supra*.

[128] Plaintiff had offered the evidence for that purpose. 13 Cal. 3d at 126, 527

evidence is of repairs and whether it comes within a recognized exception can distract the trial court from the equally applicable requirements of relevance and the danger of prejudice to the defendant.[129] This may have occurred in the *Ault* trial: the court did not respond to defendant's objection as to prejudice.[130] The distraction of the argument over the rule may have resulted in the admission of evidence that, by general standards, would have been excluded as unduly prejudicial. As pointed out in Justice Clark's dissent, the issue could have been proven with less prejudicial evidence.[131] Thus, the abandonment of the exclusionary rule may help defendants "refocus" the courts on the question of the merits of the evidence.[132]

Finally, without the exclusionary rule, evidence of subsequent repairs is properly admissible because defendants would be free to rebut any implication of negligence presented by the evidence. In common law jurisdictions, evidence of subsequent repairs would be admissible over a hearsay objection, as an admission of a party opponent.[133] The rationale for admitting the admissions of a party

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P.2d at 1156, 117 Cal. Rptr. at 820 (1975) (Clark, J., dissenting).

[129]TRAUTMAN, *supra* note 71, at 413 (1952), and James, *Relevancy, Probability and the Law*, 29 CAL. L. REV. 689, 702-03 (1941).

[130]R.T. 194-195, as quoted in plaintiff's PETITION FOR REHEARING at 19.

[131]13 Cal. 3d at 127, 527 P.2d at 1157, 117 Cal. Rptr. at 821 at footnote 3 (1975). Other available evidence that could have shown the feasibility of using the stronger metal for the part was that defendant and other manufacturers were using that metal for that part in other vehicles prior to the accident.

While conceding that evidence of subsequent repairs is not invariable prejudicial (in excess of its probative value), Justice Clark in his dissent in the *Ault* case argued that the evidence had generally low probative value and high risks. 13 Cal. 3d at 126, 527 P.3d at 1156, 117 Cal. Rptr. at 820 (1975), citing McCormick and Wigmore. He therefore advocated that this evidence be subjected to a higher balancing standard than that applied to other evidence. Specifically, he argued that the court should adopt as to evidence of subsequent repairs the same high standard previously applied in Hrnjak v. Graymar, Inc., 4 Cal. 3d 725, 484 P.2d 599, 94 Cal. Rptr. 623, 47 A.L.R.3d 224 (1971), to evidence of reimbursement from a collateral source.

> . . . before evidence of subsequent change is received as relevant to a proper issue the party introducing the evidence must persuasively satisfy the trial court that the "issue on which it is offered is of substantial importance and is actually, and not merely formally in dispute, that the plaintiff cannot establish the fact to be inferred conveniently by other proof, and consequently the need for the evidence outweighs the danger of its misuse." [Footnotes omitted.]

13 Cal. 3d at 126-27, 527 P.2d at 1157, 117 Cal. Rptr. at 821.

The test is not necessary as to evidence of subsequent repairs for two reasons. The first is that the trial court can, in its discretion, exclude any evidence that appears to be unduly prejudicial or have other dangers. Secondly, unlike the rule excluding evidence of reimbursement from a collateral source, the rule excluding evidence of subsequent repairs cannot be justified by policy considerations. *See* text accompanying notes 81-11, *supra*.

[132]JAMES, *supra* note 129, 703-05 (1941).

[133]MCCORMICK (2d ed.), *supra* note 10, §§ 250, 275. Compare FED. R. EVID. 801, *supra* note 4, and CAL. EVID. CODE § 1200, which provide that only statements (assertive conduct) can be hearsay.

opponent is that in our adversary system a party has the full opportunity to explain prior assertions or conduct.[134] The defendant-repairer is free to explain other reasons for having made the repairs. Beyond the protection that the adversary system provides in the opportunity to rebut evidence of subsequent repairs, the defendant is entitled to have such evidence excluded if irrelevant or if the trial court agrees that admission would be unfairly prejudicial to the defendant.[135] Thus, the rule should be discarded not only because of the problems caused by the rule but also because the adversary system can be trusted to adequately effect its purposes and fairly treat the defendant.

V. CONCLUSION

The many admissible purposes for evidence of subsequent repairs renders the operation of the rule unpredictable for the attorneys who must deal with it. The limiting instructions that must be given, when the evidence is so admitted, are confusing for the jurors. The rule is not needed to address problems of relevance nor probative dangers; neither does it encourage repair. Important tort and evidence law policies, moreover, favor the admission of relevant repair evidence. Finally, the objective of the exclusionary rule could be accomplished, without inequity to defendants, by discarding the rule and its attendant problems. The exclusionary rule should, therefore, be discarded.

The legislatures can, of course, abolish the exclusionary rule by repealing the appropriate statutes. In an analogous situation, the California legislature has modified a similarly confusing and unnecessary rule of evidence. Under the common law,[136] prior inconsistent statements were admissible only for impeachment and not as proof of the matter asserted therein. Juries were given instructions limiting the use of the evidence to the proper purpose. The legislature recognized the likely futility of such instructions when it enacted section 1235 of the California Evidence Code.[137] That enactment allows the use of prior inconsistent statements as proof of the matter asserted. Similarly, evidence of subsequent repairs is now generally admitted despite the exclusionary rule. The remaining effect of the rule is to qualify the admitted repair evidence with limiting instructions that are probably similarly ineffective. Given the confusion resulting from

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[134] MCCORMICK (2d ed.), *supra* note 10, § 262.

[135] *See, e.g.*, CAL. EVID. CODE § 352 (West 1968), set out at note 103, *supra*, and FED. R. EVID. 403, *supra* note 4.

[136] MCCORMICK (2d ed.), *supra* note 10, § 39.

[137] CAL. EVID. CODE § 1235, Law Rev. Comm'n Comment (West 1968).

those instructions and general invalidity of the rule, the California legislature should also discard the rule against evidence of subsequent repairs.

The judicially created exclusionary rule can, of course, be judicially discarded in non-code jurisdictions. Those other jurisdictions that have not codified their evidence law can decline to include the rule if such codification is undertaken, as was done in Maine.[138]

In California, moreover, the codified rule can also be discarded judicially. The California Supreme Court, in *Li v. Yellow Cab Co.*,[139] discarded a rule that had been codified for over one hundred years.[140] In that case, the rule that any contributory negligence by plaintiff prohibited recovery was discarded despite its codification. The California Supreme Court held that codification of existing law, when that law was of judicial origin, did not preclude continuing judicial evolution.[141] Like the contributory negligence statute, the rule against evidence of subsequent repairs was also a codification of existing law.[142] The exclusionary rule can, therefore, similarly be judicially rejected.

The rule against evidence of subsequent repairs was developed by evidence doctrines of the past. It results in unpredictable, inconvenient, and confusing application today. The rule's exclusion of relevant evidence cannot be justified in the face of tort and evidence policies that require liberal admissibility. The exclusionary rule can and should be discarded in the future.

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[138] ME. R. EVID. 407(a).
[139] 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).
[140] CALIFORNIA CIVIL CODE § 1714, *Contributory Negligence*, was enacted in 1872, and has not since been amended. *Id.* at 813, 532 P.2d at 1232, 119 Cal. Rptr. at 864, note 7.
[141] 13 Cal. 3d at 821, 532 P.2d at 1238, 119 Cal. Rptr. at 870.
[142] CAL. EVID. CODE § 1151, Law Rev. Comm'n Comment (West 1968).