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An Exception to the Exceptions: The Subsequent Repair Rule in Montana

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AN EXCEPTION TO THE EXCEPTIONS: THE SUBSEQUENT REPAIR RULE IN MONTANA

I. INTRODUCTION

Should evidence of repairs performed after an accident be admissible in a lawsuit as proof of negligence or culpable conduct? For example, an elderly woman trips on a large crack in a grocery store sidewalk, which causes her to fall and break her arm. Assuming there is a trial, it is generally accepted that evidence of a post-accident repair is not admissible to prove the negligence of the grocery store in failing to maintain the sidewalk properly.[1] There are many diverse views, however, on the wisdom of either admitting or excluding evidence of subsequent repairs as proof of negligence.[2] This comment proposes that subsequent repair evidence should be admissible to prove negligence. Specifically, this comment will demonstrate that the social policy for excluding such evidence has been undercut by the various exceptions to the so-called "repair rule."[3] To substantiate this position, this comment will begin with a brief overview of the historical and theoretical justifications for the repair rule. This will be followed by an examination of subsequent repair decisions in Montana which show that the exceptions to the repair rule have weakened the social policy. Finally, Maine Rule 407(a),[4] which admits subsequent repair evidence as proof of negligence, will be offered as an alternative for Montana.

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1. Columbia and Puget Sound R.R. v. Hawthorne, 144 U.S. 202 (1892); Hart v. Lancashire & Y. Ry., 21 L.T.R. (n.s.) 261 (Ex. 1869); FED. R. EVID. 407; 2 WIGMORE ON EVIDENCE § 283 (J. Chadbourn rev. 1979) [hereinafter cited as WIGMORE]; C. MCCORMICK, EVIDENCE § 275 (2d ed. 1972) [hereinafter cited as MCCORMICK]; Annot., 64 A.L.R.2d 1296 (1959); Annot., 170 A.L.R. 7 (1947).

2. *See, e.g.*, Note, *Admissibility of Subsequent Remedial Measures*, 32 OKLA. L. REV. 371 (1979); Soo Hoo & Soo Hoo, *Evidence of Subsequent Repairs: Yesterday, Today, and Tomorrow*, 9 U. CAL. DAVIS L. REV. 421 (1976); Field, *The Maine Rules of Evidence: What They are and How They Got That Way*, 27 ME. L. REV. 203 (1975); Comment, *The Repair Rule: Maine Rule of Evidence 407(a) and the Admissibility of Subsequent Remedial Measures in Proving Negligence*, 27 ME. L. REV. 225 (1975) [hereinafter cited as *Repair Rule*]; Schwartz, *The Exclusionary Rule of Subsequent Repairs—A Rule in Need of Repair*, 7 FORUM 1 (1971); [hereinafter cited as Schwartz]; Falknor, *Extrinsic Policies Affecting Admissibility*, 10 RUTGERS L. REV. 574 (1956).

3. The rule excluding evidence of subsequent remedial measures is known by several names. For purposes of this comment, the term "repair rule" will be used to refer to the exclusions of all post-accident remedial measures.

4. ME. R. EVID. 407(a).

II. JUSTIFICATIONS FOR THE REPAIR RULE

A. *Historical Justifications for the Repair Rule*

Early decisions, both English and American, indicate that excluding evidence of subsequent repairs as proof of negligence was a settled rule of evidence. In *Hart v. Lancashire & Y. Ry.*,[5] Baron Bramwell noted that the repair rule eliminated the notion that subsequent repairs tended to prove the repairer was negligent. According to the Baron, the law rejects the idea that "because the world gets wiser as it gets older, therefore it was foolish before."[6] Similarly, in *Morse v. Minneapolis & St. Louis Ry. Co.*,[7] the Minnesota Supreme Court concluded that evidence of subsequent repairs was inadmissible in any case as proof of prior negligence.[8] The United States Supreme Court recognized the validity of the repair rule when it stated:

> But, it is now settled, upon much consideration, by the decisions of the highest courts of most of the states in which the question has arisen, that the 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 a prejudice against the defendant.[9]

These early court decisions reflect strong opposition to the

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5. 21 L.T.R. (n.s.) 261 (Ex. 1869).

6. *Id.* at 263. Baron Bramwell prefaced this often-quoted statement as follows:

> I agree with the Lord Chief Baron and my Brother Brett, and confess that I cannot see any evidence of negligence in this matter. Although I have no desire to occupy time unnecessarily, I think there are matters of considerable importance involved in this particular case. One of them is, that people do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous.

Id.

7. 30 Minn. 465, 16 N.W. 358 (1883). *Accord*, Sappenfield v. Main Street R.R., 91 Cal. 48, 27 P. 590 (1891); Helling v. Schindler, 145 Cal. 303, 78 P. 710 (1904).

8. Morse, 30 Minn. at 468, 16 N.W. at 359. The court's rationale for excluding evidence of subsequent repairs was based upon the need to encourage repairs:

> A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence.

Id.

9. Columbia & Puget Sound R.R. v. Hawthorne, 144 U.S. 202, 207 (1892).

admission of subsequent repair evidence, and conclude that a person should be able to adopt additional safeguards without having such acts construed as an admission of negligence. From these origins evolved the modern day justifications for the exclusion of post-accident repairs.

B. *Modern Day Justifications for the Repair Rule*

Two reasons generally given for the exclusion of subsequent repair evidence as proof of negligence are: (1) the evidence is not sufficiently relevant to the issue of negligence to allow its admission; and (2) the evidence would, by its admission, discourage owners from performing the necessary corrective measures. In analyzing the first reason, Professor Wigmore notes that prior negligence cannot consistently be inferred from evidence of subsequent repairs.[10] Rather, the inference derived from the repair indicates only that the object was capable of causing the injury. This is consistent with the belief that the injury may have been caused by accident or by contributory negligence, rather than by the owner's negligence.[11] Consequently, evidence of subsequent repairs may not be relevant to the issue of negligence and, according to Professor Wigmore's analysis, should be excluded.

The second and most predominant reason offered for excluding evidence of subsequent repairs is the social policy of encouraging, or at least not discouraging, remedial safety measures by potential defendants.[12] This argument has also been analyzed by Professor Wigmore:

> That argument is that the admission of such acts, even though theoretically not plainly improper, would be liable to over-emphasis by the jury, *and that it would discourage all owners, even those who had been genuinely careful, from improving the place or thing that caused the injury, because they would fear the evidential use of such acts to their disadvantage*; and thus not only would careful owners refrain from such improvements, but even careless ones, who might have deserved to have the evidence adduced against them, would by refraining from improvements subject innocent persons to the risk of the recurrence of the injury.[13]

Full implementation of this social policy would result in evidence of subsequent repairs always being excluded. However, this

10. WIGMORE § 283(4).
11. *Id.*
12. MCCORMICK § 275.
13. WIGMORE § 283(4) (emphasis added).

is not the law today. Evidence of subsequent repairs might be admissible under one of the exceptions to the repair rule. Recall the elderly woman who tripped on the grocery store sidewalk. Evidence of the post-accident repair may be admissible: (1) to prove ownership or control of the premises where the injury occurred; (2) to show feasibility of the precautionary measure; (3) to impeach a witness; or (4) to show the physical conditions existing at the time the accident occurred.[14]

Professor McCormick has recognized that the admission of subsequent repair evidence for other purposes could defeat the predominant social policy.[15] He warns courts to consider carefully the possibility of excluding such evidence when appropriate:

> It is submitted that before admitting the evidence for any of these other purposes, the court should be satisfied 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 that the need for the evidence outweighs the danger of its misuse.[16]

Nonetheless, the exceptions to the repair rule have undermined the social policy of encouraging repairs by presenting relevant evidence related to such other purposes to the trier of fact. Consequently, the repair rule is prevented from effectively achieving its goals.[17] Additionally, there seems to be increasing liberality in admitting subsequent repair evidence under an exception to the rule. This trend is prevalent in Montana as well.

III. The Montana Treatment of Subsequent Repairs

On July 1, 1977, the Montana Rules of Evidence became effective by Supreme Court Order No. 12729 for all trials after that date.[18] As a result, Rule 407, which excludes evidence of subsequent remedial measures as proof of negligence or culpable conduct, is now the law in Montana,[19] and conforms with the majority position.[20] Montana Rule 407 states:

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14. These are the most widely recognized exceptions to the repair rule. For more discussion, *see* Comment, *Admissibility of Evidence of Subsequent Safety Measures*, 37 Texas L. Rev. 478 (1959).

15. McCormick § 275.

16. *Id.*

17. Schwartz, *supra* note 2, at 6.

18. 34 St. Rptr. 302A (1976).

19. Mont. R. Evid. 407.

20. *See, e.g.*, N.J. Evid. R. 51 (1971); Cal. Evid. Code § 1151 (West 1968); Kan. Stat. Ann. § 60-451 (Vernon 1964). It is worth noting that in California section 1151 has been

> 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.[21]

Montana Rule 407 is identical to Federal Rule 407 and was intended to promote the same social policy.[22] For analysis, the subsequent repair decisions in Montana may be divided into pre-Rule 407[23] and post-Rule 407 categories. Pre-Rule 407 decisions in Montana have consistently admitted evidence of subsequent repairs under an exception to the repair rule, as have many decisions based upon the federal rule.[24] This trend continued after the adoption of Rule 407, which simply codified the exceptions to the repair rule.[25] An examination of subsequent repair decisions in Montana shows that the exceptions have been applied more frequently than the actual repair rule and, as a result, the social policy is no longer a persuasive reason for denying the admission of subsequent repair evidence as proof of negligence.

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held inapplicable in actions against manufacturers based on strict liability in tort. Ault v. International Harvester Co., 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974).

21. MONT. R. EVID. 407.

22. Commission Comment to MONT. R. EVID. 407.

23. Montana subsequent repair decisions prior to the adoption of Rule 407: Lawlor v. County of Flathead, ___ Mont. ___, 582 P.2d 751 (1978); Teesdale v. Anschutz Drilling Co., 138 Mont. 427, 357 P.2d 4 (1960); Titus v. Anaconda Copper Mining Co., 47 Mont. 583, 133 P. 677 (1913); Pullen v. City of Butte, 45 Mont. 46, 121 P. 878 (1912); May v. City of Anaconda, 26 Mont. 140, 66 P. 759 (1901); Leonard v. City of Butte, 25 Mont. 410, 65 P. 425 (1901).

24. *See, e.g.,* Bailey v. Kawasaki-Kisen K.K., 455 F.2d 392 (5th Cir. 1972) (upheld the admission of subsequent repair evidence to show the physical condition existing at the time of the accident); Powers v. J. B. Michael & Co., 329 F.2d 674 (6th Cir. 1964) (upheld the admission of subsequent repair evidence to show control); Steele v. Wiedemann Machine Co., 280 F.2d 380 (3d Cir. 1960) (upheld the admission of subsequent repair evidence to show the physical condition existing at the time of the accident); Johnson v. United States, 270 F.2d 188 (9th Cir. 1959) (upheld the admission of subsequent repair evidence to show the feasibility of the repair); Fine v. Giant Food Stores, Inc., 163 F.Supp. 231 (D. D.C. 1958) (evidence of subsequent repairs admitted to show the physical condition existing at the time of the accident).

25. MONT. R. EVID. 407. Note, however, that the language of Rule 407 is not all inclusive regarding the exceptions to the general rule: "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." (emphasis added.) Therefore, a purpose other than those enumerated may qualify as an exception and allow the subsequent repair evidence to be admitted, so long as that purpose does not prove or tend to prove negligence or culpable conduct.

A. *Pre-Rule 407 Case Law*

One of the earliest subsequent repair decisions in Montana is *May v. City of Anaconda*.[26] In *May*, the plaintiff sustained injuries when the wagon he was driving after dark collided with a boulder in the street. Evidence was presented by the plaintiff that the city removed the boulder from the street following the accident. The Montana Supreme Court ruled that such evidence was inadmissible to show negligence on the part of the city in failing to remove the boulder prior to the plaintiff's accident. The court, however, also ruled that evidence of the subsequent removal was admissible to show that the portion of the street where the accident occurred was under control of the city.[27] Consequently, an exception to the repair rule prevailed, and the evidence was admitted.

A similar result was reached in *Pullen v. City of Butte*.[28] This case arose after the plaintiff received injuries from tripping on a six-inch uprise in a city sidewalk. The defendant contended that the trial court erred in allowing a witness to answer a question regarding the repair to the uprise after the accident. Objection to the immateriality of the question was overruled by the trial judge and the witness was allowed to respond. On appeal, the Montana Supreme Court upheld the action of the trial judge, stating that the question tended to show the physical conditions existing at the time the accident occurred.[29] The court cautioned, however, that "[g]reat care should be exercised, . . . in admitting this sort of testimony and in guarding against its effect, lest the jury get the notion that evidence of subsequent changes or repairs is evidence of confession of prior negligence."[30] The supreme court reversed the trial court decision, however, and ruled in favor of the defendant on other grounds.[31]

Pullen v. City of Butte involves two significant points. First, the supreme court admitted evidence of subsequent repairs and justified the admission under an exception to the repair rule. Second, the supreme court realized that the policy of the repair rule

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26. 26 Mont. 140, 66 P. 759 (1901). The earliest subsequent repair decision in Montana is Leonard v. City of Butte, 25 Mont. 410, 65 P. 425 (1901), where the Montana Supreme Court permitted evidence of lack of accidents after the repair, thus bringing in the fact that a repair was made. This, coupled with the numerous accidents before the repair, was held to be a proper question for the jury on the issue of causation. This may be an additional exception to the repair rule in Montana.

27. May, 26 Mont. at 144, 66 P. at 761.

28. 45 Mont. 46, 121 P. 878 (1912).

29. *Id.* at 54, 121 P. at 879.

30. *Id.* at 53, 121 P. at 879-80.

31. *Id.* at 57-58, 121 P. at 881.

could easily be defeated by admitting evidence of subsequent repairs. Both points illustrate the weakness of the repair rule. Not only did an exception to the rule admit the evidence, but, once admitted, the danger existed that the jury would view the evidence as a confession of prior negligence.

This same result was reached in *Titus v. Anaconda Copper Mining Co.*[32] In *Titus*, the trial court admitted evidence of repairs performed by the defendant following an accident in which the plaintiff injured his hand on an engine bracket. The Montana Supreme Court upheld the decision of the trial judge because the subsequent repair tended to show the physical condition of the engine bracket on the day of the injury.[33] As in *May* and *Pullen*, the evidence was admitted under an exception to the repair rule.

Evidence of subsequent repairs was admitted in the form of photographs in *Teesdale v. Anschutz Drilling Co.*[34] The plaintiff was employed to haul water from a tank maintained by the defendant. Because the tank was without a water gauge, the plaintiff had to climb a ladder to the top of the tank in order to check the water level. This was done by peering into a hole on the top of the tank. Since the ladder ended at the top of the tank, the plaintiff had to grab hold of a metal coupling attached to a rubber hose and swing himself on top of the tank. The plaintiff alleged that prior to the accident, the defendant painted the water tank and loosened the coupling. As a result, when the plaintiff climbed the ladder and grabbed the coupling, it came loose in his hand, causing him to fall and sustain serious injuries. During the trial, the court admitted, over the defendant's objection, three photographs of the water tank taken one year after the accident. The plaintiff's foundation testimony for the admission of the photographs consisted of the changes in the water tank from the time of the accident to the time the photographs were taken. These changes included a metal pipe in place of the rubber hose and the installation of a water gauge on the tank. The Montana Supreme Court ruled that the foundation testimony for the admission of the photographs was properly received by the trial judge.[35] Specifically, the court relied on the rule in *McNair v. Berger*,[36] which stated that when photographs are admitted into evidence, it is acceptable to explain any changes from the time of the accident to the time the photographs

32. 47 Mont. 583, 133 P. 677 (1913).
33. *Id.* at 588, 133 P. at 678.
34. 138 Mont. 427, 357 P.2d 4 (1960).
35. *Id.* at 440, 357 P.2d at 11.
36. 92 Mont. 441, 15 P.2d 834 (1932).

are taken.[37] Thus, evidence of subsequent repairs was again admitted under an exception to the repair rule.

The final subsequent repair decision prior to the adoption of Rule 407 is *Lawlor v. County of Flathead*.[38] In *Lawlor*, rebuttal testimony regarding repairs made to a highway under the jurisdiction of the county was excluded by the trial judge. The Montana Supreme Court reversed the trial court and admitted the subsequent repair evidence. First, the court ruled that the evidence should have been admitted as an exception to the repair rule to show the physical conditions existing at the time of the accident.[39] Second, the court ruled that the plaintiff's rebuttal testimony should have been admitted for impeachment purposes on the feasibility of repair. Both justifications are exceptions to the repair rule.[40]

It is worth noting that *Titus v. Anaconda Copper Mining Co.* and *Teesdale v. Anschutz Drilling Co.* involved the admission of subsequent repairs performed by a private party, while *May v. City of Anaconda, Pullen v. City of Butte,* and *Lawlor v. County of Flathead* involved the admission of subsequent repairs performed by public entities. In either instance, the evidence was admitted, which indicates that both private and public defendants are treated equally by the Montana Supreme Court.[41]

B. *Post-Rule 407 Case Law*

Two subsequent repair cases have been decided since the adoption of Rule 407, and the similarities with pre-Rule 407 cases are significant. One case involved a defendant who was a public entity, while the other case involved a defendant who was a private party. Most importantly, the Montana Supreme Court admitted the subsequent repair evidence under the exceptions to the repair rule.

In *Cech v. State of Montana*,[42] the plaintiff sued the state for failing to place a guardrail along a certain stretch of highway prior

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37. *Id.* at 460, 15 P.2d at 838. *Cf. supra* note 25 (exceptions to the repair rule are not limited to those specifically enumerated in Rule 407).

38. ___ Mont. ___, 582 P.2d 751 (1978).

39. *Id.* at ___, 582 P.2d at 755.

40. *Id.*

41. This is not to suggest that private parties and public entities should have been treated differently from each other by the Montana Supreme Court. Rather, the fact that no special favoritism was shown to one or the other by the court indicates that the exceptions to the repair rule were applied to both evenly. The trend toward widening admission is not, therefore, limited to one class of defendants only.

42. ___ Mont. ___, 604 P.2d 97 (1979).

to an automobile accident which fatally injured the plaintiff's wife and son. The state contended that the trial judge erred in admitting evidence of subsequent repairs taken by the state following the accident. Specifically, the state objected to the admission of a request for an emergency study which resulted in the construction of a guardrail along the portion of the highway where the accident occurred. The Montana Supreme Court upheld the trial court decision for two reasons. The court first determined that the construction of the guardrail and the supporting memorandum recommending the construction were proof of the feasibility of the repair.[43] Second, the court noted that during the trial, the state's expert witnesses testified that the lack of a guardrail conformed with acceptable standards, and that a recovery area, such as the one where the accident occurred, was a preferable method of protecting vehicles leaving the highway.[44] The supreme court held that, under Rule 407, the construction of the guardrail was admissible to impeach these contentions by the state.[45]

The most recent subsequent repair decision in Montana is *Runkle v. Burlington Northern.*[46] In *Runkle,* the Montana Supreme Court held that the trial judge committed prejudicial error in excluding evidence that automatic warning signals were installed at a railway crossing subsequent to a fatal accident.[47] Relying upon *Cech* and *Lawlor,* the court ruled that the evidence was relevant to show the feasibility of repair.[48] In addition, the court said that the evidence was admissible to impeach a witness for the defendant who testified that the railway crossing was not ultrahazardous.[49]

In all the cases just discussed, subsequent repair evidence was consistently admitted under the exceptions to the general rule.[50] In effect, the general rule now stands to be applied only as an exception to the exceptions. Recognizing this problem in its own jurisdiction, the State of Maine has adopted a rule which admits evi-

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43. *Id.* at ____, 604 P.2d at 102.
44. *Id.* at ____, 604 P.2d at 100.
45. *Id.* at ____, 604 P.2d at 102.
46. ____ Mont. ____, 613 P.2d 982 (1980).
47. *Id.* at ____, 613 P.2d at 987.
48. *Id.*
49. *Id.*
50. *But cf.* Morrison v. City of Butte, 150 Mont. 106, 115, 431 P.2d 79, 84 (1967) (subsequent repairs to snow removal equipment excluded because "such evidence should not be admitted."); Hackley v. Waldorf-Hoerner Paper Co., 149 Mont. 286, 297, 425 P.2d 712, 718 (1967) (subsequent repair evidence excluded because not a proper case for admission).

dence of subsequent repairs as proof of negligence.

IV. Rule 407(a): Maine's Approach to Subsequent Repairs

By virtue of the Evidence Enabling Act of 1974,[51] the Supreme Judicial Court of Maine promulgated the Maine Rules of Evidence. Effective February 2, 1976,[52] Rule 407(a) completely repudiated the traditional repair rule, making Maine the only jurisdiction to admit evidence of subsequent repairs as proof of negligence.[53] Maine Rule 407(a) states:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent remedial measures is admissible.[54]

The proponents of Maine Rule 407(a) felt that the social policy encouraging owners to make repairs was no longer persuasive. The proponents also recognized that the repair rule had become so flawed by exceptions that its value had diminished.[55] One proponent of Maine Rule 407(a) has offered three justifications for the admission of subsequent repair evidence as proof of negligence.[56] The first justification is based on the fact that the social policy has

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51. Me. Rev. Stat. Ann. tit. 4, § 9-A (Supp. 1975).

52. Order Adopting Maine Rules of Evidence, effective February 2, 1976, 336-343 A.2d Me. Rptr. XL (1974-75).

53. Prior to Maine's repudiation of the repair rule, Kansas was the only jurisdiction which allowed such evidence. The Kansas position concerning subsequent remedial measures evolved from a reliance on logical analysis to a reliance on precedent.

For example, early Kansas case law admitted evidence of subsequent repairs which was probative of negligence. In Atchison v. Retford, 8 Kan. 245 (1877), the Kansas Supreme Court ruled that the jury had the right to consider evidence that the defendant railway company moved its track away from a coal chute after the plaintiff collided with the chute. Such evidence was deemed to have probative value.

In Emporia v. Schmidling, 33 Kan. 485, 6 P. 893 (1885), Kansas moved slightly away from the probative value approach. Instead, the Kansas Supreme Court ruled that evidence of subsequent repairs was admissible only to show the physical condition of the premises at the time of the accident. The same result was reached in St. Louis & S.F.Ry. v. Weaver, 35 Kan. 412, 11 P. 408 (1886).

Judicial reliance on precedent was especially highlighted in Harter v. Atchison, T & S.F.Ry., 55 Kan. 250, 38 P. 778 (1895). The court cited *Retford, Emporia,* and *Weaver* and held that evidence of subsequent repairs was admissible only to show the defect existing at that time of the injury.

In short, probative value fell victim to precedent in Kansas. Evidence of subsequent repairs became inadmissible except as evidence of the physical condition at the time of the accident. In 1963, Kansas joined the majority of jurisdictions by adopting a statutory repair rule. For more discussion, *see Repair Rule, supra* note 2.

54. Me. R. Evid. 407(a).

55. *See Repair Rule, supra* note 2.

56. *Id.* at 235-36.

been undermined by the many exceptions to the repair rule.[57] At least one critic of the repair rule has commented that no statistical data has been compiled to prove that the rule has either encouraged or discouraged repairs by owners.[58] The second justification proposes that the social policy will be more effectively implemented by admitting subsequent repair evidence as proof of negligence.[59] Unlike the status of the social policy under the repair rule, a rule similar to 407(a) promotes public safety without sacrificing relevant evidence on the issue of negligence. The risk of future liability incurred by a failure to repair, coupled with the admission of similar occurring accidents in a later lawsuit on the issue of negligence, is offered as a more effective means of encouraging repairs.[60]

The third and most significant justification offered for the admission of subsequent repair evidence as proof of negligence is the probative value of the evidence. To prove negligence, a plaintiff must satisfy four elements:[61] (1) a duty requiring the defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the breach of duty and the injury to the plaintiff; and (4) actual harm or loss to the plaintiff's interest. To determine the defendant's duty, there must be a risk of harm which is reasonably foreseeable to the defendant. Proponents of Maine Rule 407(a) contend that subsequent repair evidence is especially probative of these elements.

Risk of harm has been defined as a "danger which is apparent, or should be apparent, to one in the position of the actor."[62] Subsequent repair evidence is probative of the existence of risk of harm at the time the accident occurs. This is not a novel proposition. Early Kansas decisions recognized the probity of such evidence in proving a defect or risk of harm.[63] For example, in *Emporia v. Schmidling*,[64] evidence that the city replaced an old sidewalk with asphalt after an accident was admitted on behalf of the plaintiff. The Kansas Supreme Court held that the evidence could be considered by the jury as tending to show the defect at the time of the accident. Thus, evidence of subsequent repairs is probative of

57. As indicated earlier, this is especially true in Montana.
58. Schwartz, *supra* note 2, at 6.
59. *Repair Rule*, *supra* note 2, at 243-44.
60. *Id.*
61. PROSSER ON TORTS § 30 (4th ed. 1971) [hereinafter cited as PROSSER].
62. *Id.* at § 31.
63. *See* note 54 *supra*.
64. 33 Kan. 485, 6 P. 893 (1885).

the risk of harm when the injury occurs.[65]

According to Dean Prosser, the risks of harm must be "sufficiently great to lead a reasonable man in his position to anticipate them, and to guard against them."[66] In short, the risk of harm must be reasonably foreseeable to the defendant as a reasonable person. Thus, if the plaintiff can show by evidence of subsequent repairs that the risk of harm would have been perceived by a reasonable person, the evidence is relevant to the issue of duty. In *Otts v. Brough*,[67] for example, the plaintiff was injured after he fell into an opening in a concrete floor. Immediately after the accident, the opening was barricaded. The Idaho Supreme Court held that such evidence was relevant to the defendant's recognition of a defect which he had a duty to repair. Consequently, the evidence was relevant to the issue of negligence and was a proper matter for consideration by the jury.[68]

The defendant is still left with some measure of protection, however. Subsequent repair evidence with low probative value and a prejudicial effect on the jury will be excluded by the trial judge under Rule 403.[69] Subject to this limitation, evidence of subsequent repairs is relevant to the issue of negligence since it is helpful in determining risk of harm and the foreseeability of that risk by the defendant.

V. CONCLUSION

Because Rule 407, in its present form, cannot achieve its social policy, it is time to examine an alternative like Maine Rule 407(a). Not only does such a rule better promote public safety, but it also insures that relevant evidence on the issue of negligence is presented to the jury. The adoption of a similar rule in Montana

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65. To a limited extent, this already exists in Montana. In Lawlor v. County of Flathead, ____ Mont. ____, 582 P. 2d 751 (1978), Titus v. Anaconda Copper Co., 47 Mont. 583, 133 P. 677 (1913), and Pullen v. City of Butte, 45 Mont. 46, 121 P. 878 (1912), evidence of subsequent repairs was admitted to show the physical conditions at the time of the accident. The only difference between the Montana and Kansas approach is that the Kansas Supreme Court recognized the probative value of the evidence, while the Montana Supreme Court admitted it as an exception to the repair rule.

66. PROSSER § 31.

67. 90 Idaho 124, 135, 409 P.2d 95, 101 (1965).

68. *Id.*

69. MONT. R. EVID. 403 states:

> 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.

would be an important and long-overdue step in the right direction.

Mary E. Harney