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Rhode Island's 407 Subsequent Remedial Measure Exception: Why it Informs What Goes Around Comes Around in Restatements (Second) & (Third) of Torts, and a Modest Proposal

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## Notes

## RHODE ISLAND'S 407 SUBSEQUENT REMEDIAL MEASURE EXCEPTION: WHY IT INFORMS WHAT GOES AROUND COMES AROUND IN RESTATEMENTS (SECOND) & (THIRD) OF TORTS, AND A MODEST PROPOSAL

For, dear me, why abandon a belief Merely because it ceases to be true. Cling to it long enough, and not a doubt It will turn true again, for so it goes. Most of the change we think we see in life Is due to truths being in and out of favour As I sit here, and oftentimes, I wish I could be monarch of a desert land I could devote and dedicate forever To the truths we keep coming back and back to.<sup>1</sup>

<sup>1.</sup> Excerpted from *The Black Cottage*, ROBERT FROST, EARLY FROST 77 (Jeffrey Meyers ed., The Ecco Press 1996).

#### PART I - RHODE ISLAND 407: CURIOSITY OR SIGNIFICANT SYMBOL?

#### A. Introduction

Rhode Island Rule of Evidence 407 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 measures is admissible."<sup>2</sup> This subsequent remedial measure rule stands in direct contrast to its federal counterpart,<sup>3</sup> as well as each of Rhode Island's forty-nine sister states.<sup>4</sup> Upon its surface, to stand in such a singular minority might initially seem anachronistic. But upon reflection, Rhode Island's contrary 407 rule begs an inquiry – be it the product of design and intention or mere circumstance, might Rhode Island 407 stand for something more? Specifically, in exploring Rhode Island Rule of Evidence 407. this note seeks to understand and advocate whether Rhode Island would be prudent to join the dominant, near-unanimous consensus banning evidence of subsequent remedial measures in negligence cases or whether Rhode Island's unique position might in fact signify a *de facto* leadership position. At the least, the Rhode Island rule can be seen as less of an anachronism when used as a foil to the sought after evolution of a national understanding of deep policy principles implicated in tort liability.5

#### B. Subsequent Remedial Measure – 50 State Survey

Federal Rule 407 makes inadmissible subsequent remedial

<sup>2.</sup> R.I. R. EVID. 407.

<sup>3.</sup> FED. R. EVID. 407 ("When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction.").

<sup>4.</sup> See infra notes 8-13 and accompanying text.

<sup>5.</sup> Marcie J. Freeman, Comment, Spanning the Spectrum: Proposed Amendments to the Federal Rule of Evidence 407, 28 TEX. TECH L. REV. 1175, 1186 (1997); in a conclusion that sets the stage for the current comment, the author writes, "Federal Rule of Evidence 407 existed in evidentiary common law for hundreds of years. Only recently has the rule become a source of debate and a target of reform, which has been fueled by the development of strict liability as a cause of action and American dissatisfaction with tort law." Id. at 1218.

measure evidence in general negligence cases as well as in cases of strict liability for product defect, design, and failure to warn.<sup>6</sup> The evidentiary exclusion in the realm of product liabilities claims was added in a 1997 amendment.<sup>7</sup> Though suggestive, the Federal Rules of Evidence have no binding power over the states.

Twelve jurisdictions have in place a rule equivalent or nearly equivalent to the federal position which does not allow such evidence in either negligence or product liability claims. These jurisdictions are Delaware, Florida, Idaho, Kentucky, Minnesota, Montana. North Dakota, Pennsylvania, Tennessee, Utah, Vermont, and Guam.<sup>8</sup> Thirty-four states do not allow such evidence in negligence claims but have not established an evidentiary rule to directly address the product liability question. These are Alabama, Alaska, Arizona, Arkansas, Colorado, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.<sup>9</sup> Also among this group is California, although California is unique in that it provides no exceptions to the rule when the evidence is offered for another enumerated purpose.<sup>10</sup>

8. DEL. R. EVID. 407; FLA. STAT. ANN. § 90.407 (West 2009); IDAHO R. EVID. 407; KY. R. EVID. 407; MINN. R. EVID. 407; MONT. R. EVID. 407; N.D. R. EVID. 407; PA. R. EVID. 407; TENN. R. EVID. 407; UTAH R. EVID. 407; VT. R. EVID. 407; GUAM R. EVID. 407.

9. ALA. R. EVID. 407; ALASKA R. EVID. 407; ARIZ. R. EVID. 407; ARK. R. EVID. 407; COLO. R. EVID. 407; 4 JOHN J. DVORSKE, GEORGIA PROCEDURE § 4:31 (2008); HAW. R. EVID. 407; 18 CHRISTINE GIMENO ET. AL., ILLINOIS LAW AND PRACTICE § 146 (2008); IND. R. EVID. 407; IOWA R. EVID. 5.407; KAN. R. EVID. 60-451; LA. R. EVID. 407; MD. R. EVID. 5-407; 14B HOWARD J. ALPERIN, MASSACHUSETTS PRACTICE SERIES § 10.71 (4th ed. 2007); MICH. R. EVID. 407; MISS. R. EVID. 407; NEB. REV. STAT. § 27-407 (1995); NEV. REV. STAT. ANN. § 48.095 (LexisNexis 2006); N.H. R. EVID. 407; N.J. R. EVID. 407; N.M. R. EVID. 407; 79 N.Y. JUR. 2D *Negligence* § 170 (2009); N.C. R. EVID. 407; OHIO R. EVID. 407; OKLA. STAT. ANN. tit. 12, § 2407 (West 1993); OR. REV. STAT. ANN. § 40.185 (West 1988); S.C. R. EVID. 407; S.D. CODIFIED LAWS § 19-12-9 (2008); VA. CODE ANN. § 8.01-418.1 (LexisNexis 2007); WASH. R. EVID. 407; W. VA. R. EVID. 407; WIS. STAT. ANN. § 904.07 (West 2000); WYO. R. EVID. 407.

10. CAL. EVID. CODE § 1151 (Deering 2008); see also FED. R. EVID. 407 (standard enumerated exception purposes include proving ownership, control, feasibility of precautionary measures, or impeachment).

<sup>6.</sup> FED. R. EVID. 407.

<sup>7.</sup> FED. R. EVID. 407 (amended April 11, 1997, effective Dec. 1, 1997).

Two states do not allow subsequent remedial evidence for negligence but explicitly permit such evidence to be used in strict liability claims; these are Connecticut and Missouri.<sup>11</sup> Two states, Maine and Texas, mirror the federal rule but have added an express exception allowing evidence of 'Notification of Defect' as admissible to support a product liability claim.<sup>12</sup> Only one state permits evidence of remedial measures under all circumstances – Rhode Island.<sup>13</sup>

C. The 'Modern' Maine Repair Rule and Rhode Island's Reliance

In 1987 Rhode Island adopted the evidentiary rule that made all subsequent remedial evidence admissible.<sup>14</sup> Prior to adoption, in the Rhode Island Advisory Committee Notes to proposed rule 407, the advisory committee expressed clear cognizance that the proposed rule was a departure from FRE 407 as well as then current Rhode Island law.<sup>15</sup> In support of this proposed departure, the committee explained: "The proposed rule is consistent with the modern trend and the central notion of relevancy in the rules and is based on a more realistic assessment of the policy considerations underlying the current approach. The proposed Rhode Island rule is based on Maine Rule of Evidence 407(a)."<sup>16</sup> Alluding to "signs of a departure from the traditional approach" to bar evidence of remedial measures<sup>17</sup>, the Advisory Committee continued building the case for divergence from the federal rule as well as Rhode Island common law by pointing to Maine's lead.<sup>18</sup> Slightly more than decade earlier, in 1975,

16. R.I. R. EVID. 407, Advisory Committee's Note.

17. Id.

18. Id. (The Rhode Island Advisory Committee quoted Maine's precedential 407(a) Evidence Code: "When after an event, measures are taken which, if taken previously, would have made the event less likely to

<sup>11.</sup> CONN. GEN. STAT. ANN. § 4-7 (West 2008); 22 WILLIAM A. SCHROEDER, MISSOURI PRACTICE SERIES § 407.1 (2008); 22 JEFFREY A. BURNS, MISSOURI PRACTICE SERIES § 13.8 (2008).

<sup>12.</sup> ME. R. EVID. 407; TEX. R. EVID. 407.

<sup>13.</sup> R.I. R. EVID. 407.

<sup>14.</sup> R.I. R. EVID. 407 (adopted July 20, 1987, effective Oct. 1, 1987).

<sup>15.</sup> R.I. R. EVID. 407 advisory committee's note; The committee quoted *Morancy v. Hennessey*, 52 A. 1021, 1023 (R.I. 1902) (In *Morancy*, the Rhode Island high court set forth the rule regarding subsequent remedial measures holding that "evidence of precautions against further accidents, taken after an accident, is not competent to show antecedent negligence.").

Maine's Supreme Judicial Court had promulgated the Maine Rules of Evidence.<sup>19</sup> In so doing, Maine became the first and only American jurisdiction admitting evidence of subsequent remedial repairs as circumstantial evidence of negligence.<sup>20</sup> Apparently, Maine's decision made a strong impression upon the Rhode Island Advisory Committee which noted that the Maine rule directly contravened Maine law, just as proposed rule 407, if adopted, would contravene Rhode Island law.<sup>21</sup> Though the capacity to refer to a trend-setting state helped the Rhode Island Advisory Committee support its proposed change, it was the policy consideration being advanced in Maine that functioned as the core of the proposed rule change here in Rhode Island. The Advisory Committee of Rhode Island quoted with apparent favor the Advisory Note to Maine's Rule of Evidence 407(a), which asserted, "public policy behind the rule against admissibility was that it would deter repairs. This rationale is unpersuasive today."22

Ultimately, Rhode Island adopted the proposed rule of the Advisory Committee on July 23, 1987.<sup>23</sup> The Rhode Island 407 Rule mirrored the Maine Rule but for a single, non-significant difference.<sup>24</sup> Thus, for several years Rhode Island and Maine shared the minority distinction of being the only jurisdictions allowing evidence of subsequent remedies to demonstrate the nature of antecedent behavior.

This simpatico did not last. On July 15, 1995, an amendment to Maine's 407 Rule was made effective.<sup>25</sup> Maine rule 407(a) now holds in pertinent part:

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously,

occur, evidence of subsequent measures is admissible.").

<sup>19.</sup> ME. R. EVID. 407 (adopted May 13, 1975, effective Feb. 2, 1976).

<sup>20.</sup> 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, 226 (1975) (hereinafter The Repair Rule).

<sup>21.</sup> R.I. R. EVID. 407 advisory committee's note.

<sup>22.</sup> R.I. R. EVID. 407 advisory committee's note (quoting ME. R. EVID. 407 adviser's note).

<sup>23.</sup> R.I. R. EVID. 407 supra note 14.

<sup>24.</sup> Rhode Island 407 added the article 'the' before the phrase 'subsequent measures.' In all other details, the Rhode Island and 1976 Maine rule are perfect reflections.

<sup>25.</sup> ME. R. EVID. 407.

would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction.<sup>26</sup>

Since Maine's decision to align with the federal subsequent remedial measure rule, Rhode Island has stood as the solitary jurisdiction allowing subsequent remedial measures to prove antecedent conduct, negligent or other. Thus, before deciding whether Rhode Island should have followed Maine's lead, this note will address whether Maine correctly decided, in the first instance, to allow subsequent remedial measure evidence.<sup>27</sup>

#### D. Rhode Island Out on a Limb – Reliance Beyond Maine

Rhode Island's reliance on the "modern trend" evidenced by the 1975 Maine approach may have helped to put Rhode Island in its curious minority position in relation to subsequent remedial measures, but there is more to this story than Maine's turnabout. In fact, it is the correlation of 407 rules to product liability lawsuits that underlies any discussion of the propriety or impropriety of the admissibility of subsequent remedial measures.<sup>28</sup> Rhode Island's Advisory Committee made critical note of the essential issue in the final paragraph of their proposed 407 rule, and in doing so adumbrated a major controversy in tort law.<sup>29</sup> Tensions between negligence principles and strict liability

<sup>26.</sup> Id.

<sup>27.</sup> Compare Jeffrey J. Rachlinski, A Positive Psychological Theory of Judging in Hindsight, 65 CHI. L. REV. 571, 617-18 (1998) ("The liberal rules of relevance in contemporary evidence law, however, probably support admitting evidence that a defendant has taken subsequent remedial measures. Defendants should, in principle, have no fear of this evidence.").

<sup>28.</sup> Roger C. Henderson, Product Liability and Admissibility of Subsequent Remedial Measures: Resolving The Conflict By Recognizing the Difference Between Negligence and Strict Tort Liability, 64 NEB. L. REV. 1, 5 (1985).

<sup>29.</sup> The Advisory Committee noted: "Recent developments in the law of products liability have caused some jurisdictions to interpret the rule generally excluding evidence of subsequent remedial measures as inapplicable in cases where such evidence is offered to prove the existence of a defect in a strict liability case. The rationale for this exception is that the evidence is not being offered to show 'negligence.' The leading case is *Ault v*.

principles in product design, defect and warning suits are themselves abundant.<sup>30</sup> As the advisory committee pointed out:

The confusion in this area stems from the language in the Restatement (Second) of Torts § 402A (1965), that 'one who sells any product in a defective condition unreasonably dangerous to the user . . . is subject to liability for physical harm thereby caused. . .' This language seems to emphasize fault and thus call[s] into play the concerns of FRE 407. Neither the text nor the legislative history of the federal rule confronts this problem. No Rhode Island authority was found on this point. Given the current state of tort law, it is logically indefensible to distinguish between strict liability and negligence cases in applying this rule.<sup>31</sup>

Tensions between negligence and strict liability principles and Rule 407 have been complicated by the 1997 amendment to the Federal Rules of Evidence which was, ironically, altered to alleviate apparent tensions.<sup>32</sup> The amendment clarified Federal Rule 407 to include that "evidence of subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in the product's design, or a need for a warning or instruction."<sup>33</sup> Apparently, this amendment resolved the conflict between negligence and strict liability principles for the

32. FED. R. EVID. 407 (amended Apr. 11, 1997, effective Dec. 1, 1997).

33. As is the case in many jurisdictions, the rule provides exceptions in its second sentence, which asserts: "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." *Id*.

International Harvester Co.." R.I. R. EVID. 407 advisory committee's note. Thus, the Advisory Committee was fully aware that the rule they were creating for negligence cases would become fully applicable to the more modern cases involving product defect.

<sup>30.</sup> Henderson, *supra* note 28, at 8-11. For a thorough review of the seminal framework case law which, though relevant, is outside the scope of the current note, *see* Henderson, *supra* note 28, at 16-20.

<sup>31.</sup> R.I. R. EVID. 407 advisory committee's note (emphasis added); see also Wendy Bugher Greenley, Note, Federal Rule of Evidence 407: New Controversy Besets the Admissibility of Subsequent Remedial Measures, 30 VILL. L. REV. 1611, 1622 (1985) (providing further analysis of the proposition that "no principled basis exists to distinguish negligence and strict liability actions with respect to the admissibility of evidence of subsequent remedial measures.").

purposes of Rule 407 by eliminating the distinction between the The practical effect of the change is that evidence of two subsequent remedial measures, intended to prove either negligence or strict liability claims, will be treated the same - both will be barred. This amendment accords with the Rhode Island Advisory Committee's position, articulated a decade earlier, that given the language of the legal standards applied it is logically indefensible to treat negligence claims differently from strict liability claims in determining whether to allow or bar subsequent remedial measure evidence.<sup>34</sup> Thus, even as Maine was changing its rule to strike a uniform pose with its federal counterpart, and even as the federal rule was changing to address the confused state of application of 407 in relation to negligence and strict liability actions, one of the core principles underlying Rhode Island's unchanged 407 approach, a de facto rejection of the federal evidentiary bar - that the standard of admissibility is the same regardless of whether the case is one sounding in negligence or one sounding in products liability - was concurrently, if unintentionally, being affirmed.<sup>35</sup>

However, just as one hand giveth and another taketh away, in near concurrence with the federal clarification, the American Law Institute was publishing Restatement (Third) of Torts (1997).<sup>36</sup> Restatement (Third) advocated a significant overhaul in relation to proving product liability claims.<sup>37</sup> This overhaul dramatically implicated Restatement (Second) of Torts § 402A (1965)<sup>38</sup>, the very section cited by the Rhode Island Advisory Committee that "thus call into play the concerns of FRE 407."<sup>39</sup> Adopted by many state courts since its 1997 introduction, the Restatement (Third)

<sup>34.</sup> R.I. R. EVID. 407 advisory committee's note; see also R.I. R. EVID. 407 advisory committee's note supra note 31 and accompanying text.

<sup>35.</sup> Not yet addressed in this note is the simple proposition that Rule 407 is unnecessary, a simple proposition adhered to in the final line of the Rhode Island Advisory Committee's note – "In the rare case where it would be unfair or misleading to admit evidence of subsequent remedial measures, Rule 403 gives the trial judge discretion to exclude it." R.I. R. EVID. 407 advisory committee's note.

<sup>36.</sup> RESTATEMENT (THIRD) OF TORTS (1997).

<sup>37.</sup> Frank J. Vandall, The Restatement (Third) of Torts: Products Liability, Section 2(b): The Reasonable Alternative Design Requirement, 61 TENN. L. REV. 1407, 1407 (1994).

<sup>38.</sup> RESTATEMENT (SECOND) OF TORTS (1965).

<sup>39.</sup> R.I. R. EVID. 407 advisory committee's note.

proposes a Reasonable Alternative Design (hereinafter "RAD"<sup>40</sup>) requirement in product liability cases.<sup>41</sup> And in fact, "[t]he majority of American courts either explicitly or implicitly require the plaintiff to prove the availability of a feasible alternative design in design defect cases."<sup>42</sup> Adherence to a feasible alternative design requirement and a 407 bar to subsequent remedial measures reveals direct conflict.<sup>43</sup> Exposed is a contradiction that requires discarding of either the feasible alternative design requirement or the rule 407 evidentiary bar.<sup>44</sup> While such a contradiction may be finessed by courts, consistency of approach will promote predictability of outcome.

Thus, while Rhode Island may be out on a limb in allowing evidence of subsequent remedial measures despite its position in relation to a dominant majority, it may just be that it is not the limb but the tree that is falling. As a result, other jurisdictions will be forced to confront the logical impossibility of sustaining the exclusionary bar to subsequent remedial measures while embracing the modern trend toward requiring plaintiffs to present evidence of a feasible alternative design.

43. Grubbs, supra note 41, at 784.

<sup>40.</sup> It should be noted that courts and commentators alike frequently apply the term "feasible alternative design" as synonymous with "reasonable alternative design." This synonymous usage implicates the simple underlying concept that a design can only be accepted as having been a "reasonable alternative" if the design was, in fact, a "feasible alternative" at the time of the incident giving rise to the alleged tort. Excepting for products with zero utilitarian value, to hold, for example, a manufacturer liable under negligence or strict liability for not producing and delivering into the stream of commerce a product that would be impossible to produce and deliver would itself be the quintessence of unreasonableness.

<sup>41.</sup> Laura B. Grubbs, Note, Something's Gotta Give: The Conflict Between Evidence Rule 407 and the Feasible Alternative Design Requirement, 45 BRANDEIS L.J. 781, 784 (2007).

<sup>42.</sup> Id. at 802 (citing to RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) cmt. d, (1997).

<sup>44.</sup> Id. at 806 (illustrating the contradiction through Rahmig v. Mosley Machinery Co., a Nebraska decision in which the court held that the admission of a subsequent remedial measure barred under Nebraska Rule 407 was not erroneous because prior case law requiring a feasible alternative design made such evidence necessary; the court resolved the conflict by eventually overruling the feasible alternative design requirement).

#### PART II - RHODE ISLAND 407 AS SIGNIFICANT SYMBOL

#### A. The World Gets Wiser

Having come this far, it is appropriate to identify the twin foundations upon which federal rule 407 rests. The first is rooted in the seminal declaration of Baron Bramwell who, in *Hart v. Lancashire & Yorkshire Ry. Co.*, rejected the dubious proposition that, "[B]ecause the world gets wiser as it gets older, therefore it was foolish before."<sup>45</sup> Aligning with Baron Bramwell, federal rule 407 advances the notion that evidence of subsequent remedies is of such limited probative value that its evidentiary value does not justify admission when weighed alongside the second justification for its exclusion. The original Advisory Committee Notes to the Federal Rules states:

The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. . . . Under a liberal theory of relevancy this ground alone would not support exclusion as the inference is still a possible one. (2) The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.<sup>46</sup>

Thus, the clear meaning is that absent a social policy implication, the evidentiary value of a subsequent remedial measure is sufficient to permit its evidentiary inclusion even if the probative value is limited.<sup>47</sup> Absent a social policy consideration or exclusion under a 403 analysis<sup>48</sup>, the determination of value in

<sup>45.</sup> FED. R. EVID. 407 advisory committee's note (quoting Hart v. Lancashire & Yorkshire Ry. Co., 21 L.T. 261, 263 (1869)).

<sup>46.</sup> FED. R. EVID. 407 advisory committee's note; see also Judson F. Falknor, Extrinsic Policies Affecting Admissibility, 10 RUTGERS L.REV. 574, 590 (1956); VAUGHN C. BALL, ET AL., MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 666 (Edward W. Cleary ed., West Publishing Co. 2d ed. 1972).

<sup>47.</sup> The Repair Rule, supra note 20, at 227-28.

<sup>48.</sup> FED. R. EVID. 403 (Rule 403, entitled Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time, reads: "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.").

such circumstances is properly left to the trier of fact.<sup>49</sup> However, it is notable that no studies have been conducted that support the policy proposition that parties would be deterred from taking remedial actions in the absence of an evidentiary rule barring inclusion.<sup>50</sup> As one commenter noted, "Throughout the rather long and tortuous history of the rule excluding repairs, no court or

The admissibility of evidence of subsequent repairs for these other purposes soon hardened into a set of exceptions to the general rule that threatened to erode it completely. It has been said that it is rare that the rule operates to exclude evidence and one writer has suggested that the exceptions show that courts seriously doubt the wisdom of the general rule. In this respect, the doctrine of subsequent repairs resembles the rule excluding evidence of prior crimes; indeed, it has sometimes been suggested that the two are alike in that both are rules that in reality admit the evidence they purport to exclude except when offered for a single, narrow purpose — in the case of the subsequent repair rule, to prove consciousness of fault by the tortfeasor. The two rules differ, however, in that writers have seldom urged abandonment of the prior crimes rule, but abolition of the subsequent repairs doctrine has been repeatedly advocated.

50. Id. Most modern writers and courts prefer the quasi-privilege rationale, arguing that the best explanation for the rule is not relevance but the public policy of encouraging people to take precautionary measures after an accident by assuring them that such steps cannot be used as evidence of past negligence. However, in view of the devastating criticisms that have been made of this rationale, it is difficult to see how anyone favoring the preservation of the rule could regard it as a sound justification. There is only skimpy evidence that tort defendants behave in the way that this argument supposes. Many of them are not aware of the rule, and those who were would surely regard it as a leaky shield in view of the many exceptions that would admit the evidence. Moreover, the fear of further tort liability or other sanctions provides a substantial incentive for defendants to make repairs even if this will increase the likelihood of their being found liable for past accidents. Finally, in cases where the only probative evidence of negligence is the taking of subsequent remedial measures, the rule of evidence undermines the policy of the law of torts by subsidizing the safety of others through a denial of compensation to the injured plaintiff.

<sup>49.</sup> See 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5282 (1980) The rule is of relatively recent origin. It was not until 1869 that English courts first held that evidence that after an accident an alleged tortfeasor had taken steps to prevent its recurrence could not be used as proof that his prior conduct had been negligent. Although a few American courts initially resisted the doctrine, it was eventually accepted in every state except Kansas and South Dakota. The rule was, however, quite narrowly construed; if the offeror could plausibly claim that the evidence was relevant to prove some fact other than negligence, most courts, applying the doctrine of multiple admissibility, held that the evidence could be admitted for the other purpose, subject to a limiting instruction that forbade the jury to use it as evidence of negligence.

writer has produced any empirical data showing that the rule has resulted in a single repair or that its absence would discourage repair activity."<sup>51</sup> In preparing this note, it is apparent that this long trend of the utter absence of empirical evidence to support the social policy prong of the subsequent remedial measure exclusion rule remains glaring.<sup>52</sup> This dubious and long-standing assumption is now being openly contested by the counterargument, often in product liability suits, which presents the reality that entities are encouraged to make subsequent improvements and repairs so as to avoid exposure to continuing liability.53 This rationale has added strength to the logical proposition that in claims originating from circumstances where an injury has occurred and there has been no remedial measure taken, the presumption of negligence is heightened not in spite of 'the world being foolish,' but because there is a strong and reasonable expectation that 'the world gets wiser.' In other words, because there is sufficient incentive to make repairs following an accident irrespective of negligence.<sup>54</sup> the 407 evidentiary bar is at

52. Schwartz, supra note 51 at 6 n.31 ("Courts in Kansas for many years admitted evidence of subsequent repairs or remedial measures when this tended to prove . . . negligen[ce]. In all these years no defendant marshalled any evidence that would tend to prove that the rule allowing admissibility discouraged the making of repairs. The policy of the Kansas courts would appear to have been that the mere possibility that its rule would have this unfortunate effect was 'not deemed of equal importance with protection against life and limb' that could be achieved by admitting the evidence. In 1963 the Kansas legislature adopted the Uniform Rules of Evidence . . . . [i]t included an exclusionary rule on evidence of repair. The [] legislative history that is available indicates that no evidence was produced showing that the eighty-year old Kansas rule of admission did not work and work well.").

53. See Ault v. Int'l Harvester Co., 528 P.2d 1148, 1151-52 (Cal. 1974).

54. GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE, § 5.17, at 172-73 (2d ed. 1987) ("Whether this rule of exclusion actually affects one's willingness to undertake remedial steps is problematic and the assumption that it does has been seriously questioned. Arguably, even if the evidence of remedial measures were admissible, the actor would still make the necessary repairs or take other corrective action. Failure to do so poses for him the risk that another person would injure himself; furthermore, the second claimant's case would be strengthened by the fact that the defendant had notice of a

<sup>51.</sup> Victor E. Schwartz, The Exclusionary Rule on Subsequent Repairs – A Rule in Need of Repair, 7 FORUM 1, 6 n.31 (1971) where the author expands this point, writing, "The authors of the Proposed Federal Rules of Evidence apparently did not empirically test their conclusion that their rule would 'encourage people to take or at least not discourag[e] them from taking steps in furtherance of added safety." (alteration in original).

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best a redundant incentive, and at worst a patently false assumption unsupported by empiricism.<sup>55</sup> What is worse, whether reality is closest to the best case scenario or the worst case scenario, or simply something in between, at present, in all jurisdictions but Rhode Island, "the exclusionary rule serves only to protect defendants who might otherwise be held liable under substantive tort principles. . . . without any corresponding benefit to society."<sup>56</sup>

B. Federal 407 and the Restatement (Second) of Torts § 402A

As foreshadowed previously, the fundamental overhaul to torts law implicated by Restatement (Second) of Torts § 402A was cited by the Rhode Island Advisory Committee as directly calling into play the concerns of federal rule 407.<sup>57</sup> In large part, § 402A reflected the thinking embodied in the seminal California Supreme Court decision in Greenman v. Yuba Power Products. Inc.<sup>58</sup> In Greenman, the Court effectuated a movement toward strict liability that was incorporated into the Restatement (Second), published in 1965, just two years later.<sup>59</sup> Cited specifically by Rhode Island Advisory Committee, § 402A asserts, "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 . . . . "60 Rhode Island's early determination regarding the logical indefensibility of distinguishing between strict and negligence liability for the

56. Schwartz, supra note 51, at 7.

57. R.I. R. EVID. 407 advisory committee's note.

58. Greenman v. Yuba Power Prods., Inc., 377 P.2d 897 (Cal. 1963).

59. JOHN L. DIAMOND, LAWRENCE C. LEVINE & M. STUART MADDEN, UNDERSTANDING TORTS 272 (3d ed. 2007).

60. RESTATEMENT (SECOND) OF TORTS § 402A (1965); see also R.I. R. EVID. 407 advisory committee's note.

possibly dangerous condition by reason of the first accident.").

<sup>55.</sup> See Herman L. Trautman, Logical or Legal Relevancy – A Conflict in Theory, 5 VAND. L. REV. 385, 411-13 (1952) (Advocating a shift to logical analysis instead of legal precedence, Professor Trautman's influential comment proposes that the rule of exclusion of subsequent repairs loses whatever semblance of rationality it might sustain because it is eroded by the numerous exceptions it has historically contained. In addition to the declaration that the subsequent measures bar and its exceptions results in inefficient trial administration due to the absence of a usable principle, Professor Trautman concludes, "this results in the exclusion of circumstantial evidence without reason or explanation.").

purposes of determining the admissibility of subsequent remedial measure evidence is as admirable from a contemporary perspective as it was perceptive at the time of the pronouncement. In part, this is because the same arguments used to support the position that evidence of remedial measures would be barred for negligence claims but not for strict liability claims have been used to support the Rhode Island position that it is logically indefensible to treat remedial measure evidence differently dependent upon the nature of the claim. This recognition is imperative to understanding the nature of what this entire comment advances, for it is this recognition that resolves the logical contradiction that is going to become increasingly apparent as Restatement (Third) of Torts intersects with federal rule 407. It is also imperative because without this first distinction, which has in large part proven to be right, Rhode Island could not have come to the second distinction - the distinction resulting in the decision that all evidence of subsequent remedial measures is sufficiently competent and relevant so as to overcome speculative policy considerations.

Because it is the first of the two major distinctions made by Rhode Island that have resulted in Rhode Island's significant status, it is important to analyze the subsequent remedial remedy tension arising as a result of *Greenman* and § 402A. Here, the most important case in the field is *Ault v. International Harvester*  $Co.^{61}$  In *Ault*, the plaintiff brought a strict liability claim in response to injuries caused by a defectively designed motor vehicle gear box.<sup>62</sup> Appealing a plaintiff's jury verdict, the defendant argued that the trial court, by allowing evidence of gear box changes made three years after the plaintiff's accident, had violated California Evidence Code 1151, which bars evidence of

<sup>61.</sup> R.I. R. EVID. 407 advisory committee's note; Ault v. Int'l Harvester Co., 528 P.2d 1148 (Cal. 1974); see also Joseph A. Hoffman & George D. Zuckerman, Tort Reform and Rules of Evidence: Saving the Rule Excluding Evidence of Subsequent Remedial Actions, 22 TORT & INS. L.J. 497, 505 (1987) (Recognizing that though Ault is the landmark case regarding the inapplicability of applying the exclusionary rule in strict liability cases, one of the first to successfully articulate the theory was Sutkowski v. Universal Marion Corp., 281 N.E.2d 749 (Ill. App. 1972)).

<sup>62.</sup> Michael W. Blanton, Comment, Application of Federal Rule of Evidence 407 in Strict Products Liability Cases: The Evidence Weighs Against Automatic Exclusion, 65 UMKC L. REV. 49, 61-62 (1996).

subsequent remedial measures to prove negligent or culpable conduct.<sup>63</sup> Affirming the lower court, the California Supreme Court determined that in the products liability context public policy justifications do not support application of the exclusionary rule.<sup>64</sup> The Court held:

When the context is transformed from a typical negligence setting to the modern products liability field, however, the 'public policy' assumptions justifying this evidentiary rule are no longer valid. The contemporary corporate mass producer of goods, the normal products liability defendant, manufactures tens of thousands of units of goods; it is manifestly unrealistic to suggest that such a producer will forego making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse effect upon its public image, simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the improvement. In the products liability area, the exclusionary rule of *section 1151* does not affect the primary conduct of the mass producer of goods, but serves merely as a shield against potential liability.<sup>65</sup>

In a cogent analysis of the policy considerations underlying the admission of evidence of post-occurrence changes in a products liability context, the author states, 'The assumption that the admission of evidence of subsequent repairs discourages defendants from making required repairs Manufacturers and distributors of mass-produced may be erroneous. products may not be so callous to the safety of the consumer as the general exclusionary rule presumes. Furthermore, to the extent that admission of such evidence results in recovery by injured plaintiffs, it can be argued that evidence of subsequent repairs encourages future remedial action. А distributor of mass-produced goods may have thousands of goods on the market. If his products are defective, the distributor would probably face greater total liability by allowing such defective products to remain on the market or by continuing to put more defective products on the market than he would by being adjudged liable in one particular case where evidence of subsequent repairs was introduced. Also, concern on the part of the distributors for consumer protection is promoted by consumer organizations, federal agencies, and mass media exposure of product defects. To some extent, the economic self-interest of product distributors requires that they

<sup>63.</sup> Id. at 62.

<sup>64.</sup> C. Paul Carver, Esq., Subsequent Remedial Measures 2000 and Beyond, 27 WM. MITCHELL L. REV. 583, 598 (2000).

<sup>65.</sup> Ault v. Int'l Harvester Co., 528 P.2d 1148, 1151-52 (Cal. 1974) (emphasis added); see also Ault, 528 P.2d at 1152 n.4 (quoting Note, Products Liability and Evidence of Subsequent Repairs, 1972 DUKE L.J. 837, 845-852).

Economic self-interest drives reasonable improvement, not an unnecessary liability shield derivative of a rule that excludes "evidence for policy reasons quite apart from enabling the trier of fact to reach a correct verdict."<sup>66</sup>

At least five facets of this self-interest can be identified.<sup>67</sup> First, failure to take remedial action following an accident exposes either an individual or a corporation to increased risk of liability due to the impact of a previous accident upon reasonable foreseeability.<sup>68</sup> Second, individuals and corporations will only make repairs and remedies with the intention of improving safety because no entity will undertake a remedial measure solely as change for change's sake.<sup>69</sup> Third, consumer safety advocates, watchdog groups, product testing guides, safety reports and awards, special interest lobbyists and agencies provide incentive and pressure promoting manufacturers to make repairs and improve products.<sup>70</sup> Fourth, "the manufacturers' intrinsic concern with consumer safety mitigates the need for an exclusionary Finally, it is difficult to sell products, and therefore rule."71 remain competitive in the marketplace, once knowledge of a product defect has circulated amongst consumers so as to tarnish either a particular product or the associated corporate brand.<sup>72</sup>

66. Schwartz, supra note 51, at 3.

72. This fifth facet is a construction of this note's author. Though the notion of marketplace viability and brand maintenance are tangentially

repair and improve defective products to avoid adverse publicity which might result from future litigation. Since a prior jury finding of product defectiveness is admissible in a subsequent suit when the product causing the second injury is substantially similar to the first, distributors of defective products are under pressure to repair or alter their products to insulate themselves from a finding of defectiveness which may be used against them in subsequent litigation. . . . In conclusion, excluding evidence of subsequent repairs to encourage future remedial action may preclude recovery under theories of products liability which are themselves designed to ensure safety in marketed products. Relevant evidence should not be excluded from a products liability case by an obsolete evidentiary rule when modern legal theories, accompanied by economic and political pressures, will achieve the desired policy goals.'

<sup>67.</sup> E. Lee Reichert, Note, The "Superior Authority Exception" to Federal Rule of Evidence 407: The "Remedial Measure" Required to Clarify a Confused State of Evidence, 1991 U. ILL. L. REV. 843, 851-53.

<sup>68.</sup> Id. at 851-52.

<sup>69.</sup> Id. at 852.

<sup>70.</sup> Id. at 853.

<sup>71.</sup> Id.

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While the strict liability evidentiary exception emerged as one answer to the questions triggered by evolving concepts of tort liability inherent in § 402A and its embracing case law.<sup>73</sup> this approach has not been conclusive.<sup>74</sup> However, what is conclusive is that § 402A, which represented a significant progression in tort conceptualization, intersected quite problematically with the subsequent remedial measure rule.<sup>75</sup> At least, pre-1997, it operated problematically in all places but Maine and Rhode Island. In Rhode Island, business in relation to Rule 407 continued as usual - consistent and predictable. Determining early that § 402A emphasized fault. Rhode Island avoided the pitfall that has become common with federal rule 407 and its reflections as cast within the various states.<sup>76</sup>To wit, "the acceptance by many courts of strict liability in tort has encouraged a significant increase in product liability cases, and spawned another exception to the exclusionary rule, that the rule is

74. See Herdon v. Seven Bar Flying Servs., Inc., 716 F.2d 1322, 1333-34 (10th Cir. 1983) (summarizing appendix displays and discusses jurisdictional and Circuit splits in relation to applying the 407 bar to strict liability claims).

75. The Ault decision has represented a strident minority position; cf. Brent R. Johnson, The Uncertain Fate of Remedial Evidence: Victim of an Illogical Imposition of Federal Rule of Evidence 407, 20 WM. MITCHELL L. REV. 191, 201 (1994).

Robbins v. Farmers Union Grain Terminal Ass'n was the first [post-Ault] strict liability case to test Rule 407. In that 1977 case, a farmer sued the manufacturer of a cattle protein supplement when his calves died after ingesting the product. After the accident, the manufacturer sent consumers a notice warning that the feed supplement may be dangerous if used within one month of transporting and vaccinating cattle. The farmer claimed strict liability and sought to introduce the letter to demonstrate that the product was unreasonably dangerous and defective. On appeal, the Eighth Circuit admitted the evidence on the ground that strict liability, by its nature, does not contain the elements of negligence required for exclusion under Rule 407. Despite the apparent lack of ambiguity in the Robbins decision, federal circuit courts have inconsistently applied Rule 407 to subsequent product liability actions. The first occasion of inconsistency occurred in 1979, when the Third Circuit, ruling in Knight v. Otis Elevator Co., 595 F.2d 84 (3d Cir. 1979) decided that Rule 407 does apply to strict liability claims.

76. R.I. R. EVID. 407 advisory committee's note.

alluded to within the other four facets, the importance of this concept merits direct articulation and enumeration.

<sup>73.</sup> See Ritter v. Narragansett Elec. Co., 283 A.2d 255, 263 (R.I. 1971) (express adoption by the Rhode Island Supreme Court of § 402A and the incumbent strict liability principles).

inapplicable in strict liability cases."<sup>77</sup> In each jurisdiction where strict liability claims, consistent with § 402A have been accepted, the rule 407 question is inherently implicated such that courts are placed in the unenviable position of being tasked to get one more angel onto the head of an already overburdened pin. The results have been inconsistent interpretations, split circuits,<sup>78</sup> an invitation to forum shopping due to lack of uniformity,<sup>79</sup> and a general hodgepodge of confusion.

Striving to address the muddled state of the rule 407 bar caused by § 402A, Federal Rule 407 was amended in 1997 to provide that "evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction."<sup>80</sup> The proposed 1997 revision prescribed by the Supreme Court was enacted by Congress without change.<sup>81</sup> Clearly, in contravention of Ault, and all jurisdictions that followed the theory advanced in Ault, this change sent the clear message that the strict liability exception to the subsequent

79. Erin G Lutkewitte, Comment, A Problem in Need of Repair: Louisiana's Subsequent Remedial Measures Rule, 67 LA. L. REV. 195, 224-25 (2006) (Though the writer of this comment overlooks Rhode Island in asserting that "The exclusion of evidence of subsequent remedial measures is a universally accepted doctrine when applied to negligence and culpable conduct," useful insights into the forum shopping promoted by lack of uniformity in response to 407 exclusionary differences are offered therein); see also Carver, supra note 65, at 593; Johnson, supra note 76, at 204-05 ("Most cases involving the application of the exclusionary rule to subsequent remedial evidence are diversity actions, and thus, arise in federal court. In such cases, Federal Evidence Rule 407, rather than state law, generally applies since it can be rationally classified as procedural by nature. However, where state legislation contains specific exclusionary provisions for subsequent repairs, the state statutes may apply due to their substantive nature.").

80. FED. R. EVID. 407 (amended April 11, 1997; effective December 1, 1997) (emphasis added).

81. GEORGE FISHER, EVIDENCE: FEDERAL RULES OF EVIDENCE 2008-2009 STATUTORY SUPPLEMENT 60 (2d ed. 2008).

<sup>77.</sup> Hoffman & Zuckerman, supra note 61, at 504.

<sup>78.</sup> Thaus L. Richardson, Comment, The Proposed Amendment to Federal Rule of Evidence 407: A Subsequent Remedial Measure That Does not fix the Problem, 45 AM. U. L. REV. 1453, 1467 (1996) ("In refusing to apply Rule 407 to products liability actions, the Eighth and Tenth Circuits follow the minority rule. These two circuits adopted the rationale of the California Supreme Court in Ault v. International Harvester Co.").

measure rule was not the preference of the Supreme Court or Congress.<sup>82</sup> Federal Rule 407 applied equally to negligence and strict liability actions. However, even as this attempt to impart clarity and uniformity was underway, the ALI, on the heels of the evidentiary amending, published the Restatement (Third) of Torts.<sup>83</sup> Specifically, § 2, responding to dissatisfaction with the state of strict liability in tort, would seek to reduce the role of the expectation test of 402A - whichdefines consumer § "reasonableness" in accordance with an ordinary consumer's expectation – and fill the resultant vacuum with the pragmatically-oriented RAD requirement.<sup>84</sup> Though making the "reasonableness" standard less subject to shifting societal whims, the RAD requirement also places an increased burden on the plaintiff, one which quite arguably makes evidence of subsequent measures not only far more probative and relevant, but far more imperative for a full and fair adjudication by the trier of fact.<sup>85</sup> These two concurrent changes have set Federal Rule 407 and evolving tort principles on a collision course based upon coordinates of inherent contradiction.<sup>86</sup>

82. See Grubbs, supra note 41, at 782 (noting that, "[a]lthough the amendment clarified application of the exclusion of subsequent remedial measures evidence at the federal level, state courts remain divided").

83. See RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 (1998).

84. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965) (establishing that a product is 'unreasonably dangerous' "to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."); see generally Barker v. Lull Engineering Co., Inc., 573 P.2d 443, 455-456 (Cal. 1978) (holding that a product may be found defective in design, "if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.").

85. Reichert, supra note 67, at 849; infra note 92 and accompanying text.

86. See Grubbs, supra note 41, at 808 (arguing that Kentucky should repeal its recent 407 amendment, the author concludes, "The amendment extends application of the rule to products liability actions and results in a direct conflict with Kentucky's feasible alternative design requirement in design defect cases. By abandoning what is ultimately a futile revision to KRE 407, Kentucky will avoid needless appeals to clarify the admissibility of subsequent remedial measures in products liability cases.").

# C. Federal Rule 407 (1997) and the Restatement (Third) of Torts $\S$ 2

Section 2(b) of the Restatement (Third) sets forth the RAD requirement.<sup>87</sup> It is worth noting at the start: "The controversy surrounding the *Restatement (Third)'s* RAD requirement does not stem from complex language."<sup>88</sup> The section states that a design defect exists, "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe. . . .<sup>89</sup> Under this language, "[a]ssessment of a product design requires a comparison between an alternative design and the product design that caused the injury, undertaken from the viewpoint of the reasonable person.<sup>90</sup>

This shift in focus from consumer expectations to RAD is seismic in nature. $^{91}$ 

First, section 2(b) expressly limits consideration to 'the foreseeable risks of harm posed by the product.' Second, it requires establishment of a reasonable alternative design (RAD) as an element of a design defect claim. To hold a manufacturer accountable for injuries caused by its defectively designed product, a plaintiff must find or develop an alternative design, demonstrate that it was a 'reasonable' (meaning cost effective) alternative at the time of the manufacturer's decision, and prove that the

<sup>87.</sup> See RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 (1998).

<sup>88.</sup> Richard L. Cupp Jr., Defining the Boundaries of "Alternative Design" Under the Restatement (Third) of Torts: The Nature and Role of Substitute Products in Design Defect Analysis, 63 TENN. L. R. 329, 333 (1996).

<sup>89.</sup> See RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2(b) (1998).

<sup>90.</sup> Cupp, supra note 88, at 334.

<sup>91.</sup> Victor E. Schwartz, *The Restatement, Third, Torts: Products Liability:* A Model of Fairness and Balance, 10 KAN. J.L. & PUB. POL. 41, 41-44 (2000) (the author notes, "The Restatement Third, Torts: Product Liability is a model of fairness and balance. It neither favors plaintiffs nor defendants. It is based on case law written by America's judges. It is not simply a result of 'poll taking' of existing case law. The reasoning, insight and public policy supporting case law have been the guidelines for the new RESTATEMENT'S rules." In contrast, of the consumer expectation test, the author asserts, "the problem with the test is that it is so subjective that it can mean anything to anyone. Each juror can have his or her own personal 'expectations' which may result in defendants being subject to too harsh or too lenient a requirement.").

manufactured product was not reasonably safe because it did not incorporate the alternative design.

Third, the Restatement expressly rejects the consumer expectations test as 'an independent standard for judging the defectiveness of product designs,' relegating it to 'an important factor in determining the necessity for, or the adequacy of, a proposed alternative design.'...

These requirements effectively insulate most product marketing decisions from tort system review and erect substantial impediments to review of design choices. The manifest effect (and apparent purpose) is to shift accident costs to consumers by either precluding their claims or making them harder to establish....

As to design decisions, the RAD requirement (including its rejection of hindsight and of the consumer expectations test) presents 'a potentially insurmountable stumbling block' in the way of those injured by badly designed products.<sup>92</sup>

In fact, the complexity of the landscape is in great part a function of the relative youth of a robust realm of tort law, a realm whose rapid development has neatly coincided with the rise of  $20^{\text{th}}$  century mass production, industrialism and the now inevitable surge of mass economics.<sup>93</sup> Additionally, this shift is seismic because of the utter incompatibility between this shift in tort thinking and the absolute hobbling effect of federal rule 407.

The theme is clear, where product liability concepts have expanded, the role of remedial measure evidence has taken on widening significance.<sup>94</sup> As such, "[b]ecause of the importance of Rule 407 in products liability litigation, much of the current dispute is rooted in the development of that field.<sup>95</sup>

94. Freeman, supra note 5, at 1186.

<sup>92.</sup> Note, Just What You'd Expect: Professor Henderson's Redesign of Products Liability, 111 HARV. L. REV. 2366, 2372-73 (1998) (hereinafter Products Liability) (The author of this note concludes that Restatement (Third) is a highly problematic document that "represents a giant step backward." This conclusion hinges in part on the high burden RAD would place upon the plaintiff. This note suggests that the Restatement (Third) is not the problem, but it is Federal Rule 407 that is the problem – for the two cannot comfortably coexist without imparting an unfair burden upon plaintiffs.).

<sup>93.</sup> Vandall, *supra* note 38, at 1425-26 (studying the economic impact of the RAD requirement in relation to the added, and ultimately dissuading, litigation burden of the requirement shift upon plaintiffs).

<sup>95.</sup> Id.

Problematically, substantive review of developments in the Federal Rules and the Restatements indicates diverging approaches that spell more than a lack of clarity and finality to issues that have beleaguered courts for decades.<sup>96</sup> Worse even, it is here asserted that utilization of the RAD requirement with federal rule 407 is destined to preclude access to just remedies for plaintiffs in liability cases.

This tension between the proposed RAD requirement of § 2 and the proposed 1997 change to Federal Rule 407 was predictable. Even before the respective proposals were published, criticisms anticipating the incipient contradictions abounded.<sup>97</sup> For, even as federal rule 407 was explicitly expanding the exclusionary bar to strict liability claims, Restatement (Third) was advocating the import of subsequent measures while affirming strict liability claims through "reasonableness" language – a hallmark of negligence.

[T]he *Third Restatement Draft* states explicitly that design defects and defects due to inadequate instructions or warnings are to be judged by a reasonableness standard at the time of sale or distribution . . .

. . . First, if a product causes injury while being put to a *reasonably foreseeable use*, the product manufacturer is imputed with knowledge of the risks attendant to such use. Second, by characterizing a claim in terms of strict liability rather than in terms of negligence, courts can limit the introduction of defenses such as comparative or contributory negligence. Finally, by

<sup>96.</sup> Id. at 1218. (Here, I challenge the author's conclusion regarding the effect of the then proposed changes to federal rule 407. In fact, until any version of rule 407 is synchronized to tort reform as led by the Restatements, clarity and finality will elude. Rhode Island, through its unique approach, has either presaged, or simply been fortunate to be positioned for just such synchronicity between its 407 rule and the trending direction of tort reform).

<sup>97.</sup> Cami Perkins, The Increasing Acceptance of the Restatement (Third) Risk Utility Analysis in Design Defect Claimas, 4 NEV. L.J. 609, 614 (2004) ("A final criticism is that the Restatement (Third) is a retrogression in products liability because it returns to negligence concepts by placing the burden on the plaintiff. Pro-consumer advocates present this argument because the Restatement (Second) relieved plaintiffs from proving negligence on the part of the manufacturer. By focusing on the product itself, however, the consumer expectations test unfairly made it easier to obtain a recovery for the plaintiff, regardless of whether the manufacturer exercised the utmost care.").

focusing on the product rather than on the conduct of the manufacturer, courts avoid a negligence standard that may be 'too forgiving of a small manufacturer who might be excused for its ignorance of risk or for failing to take adequate precautions to avoid risk.' Thus, while the theory of strict liability may have become the 'paramount' basis of liability for product manufacturers, elements of the traditional negligence theory have found their way back into the strict liability scheme.<sup>98</sup>

Here, it is apparent that the longstanding criticism that strict liability is a semantically constructed judicial hedge against overly weak negligence concepts not only remains but resurfaces in Restatement (Third).<sup>99</sup> Identified as 'logically indefensible,' this judicial hedge is precisely what the Rhode Island Advisory Committee's Notes refused to validate.<sup>100</sup> Interestingly, in addition to reasonableness, Restatement (Third), by speaking of a 'reasonableness standard' at the time of sale or distribution, was intensely implicating the bounds of rule 407 such that some argued that the revised exclusionary rule did not go far enough and should be expanded to cover pre-event remedial measures taken after a manufacturer releases its product into the stream of commerce.<sup>101</sup> Hopefully, what has become clear is that the miasma surrounding federal rule 407 and its relationship to tort principles stems from an attempt to validate and advance rules that, at root, are logically irreconcilable.

100. See generally R.I. R. EVID. 407 advisory committee's note.

<sup>98.</sup> Richardson, supra note 78, at 1464-66 (emphasis added).

<sup>99.</sup> Products Liability, supra note 92, at 2380 (assailing one of the architects of Restatement (Third) and thereby illuminating the rationale of the Restatement, the note asserts, "[A]ssumption that fault somehow inheres in the nature of causation is a manifestation of an implicit underlying assumption that the standard to be applied by a court for imposition of liability must be the same as the standard of conduct desired on the actor's part. This underlying assumption may be seen as embodied in Henderson's conformability constraint: Henderson argues that it is both inefficient and unfair 'to penalize an individual for failing to conform to . . . a rule that asks the impossible.") (alterations in original).

<sup>101.</sup> Richardson, *supra* note 78, at 1456 ("while the rule's expansion to cover products liability actions is appropriate, limiting the scope of the exclusionary rule to remedial measures taken after personal injury or property damage in products liability actions is inconsistent with both the public policy behind the rule and substantive products liability law.").

D. Rhode Island Law in Relation to the Restatements (Second) & (Third)

To further contextualize Rhode Island's instructive positioning at a nexus of tort and evidentiary law, it is useful to define the state's current relationship to Restatements (Second) and (Third). The Rhode Island Supreme Court explicitly adopted Restatement (Third) of Torts § 5 in Buonanno v. Colmar Belting Co., Inc.<sup>102</sup> In dicta, the court spoke favorably of Restatement (Third) of Torts § 2, and specifically § 2(b), which sets forth the RAD standard.<sup>103</sup> Whether Buonanno evinces adoption of Restatement (Third) of Torts § 2 is debatable.<sup>104</sup> Since Buonanno, the court has not expounded upon this discussion of § 2.105However, the following cases provide some modicum of support for the position that the Rhode Island Supreme Court may be willing to expressly adopt Restatement (Third) § 2, and therefore the ascendance of the traditional risk-utility test that flows into a RAD analysis, if given the opportunity.<sup>106</sup>

The first is Castrignano v. E.R. Squibb & Sons, Inc.<sup>107</sup> In Castrignano, the court cited the seminal 1971 Ritter v. Narragansett Electric Co.<sup>108</sup> case, in which the court embraced the strict liability consumer-expectation test advanced under Restatement (Second) of Torts § 402(A). Post-Ritter, the court has adopted several of the Restatement (Second)'s comments that explain how § 402(A) should be applied.<sup>109</sup> These comments often

106. The language of "risk-utility" balancing is equivalent to the common tort concept of "cost-benefit" analysis. RAD relies upon such balancing analyses in a way that the Consumer Expectation Test promoted through the Restatement (Second) of Torts does not.

107. Castrignano v. E.R. Squibb & Sons, Inc., 546 A.2d 775 (R.I. 1988).

109. See Thomas v. Amway Corp., 488 A.2d 716, 722 (R.I. 1985) (citing comment j); Brimbau v. Ausdale Equip. Rental Corp., 440 A.2d 1292, 1297 (R.I. 1982) (citing comment f); Romano v. Westinghouse Elec. Co., 336 A.2d

<sup>102.</sup> Buonanno v. Colmar Belting Co., Inc., 733 A.2d 712, 716 (R.I. 1999).

<sup>103.</sup> Id. at 717-18.

<sup>104.</sup> See Guilbeault v. R.J. Reynolds Tobacco Co., 84 F. Supp. 2d 263, 278 (D.R.I. 2000) (rejecting the idea that Rhode Island adopted Restatement (Third) § 2 in *Buonanno*).

<sup>105.</sup> See Ruzzo v. LaRose Enters., 748 A.2d 261, 266 n.6 (R.I. 2000) (discussing the court's adoption of § 5 of Restatement (Third) of Torts in *Buonanno*).

<sup>108.</sup> Id. at 779 (citing Ritter v. Narragansett Elec. Co., 283 A.2d 255 (R.I. 1971)).

have the effect of blunting strict liability concepts. In Castrignano, the court adopted § 402(A) comment k, stating, "[c]omment k recognizes that certain products have dangers associated with their use even though they are manufactured and used as intended. It provides that those products that are deemed 'unavoidably unsafe' should be exempted from the no-fault strictliability analysis of § 402A."<sup>110</sup>The court goes on to state, "[h]aving adopted comment k, we must next decide the scope of its protection by defining what drugs comment k should exempt from design-defect liability."111 While section k and Castrignano share a focus upon the field of pharmaceutical drugs, there is nothing in § 402A comment k to indicate that the "unavoidably unsafe" concept and the risk-utility analysis it triggers is limited to that Most significant is that in adopting the comment k sector. exception, the court signaled that it will emphasize the social policies underlying risk-utility. To this point, the court, quoting comment k, held:

'The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.' This comment provides a risk-benefit test for products that, given the present state of human knowledge, are incapable of being made safe for their intended use.<sup>112</sup>

While Castrignano pre-dates the Restatement (Third), it does evidence that the Rhode Island Supreme Court may prefer negligence concepts to strict liability concepts where there are social interests in recognizing the practical necessity, be it current or retroactive, of risk-utility balancing. That sets the stage for ultimately adopting the RAD test promoted in the Restatement (Third).

<sup>555, 558 (1975) (</sup>citing comment m).

<sup>110.</sup> Castrignano, 546 A.2d at 797.

<sup>111.</sup> Id. at 780-81

<sup>112.</sup> Id. at 780.

Castrignano impliedly affirms the court's adoption of § 402(A), comment j, in *Thomas.*<sup>113</sup> Departing from rigorous strict liability concepts, comment i establishes that the standard for failure to warn is equivalent to the standard for negligence.<sup>114</sup> "In *Thomas*. . . th[e] court limited the failure-to-warn theory by ruling that a seller need only warn of those dangers that are reasonably foreseeable and knowable at the time of marketing."<sup>115</sup> Again, the core concept is that prior to the publication of the Restatement (Third), the court demonstrated a history of easing away from strict liability theories in favor of negligence analyses founded upon risk-utility test public policy arguments. Such a history accords with Rhode Island's subsequent measure evidentiary policy, and presents a harmonized framework of tort and evidentiary rules that other jurisdictions are flailing to either attain or reconcile.

Considering Buonanno as the logical progeny of Castrignano and Thomas, ground exists to support the proposition that the Rhode Island Supreme Court would expressly adopt the riskutility balancing and RAD tests of Restatement (Third) § 2 if given the opportunity. Common concerns that Restatement (Third) § 2 sets too great a burden upon plaintiffs is addressed, in part, through reference to § 2 comment b. Comment b emphasizes that in some instances the plaintiff may establish a design defect without proof of a reasonable alternative design. These instances are specifically covered in § 2, Comment e, and §§ 3 and 4. "When § 2(b) is read in conjunction with these other provisions that allow other avenues for determining defective design, it reflects a substantial body of case law suggesting that the reasonable alternative design is the predominant, yet not exclusive, method for establishing defective design."<sup>116</sup> The plain purpose of comment b is to provide the important assurance that adoption of Restatement (Third) § 2 does not create an absolute and

<sup>113. .</sup>Id. at 779; compare with Raimbeault et al. v. Takeuchi Mfg., 772 A.2d 1056, 1063 (R.I. 2001) (here, citing with favor to Thomas v. Amway Corp. in a product liability and negligence action predicated on negligent design and failure to warn theories, the court implicitly utilized the § 402A, comment k, unavoidably unsafe analysis. As asserted previously, such an analysis implies a *de facto* risk-utility test).

<sup>114.</sup> Thomas, 488 A.2d at 722.

<sup>115.</sup> Castrignano, 546 A.2d at 782.

<sup>116.</sup> RESTATEMENT (THIRD) OR TORTS: PROD. LIAB. § 2 cmt. b (1998).

overwhelming burden upon plaintiffs to demonstrate a RAD. This caveat provides consumer-plaintiffs with safeguards while simultaneously permitting courts to move away from the inherent pitfalls of the consumer expectations test that has contributed to much modern disenchantment with the uncertain and unpredictable state of tort law.<sup>117</sup>

PART III - CONCLUSION AND MODEST PROPOSAL

Subsequent remedial measures should be treated uniformly irrespective of the nature of the claim. Federal 407 has come to this consistent treatment conclusion as Rhode Island did years earlier. That the federal rule and Rhode Island differ on the next logical question, general admissibility, is perhaps the larger point. Though Rhode Island would appear to be in a super-minority, it may well be that Rhode Island's position is the stronger both in terms of principle and policy. The principle is adherence to logic; the policy is the aim of judicial truth-seeking, especially within the intensely contested realm of product liability where even small grains of evidence can have a profound influence on an outcome.

There is something to be said for not chasing the trends of favor, especially where there is a principled reason for standing still. Kansas adopted the federal rule on remedial measures mainly for the aim of uniformity despite a long and untroubled history of admitting such evidence.<sup>118</sup> Maine's reversal was also predicated upon blind uniformity aims rather than the articulation of a logical principle.<sup>119</sup>

Whether Rhode Island proves to be a curiosity or a significant symbol demonstrating the way forward through an inevitable

118. See supra notes 49, 52 and accompanying text.

<sup>117.</sup> It is worth noting that although the Rhode Island Supreme Court has adopted sections of the Third Restatement (See Calise v. Hidden Valley Condo. Ass'n, Inc., 773 A.2d 834, 845 (R.I. 2001) (citing favorably to § C21); Ruzzo v. LaRose Enter., 748 A.2d 261, 266 n.6 (adopting § 18)), the closest the Court has come to § 2 is in *Buonanno* while adopting § 5. This is significant because it is an adoption of any of §§ 1-4 that will signal the clearest adoption of the Restatement (Third) product liability approach. Comment b states, "This Restatement, especially its first four sections, must be read together, as an integrated whole." RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 (1998).

<sup>119.</sup> See supra notes 25-26 (this statement is derived via deductive reasoning as Maine issued no advisory note explaining the reasons for reversing its subsequent remedial measure evidentiary rule).

crisis for federal rule 407 remains to be seen. Rhode Island has, however. attained what the federal counterpart has striven but failed to attain – clarity and predictability. In the final analysis, much of the problem in this field has resulted from submission to a complex calculus of moving parts where simple Boolean logic would be far more apropos. In any truth-seeking enterprise, which is at least in popular thought the prime function of the judicial system, exclusions of factual evidence should be utilized not as a first but as a last resort.<sup>120</sup> Federal rule 407 is an exclusion that has become fraught with exceptions.<sup>121</sup> Useful application of the rule is challenging enough, but the calculus gets utterly subjective once intersected with the tenuous and semantically slippery realms of negligence and strict liability in torts, especially in its burgeoning form as a way for determining recovery for products liability. The more exclusions and exceptions that are created, the further from the truth the trier of fact will be.<sup>122</sup> The contradictory result is logically indefensible: strict liability will cause liability to reside with non-negligent parties, while in concurrent cases, the rule 407 exclusion will shield negligent parties from being held accountable.

For decades now, the criticism of the remedial measure bar is that if the public policy rational of encouraging, or at least not discouraging, repairs is an incorrect assumption, then the rule limits evidence while providing zero social benefit.<sup>123</sup> The point here asserted is that throughout all of these decades of devotion to this assumption, there remains no validating empirical proof.<sup>124</sup> The policy of not discouraging repairs thus resembles, more and

123. Schwartz, supra note 51, at 4-6.

<sup>120.</sup> See FED. R. EVID. 102 (which states, "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.").

<sup>121.</sup> See supra note 9 (listing standard enumerated exceptions of FED. R. EVID. 407).

<sup>122.</sup> See supra notes 86-94 and accompanying text.

<sup>124.</sup> Johnson, *supra* note 75, at 206 ("Those who advocate excluding remedial evidence argue that admission of the evidence would discourage otherwise reasonable people from taking steps to increase safety. This argument, based on early common law decisions involving negligence, is speculative at best. There is no evidence that admitting remedial evidence deters manufacturers from correcting products that are known to be defective or dangerous.").

more, antiquated speculation.<sup>125</sup>

Now, particularly in light of evolution in the fields of mass, economic-driven industrialization and tort, such threadbare speculation needs to be challenged, and in the absence of empirical evidence, the truth-seeking enterprise should be honored above speculative, if not outright specious, social policies.<sup>126</sup> And so, this author concludes with a modest proposal. Rhode Island should maintain its unchanged course as the sole jurisdiction allowing subsequent remedial measure evidence While it may seem that such a under all circumstances. conclusion renders the entirety of this comment superfluous, it is here argued that the grounds for Rhode Island's unique position have been and are worthy of articulation for two main reasons: 1) to present a ready defense against some future impulse to follow the national trend simply because it is the trend, and 2) more importantly, to set forth the underlying logic of Rhode Island's idiosyncratic position such that others might see that the oft-

<sup>125.</sup> Id. at 206-07 ("Lack of evidentiary support is but one of several flaws in the deterrence theory. The notion that admitting remedial evidence will discourage post-accident repairs assumes that manufacturers know and understand the effect and applicability of Rule 407. This assumption is both unsupported and unrealistic. Decisions affecting the manufacturing process are made by management and engineering specialists. It is unlikely that a concept so foreign to the production process as a federal evidentiary rule would have any impact on the methods and specifications by which a product is manufactured. Even assuming that the manufacturer contemplates Rule 407, the effect of the rule, with its many exceptions and inconsistencies, is incapable of being predicted with any certainty.").

<sup>126.</sup> The note writer is here reminded of a rather famous parable about a holiday ham. One holiday, with a large family gathered, the centerpiece ham was brought into the dining room amid much joy and fanfare. A young child noticed that both ends of the ham had been cut off to make the ham much shorter than it would otherwise have been. Curious, the child asked her father, who had cooked the ham, why the ends had been cut off. The father answered that he did it this way because that's the way his mother had always done it. As the father's mother was present, the little girl asked her fraternal grandmother why she had cut the ends off the ham. She scrolled her eyes in bemusement before admitting she didn't know the exact reason but that's what her mother had always done. Well, since the relevant greatgrandmother was present, sitting quietly at the end of the table, the little girl asked her why she had cut the ends off the ham. The great-grandmother laughed softly while shaking her head before answering in something of a rasping whisper, "My dear child, I cut off the ends of the ham because we were poor and we had only one pan for cooking. Cutting off the ends was the only way I could get a ham into the pan."

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ignored or overlooked Rhode Island exception may serve as an empirical proof of the general failure of the convolute federal approach. Why? Quite simply because it is a course that is and has been grounded in the first and simplest of logical principles, the one we keep coming back and back to – truth.<sup>127</sup>

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127. Supra at note 1.

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