Toups v. Sears, Roebuck & Co.: Re-Assessing Admissibility of Subsequent Remedial Measures Evidence in a Products Liability Suit

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The Toups family maintained a small shed behind their home to store their lawn mower, a gas can, and the tricycle of their three year old son, Shawn. The shed also contained the family's gas hot water heater. The heater had been properly installed. Its air intake system was two inches above the ground as designed. It bore no warning to caution consumers of the danger of storing flammable liquids nearby.

On the day the accident occurred, Richard, the family's twelve year old son, had cut the lawn and returned the lawn mower and gas can to the shed. Later, Shawn went to the shed to get his tricycle. Flammable gasoline vapors, emanating from both the lawn mower and gas can, entered the ground level air intake system. The heater's pilot light ignited these vapors, causing a flash fire which severely burnt Shawn. In response to this and many similar accidents nationwide, Sears added warnings to the heater and the operator's manual to caution consumers as to the danger of storing flammable liquids nearby.

Subsequently, Shawn's parents brought a strict products liability suit against the manufacturer. On alternative grounds, they contended either that Sears failed to warn of the danger of storing flammable liquids near the water heater or that Sears failed to adopt a safer, alternative design which would have raised the air intake system above the height where flammable vapors might exist. Sears countered that the water heater was not defective because it had been built according to the industry's minimum standards of the time. Additionally, using the defense of scientific unknowability, Sears argued that it could not have known of this risk with the technology existing at the time it manufactured the water heater. Finally, Sears argued that the mother or one of the children was contributorily negligent in handling the gasoline and that the mother was contributorily negligent in her supervision of the children.

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1. Sears was the vendor of both the lawn mower and the water heater. State Industries, the manufacturer of the water heater, was also a defendant, but the manufacturer of the lawn mower was not joined. Upon appeal to the Louisiana Supreme Court, the claim based upon the lawn mower was dropped. While both defendants remained, the court referred only to Sears to avoid confusion.

For questions involving vendor liability, see the court's discussion in Toups v. Sears, Roebuck & Co., 507 So. 2d 809, 819 n.27 (La. 1987).
A jury found that neither the lawn mower nor the water heater was defective and that the plaintiffs were contributorily negligent in their handling of the gasoline. The jury, however, was not allowed to hear evidence of the subsequently added warnings in the operator’s manual and on the heater. This evidence arguably would have proved either the knowledge necessary to create a duty to warn or the feasibility of the alternative design alleged as possible by the plaintiffs. The Louisiana Fourth Circuit Court of Appeal affirmed both the evidentiary exclusion and the jury verdict. In a plurality opinion, the Louisiana Supreme Court reversed, holding that the evidence was improperly excluded from the jury and that Sears breached its duty to warn of the known danger of storing flammable liquids near the heater. *Toups v. Sears, Roebuck & Co.*, 507 So. 2d 809 (La. 1987).

The *Toups* opinion raises more than the question of whether a product was unreasonably dangerous because a manufacturer breached his duty to warn of a foreseeable risk. More importantly, it addresses the admissibility of evidence of subsequent remedial measures in a products liability case. This note will analyze the *Toups* rationale for admissibility and the implications of that rationale. This note also includes a historical analysis of the admissibility of proof of subsequent remedial measures and an analysis of the relationship of “scientific unknowability” to evidence of subsequent remedial measures.

**Analysis of Admissibility of Subsequent Remedial Measures Evidence**

Evidence of subsequent remedial measures has been always inadmissible to establish negligence or to show culpable conduct. Federal Rule of Evidence 407, to which the vast majority of jurisdictions adhere, codifies this common law rule. Several reasons justify this rule. First,
exclusion of evidence of subsequent measures encourages people to take steps to further safety, or, at least, does not discourage the taking of such steps. Second, such evidence is considered logically irrelevant to the issue of negligence, since the subsequent act is not to be regarded as an admission of antecedent negligence. Commentators have elaborated on this, characterizing subsequent remedial measures evidence as "logically irrelevant because what occurs prior to the injury, not afterwards, determines whether there has been a culpable breach of duty." The irrelevancy stems from a possible multiplicity of causation, since a defendant's later improvements may be based on aesthetic, functional, or economic reasons unrelated to the issue of negligence. Finally, the evidence may unfairly prejudice the defendant because it confuses the jury as to its purpose and might be considered by the jury as an admission of negligence by the defendant.

Historically, courts also uniformly excluded evidence of subsequent remedial measures in strict products liability, since the policy rationale for excluding the evidence is the same under both theories. However,
beginning with *Ault v. International Harvester*, courts nationwide reevaluated whether this exclusion in strict products liability attained desired social policies of compensating victims and encouraging product safety reform. Subsequently, many state jurisdictions reversed themselves and admitted this evidence, holding that the exclusionary rule does not apply to strict products liability since the litigation centers on the product, not manufacturer negligence or culpability. Arguing that this distinction meant that negligence and strict products liability are not analogous, advocates of admissibility of subsequent remedial measures evidence have

general would be less likely to take subsequent remedial measures if their repairs or improvements would be used against them in a lawsuit arising out of prior accidents. By excluding this evidence defendants are encouraged to make such improvements. It is difficult to understand why this policy should apply any differently where the complaint is based on strict liability as well as negligence.

Id. at 857.

13. 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974). The plaintiff was riding in an International Harvester Scout which veered off the road and plunged into a canyon, allegedly because of a failure in its aluminum gear box. The plaintiff wished to introduce evidence that subsequent to this injury the defendant replaced aluminum Scout gearboxes with iron ones, in order to show that the aluminum gearbox was defective. The California Supreme Court held that the evidence was admissible to prove the existence of a defect. No policy factors prevented this admission because the policy exclusion of subsequent remedial measures in negligence actions did not analogously apply in cases of strict liability. The California Supreme Court reasoned that mass manufacturers of thousands of units of a product would take remedial measures to avoid greater future liability regardless of the admissibility of the evidence.

To note the trend of jurisdictions adopting this policy, see generally infra note 14. See also 2 L. Frumer & M. Friedman, supra note 4, at § 3.04[3].

14. Comment, supra note 5, at 1487 n.11.


Another factor which supports relevancy is that it allows a plaintiff in failure to warn and design defect cases to prove manufacturer knowledge or feasibility of warning with greater ease than in traditional negligence suits, where those issues are difficult if not impossible to substantiate. This again fosters victim recovery. See Lugenhuhl, Contemporary Problems in Maritime Products Liability, 45 La. L. Rev. 859, 861 (1985); Prosser & Keeton On Torts 695-96; Green, Strict Liability Under 402A & 402B: A Decade of Litigation, 54 Tex. L. Rev. 1185, 1189 (1976); Comment, Design Defects: Are Consumer Expectations Unrealistic?, 45 La. L. Rev. 1313, 1314 (1985).

15. R. Lempert & S. Saltzburg, supra note 11, at 193-94; Comment, Products Liability and Evidence of Subsequent Repair, 1972 Duke L.J. 837, 846-48 (1972); Comment, supra note 4, at 138-39. Negligence and products liability cases are distinguishable in two ways. First, strict products liability is different because the focus of liability stems from the product, not from reasonableness or culpable conduct. Second, the rule in products liability affects the substantive law of products liability, while it does not do so in negligence.
asserted that assumptions forming the basis for exclusion in strict liability, primarily that admission of such evidence prevents safety reform, are manifestly erroneous. They have contended that admitting, not excluding, evidence of subsequent remedial measures actually encourages repairs. Under their analysis, mass manufacturers of defective products must take action to repair because of the threat of immense economic liability from thousands of products liability lawsuits and the social liability from adverse publicity of such litigation.

Courts nationwide have also reassessed the logical and legal relevance of this evidence to the issues of products liability, developing narrow exceptions to the general exclusionary rule. Initially, courts have recognized that exceptions exist within Federal Rule of Evidence 407 and its state counterparts. These exceptions allow admissibility of subsequent repair evidence where ownership, control or feasibility are controverted by the defendant. Other narrow exceptions have developed within this framework, including the admission of this evidence to prove prior notice, knowledge, or for impeachment purposes. In each case, the evidence is probative of the validity of the defendant’s denial, yet is always subject to exclusion if it unduly prejudices the defendant.

Conversely, some courts have adopted the Ault analysis in which the exclusionary rule has no application to products liability. In those jurisdictions, this evidence is not only probative of collateral issues, but also of the ultimate issue of a product’s defectiveness because the evidence reflects appropriate safety standards for products and the defen-

16. Comment, supra note 15, at 848. "[T]he 'public policy' assumptions justifying this evidentiary rule are no longer valid." Ault, 13 Cal. 3d at 120, 528 P.2d at 1152, 117 Cal. Rptr. at 815.
17. Comment, supra note 15, at 848.
18. Id. at 848-50. "[T]he repairs may be mandated by government agencies; the prospect of repeated liability claims will make immediate repairs the less costly alternative whatever the litigation costs; or, and perhaps most importantly, the danger that unfavorable publicity will interfere with the sales of non-defective products." R. Lempert & S. Saltzburg, supra note 11, at 194 n.5.
19. See also, Ault, 13 Cal. 3d at 113, 528 P.2d at 1148, 117 Cal. Rptr. at 816; Robbins v. Farmers Union Grain Terminal Ass’n, 552 F.2d 788, 793-94 (8th Cir. 1977); Farner v. Paccar, Inc., 562 F.2d 518, 527 (8th Cir. 1977).
20. The exceptions of Fed. R. Evid. 407 are merely illustrative. As such, other exceptions have developed within that framework. See Fed. R. Evid. 407, Advisory Comm. Notes. See also Comment, supra note 4, at 151-53.
dant's ability to adopt them.21 These Ault-type jurisdictions, where no exclusionary rule exists, must be distinguished from those which adopt an exclusionary rule for products liability, but maintain exceptions to it.

While a trend toward admissibility of subsequent remedial measures exists, opinions remain mixed as to both relevancy and policy.22 Maintaining the argument of multiplicity of causation to disprove the relevancy of this evidence, commentators have reasserted the need for exclusion of such evidence in order to expedite socially optimal product reform.23 These rebuttals contend that the mere use of this evidence, regardless of under what theory or issue it is admitted, represses any inclination to make subsequent improvements or repairs.24 Others have argued that the Ault standard erroneously assumes manufacturers act in an idealistic market setting, when, in fact, they do not.25 Personal motives of corporate managers to "play deep"26 and to maximize short-term profits actually make it marginally optimal to ignore product reform. Thus a manufacturer is motivated to leave the product in its current state, rather than risk an admission of defect by implementing product improvements.27

With neither strong empirical evidence nor consistent jurisprudential analysis to corroborate either position, the issue of admissibility of subsequent remedial measures has remained unresolved. Because of the multiplicity of causes of accidents involving products, it is difficult to find empirical evidence to support the policy of admissibility. Some empirical evidence exists to prove the efficacy of exclusion, yet the data often lacks persuasiveness.28 Likewise, Federal Rule of Evidence 407

21. R. Lempert & S. Saltzburg, supra note 11, at 194: To prove the existence of a defect, "the plaintiff must usually show that some alternative way of manufacture or design was both safer and feasible. A subsequent improvement is highly probative on both these points. . . . [A] business is not likely to change a product unless the change promotes safety and is feasible." See also Comment, supra note 15, at 846-47.
22. Comment, supra note 6, at 342-47.
26. Id. "[D]eep play" refers to the tendency of corporations and corporate managers to defer taking action that would enhance the safety of their products and thereby reduce their aggregate liability exposure, even though the costs appear to be outweighed by the benefits of taking such action." Id. at 766 n.3.
27. Id. at 765.
28. Id. at 777-80. Henderson uses two examples, asbestos and DDT, which offer some empirical proof as to the efficiency of the exclusion in products liability, but it is doubtful that other products would be treated similarly unless the dangers presented by those products were as significant. See also Grenada Steel Indus. v. Alabama Oxygen Co., 695 F.2d 883, 887 (5th Cir. 1983).
offers no solution because of its susceptibility to conflicting interpretations in the various federal districts.29

The Dilemma of the Federal Courts

In *Grenada Steel Industries v. Alabama Oxygen Co.*,30 the United States Fifth Circuit Court of Appeals noted the lack of uniformity on the issue of the admissibility of evidence of subsequent remedial measures. The Fifth Circuit followed the path taken by the Second, Third, Fourth, and Sixth Circuits, and held such evidence inadmissible under Rule 407 to prove the existence of a defect in strict products liability.31 Justification for this position rested not only on policy factors, but, more heavily, on the irrelevancy of subsequent remedial measures to the issue of defect.32 The court asserted that arguments on such evidence’s probative nature are “based on little direct evidence of why manufacturers make product changes.”33 The court continued, decrying reliance on “undocumented assumptions about how evidence of such changes might affect litigation.”34 The court focused on the mysterious nature of industry actions, stating:

A priori judgments concerning why manufacturers do or do not alter their products, made by such dubious experts as judges, lawyers, and law professors, suffer from excessive reliance on logical deduction and surmise without the benefit of evidence of industry practice or economic factors. . . . We cannot really know why changes are made by industry generally or why a change was made in a particular product in the absence of evidence on the question.35

The court also based exclusion on the jury confusion created by such evidence.36 Hence, the court reasoned that even had the evidence been

29. No conformity is found on Fed. R. Evid. 407’s application in the federal district or appellate courts. For a discussion and examples, see infra notes 39-41.
30. 695 F.2d 883 (5th Cir. 1983).
32. *Grenada*, 695 F.2d at 888.
33. Id. at 887-88.
34. Id.
35. Id.
36. Id.
relevant under Rule 407, the danger of confusion would have outweighed
the probative value sufficiently to justify exclusion based on Rule 403.37
This is especially true where manufacturer knowledge may be proven
by alternative methods which are less confusing and more probative on
the issue.38

The *Grenada* court noted that the Eighth Circuit has repeatedly held
that Rule 407 has no applicability for excluding this evidence in strict
products liability.39 Similarly, many state courts have followed the *Ault*
and Eighth Circuit rationale, holding that such evidence is admissible
in strict products liability.40 In response, the Fifth Circuit in *Grenada*
argued that certain exceptions exist under Rule 407 when a defendant
attempts to affirmatively use this evidence, but that generally Rule 407
still excludes subsequent repair evidence in strict liability. Hence, the
Fifth Circuit rejected the *Ault* and Eighth Circuit position, instead
recognizing the applicability of the exclusionary rule to products liability,
along with its limited exceptions.41

*The Louisiana Position*

Prior to *Toups*, Louisiana's jurisprudential position has been clearly against
admission of subsequent remedial measures evidence in negligence actions.42

37. Id.

Fed. R. Evid. 403 provides: "Although relevant, evidence may be excluded if its probative
value is substantially outweighed by the danger of unfair prejudice, confusion of issues,
or misleading the jury, or by considerations of undue delay, waste of time, or needless
presentation of cumulative evidence."

38. See *Ault*, 13 Cal. 3d at 124-28, 528 P.2d at 1154-57, 117 Cal. Rptr. at 819-21
(Clark, J., dissenting); Comment, supra note 6, at 341.


40. Id. at 887 n.5. See also, Comment, supra note 5, at 1487 n.11.

41. *Grenada*, 695 F.2d at 888-89. The position taken by the majority of federal
courts is that Fed. R. Evid. 407 applies to exclude this evidence in products liability,
yet certain exceptions exist when controverted by the defendant. Thus, if the defendant
does not raise the issue, the court may not use the exception to admit the evidence. For
an excellent discussion of grounds for exclusion, see Note, Subsequent Remedial Measures

42. For a complete list of Louisiana cases excluding evidence of subsequent remedial
measures in negligence, in addition to the four discussed in the text, see Boudreaux v.
Exxon Co., USA, 451 So. 2d 85, 90 (La. App. 3d Cir.), writ denied, 458 So. 2d 119
(1984); Esta v. Dover Corp. 385 So. 2d 439, 448 (La. App. 1st Cir.), writ denied,
392 So. 2d 690 (1980); Lea v. Baumann Surgical Supplies, 321 So. 2d 844, 856 (La.
App. 1st Cir. 1975), writ denied, 325 So. 2d 279 (1976); Hadrick v. Diaz, 302 So.
2d 345, 351 (La. App. 1st Cir. 1974); Trahan v. Liberty Mutual Ins. Co., 273 So. 2d
331, 333 (La. App. 3d Cir.), writ denied, 275 So. 2d 791 (1973); Nichols v. Green
Four cases exemplify Louisiana's prohibition. In *Givens v. De Soto Bldg. Co.*, Mr. Givens fell on an unlighted step in a theater. Nothing was present to caution patrons of the potential hazard. After the injury, the Desoto Building Company lighted the area. The *Givens* court held the evidence of the subsequent repair inadmissible to prove negligence because of the policy of encouraging remedial action. The court explained that such an admission would operate "as a confession that [the defendant] was guilty of prior wrong"; thus admission was improper since it would prevent society from taking advantage of new information, profiting from experience, and implementing remedial measures.

In *Currier v. Saenger Theaters Corp.*, Mrs. Currier fell down unrailed stairs in the Saenger Theater because the stairs were too steep and the carpet was badly worn. No warning existed to caution persons using the stairs of the danger of tripping. After Mrs. Currier's injury, the stairs were railed and the carpet replaced. The court held that the evidence of these changes was inadmissible because the acts were without probative value to prove antecedent negligence.

In *Gauche v. Ford Motor Co.*, Mrs. Gauche was injured when the brakes on the family's 1965 Lincoln Continental overheated and failed because of a low grade brake fluid. Later in the year, Ford recalled all 1965 Continentals and changed the brake fluid and lines. On rehearing, the court clarified its basis for findings of defect for redhibitory purposes and fault for negligence. The *Gauche* court, re-
turning to the analysis of *Givens*, held that evidence of the recall and fluid change could not be used to prove negligence or actionable fault, asserting that such a policy would prevent future remedial measures.\(^{48}\)

Finally, *Galloway v. Employers Mutual*\(^{49}\) involved an exposed, worn gear of a machine. While cleaning the gear, Mr. Galloway’s pants became caught in the gear’s treads. His penis was traumatically and totally amputated within a matter of seconds. To prove his employer’s negligence for failure to remedy the defect and prevent the injury, Mr. Galloway offered evidence that the gear was later covered by a protective metal plate. The court gave no analysis for its exclusion, stating only that it believed the evidence “to have been properly withheld from the jury.”\(^{50}\)

Following the traditional view that products liability and negligence are analogous, Louisiana courts have applied these principles to strict products liability, holding that evidence of subsequent remedial measures is inadmissible to prove the existence of a defect.\(^{51}\) In *Landry v. Adam*,\(^{52}\) the fourth circuit held evidence of a recall letter and subsequent brake system repair logically irrelevant to prove the existence of a defect in a products liability suit, and, therefore, inadmissible.\(^{53}\) The fourth circuit also rejected the evidence because of the potential unfair prejudice to the defendant, as well as because admission of this evidence would have been contrary to a policy of encouraging repair.\(^{54}\)

In *Lovell v. Earl Grissmer Co.*,\(^{55}\) the first circuit joined the fourth circuit, rejecting evidence offered to prove the existence of a defect in products liability. The plaintiff had sought to introduce evidence of the defendant’s post-accident modification to a power service cord and addition of a warning to an electrical washing device. The first circuit maintained that this evidence was not logically relevant since it had no probative value as to proof of a defect, nor was it legally relevant since it raised undue inferences of the defendant’s guilt.\(^{56}\) That court again rejected subsequent remedial measures evidence in *Smith v. Formica Corp.*,\(^{57}\) where evidence of a post-accident federal regulatory change in the use of a linoleum adhesive was ruled irrelevant to a determination

\(^{48}\) Id. at 211.
\(^{49}\) 286 So. 2d 676 (La. App. 4th Cir. 1973), writ denied, 290 So. 2d 333 (1974).
\(^{50}\) Id. at 682.
\(^{51}\) Prior to *Toups*, the Louisiana Supreme Court never addressed the admissibility of subsequent remedial measures evidence in products liability and only scarcely in negligence, uniformly denying writs whenever applied.
\(^{52}\) 282 So. 2d 590 (La. App. 4th Cir. 1973).
\(^{53}\) Id. at 595-96.
\(^{54}\) Id.
\(^{55}\) 422 So. 2d 1344 (La. App. 1st Cir. 1982).
\(^{56}\) Id. at 1348-49.
\(^{57}\) 439 So. 2d 1194, 1200 (La. App. 1st Cir. 1983).
of whether a product was unreasonably dangerous. Similarly, the third circuit rejected such evidence as both logically and legally irrelevant in *Fontenot v. H. Hollier & Sons, Inc.*,\(^8\) where it was offered to prove whether a product was unreasonably dangerous.

Consonantly, Louisiana courts have refused to recognize other exceptions which have developed, such as those in the federal courts, and maintained an absolute exclusion of all such evidence. In their rejection, Louisiana courts have excluded remedial measures evidence for its lack of probative value on other products liability issues and for its prejudicial effect. In *Mobley v. General Motors Corp.*,\(^9\) Mr. Mobley presented evidence that subsequent to his accident, which occurred when trying to fit a 16 inch tire onto a 16.5 inch rim, General Motors added warnings which would have cautioned him and prevented the accident. Although Mr. Mobley did not introduce the evidence to prove defect, he did offer it to prove feasibility of warning and to impeach the defendant's expert witness. The third circuit rejected the evidence for both purposes, holding that Louisiana did not recognize those exceptions to the general exclusionary rule. The court also questioned the *Ault* analysis of admissibility for subsequent remedial measures evidence, which it considered logically and legally irrelevant.\(^6\) The fourth circuit in *Toups* likewise found no grounds for admissibility of subsequent remedial measures evidence to prove manufacturer knowledge or feasibility.\(^6\)

**Analysis of Toups v. Sears**

In *Toups*, the Louisiana Supreme Court purports to resolve the question of Louisiana's position on the admissibility of evidence of subsequent remedial measures by adopting proposed Louisiana Code of Evidence article 407 and by citing jurisprudence consistent with this principle. Finding that the policy considerations which justify the exclusionary rule in negligence do not impede the actions of manufacturers in products liability, the court contended that this admissibility does not discourage remedial efforts because manufacturers may employ the defense of scientific unknowability to dispel any inferences of actual knowledge or feasibility created by evidence of subsequent remedial measures.\(^6\)

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59. 482 So. 2d 1056 (La. App. 3d Cir.), writ denied, 427 So. 2d 871 (La. 1986).
60. Id. at 1062. See also dicta in *Fontenot*, 478 So. 2d at 1388.
61. *Toups*, 499 So. 2d at 348.
62. *Toups*, 507 So. 2d at 817.

"""Any discouragement to produce new products or to discover safety improvements will be mitigated by the manufacturer's ability to defend failure to warn cases, alternative design cases, and alternative product cases on the basis of scientific unknowability and inability.""" Id., quoting *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 118 (La. 1986).
The court argued that where manufacturer knowledge and feasibility are at issue, "evidence of such remedial measures should be allowed insofar as they are relevant in establishing what the manufacturer knew or should have known at the time of the injury." Thus the court concluded that this evidence should be admitted in limited instances in "the products liability field when credibility and precautionary measures, i.e. warnings and/or alternative designs are at issue."

Problems with Proposed Article 407

The Toups court justifies this policy largely by use of proposed Louisiana Code of Evidence article 407, which is almost identical to its federal counterpart. The article, however, neither makes a specific attempt to address or resolve the issue of admissibility, nor is it law. Deferring to the courts on whether products liability in Louisiana embraces any concept of culpable conduct, comment (d) states that article 407 applies only if the litigation is based on negligence or culpable conduct. Consequently, when the Toups court says the exclusionary rule does not apply because of the Ault and Eighth Circuit rationale, it

63. Toups, 507 So. 2d at 816-17. This analysis is identical to that of the Ault court and would, if not qualified, suggest that the Toups court adopts the Ault position of inapplicability of Rule 407 to exclude this evidence in products liability. However, other language of the Toups opinion limits that suggestion. The Toups court qualifies the areas of admissibility to only those exceptions listed within Rule 407. Consequently, the court interprets the rule to have general applicability to strict products liability, with some exceptions. Toups, 507 So. 2d at 816. Whether the court will expand this position and hold the exclusionary rule inapplicable in strict products liability cases remains unclear. In Toups, because Sears controverted the feasibility of the alternative design, the court applied the rule and admitted the evidence under an exception.

64. Id. at 818. This is, however, a questionable assumption. See supra notes 6-12, 30-40 and accompanying text.

65. Toups, 507 So. 2d at 816-17.

66. See supra note 5. Proposed La. Code Evid. art. 407 is substantially the same as the federal rule, except that "article" is "rule" and "impeachment" is "attacking credibility." Proposed La. Code Evid. art. 407, comment (b) (West 1987).


The Toups court interprets the article analogously to the Grenada opinion and remains consistent with the exclusionary rule so often adopted, merely recognizing limited exceptions when the issue is raised by the defendant. The opinion, however, arguably could be expanded to recognize non-applicability of the exclusionary rule to strict products liability. See Toups, 507 So. 2d at 816: "The policy considerations which exclude evidence of remedial measures in negligence cases are not applicable where strict liability is involved." See also infra notes 93-95 and accompanying text.

alludes to their interpretation that the exclusionary rule has no application in products liability because neither negligence nor culpability are at issue. Despite this inference, other language in the opinion and the court's application of proposed article 407 laudably suggests an interpretation in line with the Fifth Circuit's, in which the rule applies to products liability, but provides exceptions when certain issues are controverted by the defendant. However, which interpretation the court endorses is unclear.

The cases cited in comment (a) of article 407 offer no support for an admission of subsequent remedial measures evidence in products liability, despite comment (a)'s statement that "this article is in accord with prior Louisiana jurisprudence." Close analysis of the cited jurisprudence reveals that the comment which the court emphatically quotes for corroboration is wrong. Only the first sentence of the rule, pertaining to the exclusion of such evidence in negligence actions finds support from earlier jurisprudence. The second sentence, which pertains to exceptions to the exclusionary rule, finds no jurisprudential corroboration in Louisiana, merely reflecting a proposed legislative draft. Consequently, no Louisiana jurisprudential support exists for the interpretation of proposed article 407 which the Toups court suggests.

The Fallacy of Ault

The Toups court adopts Ault's standard without consideration of the validity of its basic policy premise. Indeed, Ault's analysis does not withstand scrutiny. Since the idea of liability, regardless of whether brought in negligence, strict liability, or on any other theory, inhibits remedial actions, admission of subsequent remedial measures evidence curtails rather than encourages safety incentives. The admission of evidence of subsequent remedial measures allowed by the Toups opinion means manufacturers "will avoid making some marginal improvements,

70. Toups, 507 So. 2d at 817.
71. See sources cited supra notes 42-56. These cases support only the proposition that evidence of subsequent remedial measures is not admissible to prove negligence or culpable conduct. They do not purport to allow admissibility in any other instance. However, even if the issue of admissibility in products liability had not been addressed by prior products liability jurisprudence, logic would require a result consonant with the factually similar negligence jurisprudence such as Gauche v. Ford Motor Co., 226 So. 2d 198 (La. App. 4th Cir. 1969), and Galloway v. Employers' Mutual, 286 So. 2d 676 (La. App. 4th Cir. 1973), writ denied, 290 So. 2d 333 (1984), which would be grounded in products liability today, as well as other products liability cases such as Landry v. Adam, 282 So. 2d 590 (La. App. 4th Cir. 1973), and Mobley v. General Motors Corp., 482 So. 2d 1056 (La. App. 3d Cir.), writ denied, 427 So. 2d 871 (1986).
72. Toups, 507 So. 2d at 818.
even if otherwise cost-effective, because of the possible negative implications for tort claims [under failure to warn and design defect] involving older designs.73

This threat of liability fosters the tendency of manufacturers to play deep; other factors contemporaneously buttress this tendency. One factor is the impact of lengthy delays in trials and the resulting high discount rates which decrease actual loss.74 Another factor is the possibility of government intervention in the form of a subsidy to defray the cost of liability defense, or in the form of remedial legislation to retroactively bar suits not yet filed.75 Finally, Ault's assumptions about economic behavior are distorted when corporate managers pursue individual motives. Since these managers are judged on short-term results, they may defer taking action, assuming that rewards are based on the short-run benefits obtained from their deferral tactics. The fears of repercussions are insignificant since the manager relies on the bureaucratic corporate structure to promote him to another position, possibly with another corporation, before the long-term implications materialize. Reasonably believing he will escape most, if not all, of the blame for the losses eventually incurred, the corporate manager distorts the idealistic regime upon which the Ault theory depends.76

The Ault opinion is premised on the character of the defendant manufacturer as a contemporary, corporate mass producer of tens of thousands of units of goods whose objective, non-personal nature make it immune from the impact of any potential litigation which would impair its desire to repair.77 Because the ultimate stakes are so high, these large players will act optimally to minimize long-run losses. The premise, however, fails to consider the actions of the numerous smaller manufacturers whose long-term prospects become highly suspect when faced with the losses of a single short-term products liability suit. Thus, while the premise, at least theoretically, may not inhibit large manufacturers such as Sears from acting optimally and taking remedial actions, the implications are devastating to smaller manufacturers such as the De Soto Building Company in Givens and the Earl Grissmer Company in Lovell. Because they cannot absorb the short-term impact of a single loss which evidence of subsequent remedial measures might cause, they will avoid remedial action.78

73. Henderson, supra note 23, at 774.
74. Id. at 776.
75. Id. at 776-77.
76. Id. at 781-82.
77. R. Lempert & S. Saltzburg, supra note 11, at 193; Ault, 13 Cal. 3d at 120, 528 P.2d at 1152, 117 Cal. Rptr. at 816; Comment, supra note 15, at 848.
78. The theory of Ault apparently rests not on the theory of the plaintiff's case in negligence or strict liability, but on the nature of the defendant as a mass manufacturer
Problems with Scientific Unknowability

In *Halphen v. Johns-Manville Sales Corp.*, the Louisiana Supreme Court elaborated on four theories of products liability. The *Halphen* court maintained that incentives for manufacturers to repair and innovate were not lost when manufacturer knowledge and feasibility were put at issue in failure to warn and design defect cases because of the ability of defendant manufacturers to assert the defense of scientific unknowability. Similarly, the *Toups* court recognized that this defense refutes the same inferences in failure to warn and design defect cases when created by evidence of subsequent remedial measures. Hence, the court reasoned, admission of subsequent repair evidence should not discourage remedial actions.

The assertion of the *Toups* court that admitting subsequent remedial measures evidence will not discourage remedial actions is severely limited, however, by defendants' inability to assert the defense of scientific unknowability in the *Halphen* "per se" and "manufacture or composition" theories. The Louisiana Supreme Court in *Halphen* stated that knowledge is not relevant under those theories. Furthermore, this assertion fails to recognize the reality that manufacturers will not implement product reform because of the difficulty a plaintiff will have in proving what was actually known absent such a remedial measure.

and the necessity of management to institute changes because of economics. Hence, under the *Ault* analysis a plaintiff should be able to introduce the evidence in any suit so long as the defendant is a mass manufacturer. See Note, supra note 41, at 896 n.9.

79. 484 So. 2d 110 (La. 1986).
81. *Halphen*, 484 So. 2d at 118.
82. *Toups*, 507 So. 2d at 817.
83. *Halphen*, 484 So. 2d at 114-15. The *Halphen* court explained that evidence of knowledge or feasibility is not relevant in "per se" and "manufacture or composition" categories; thus, scientific unknowability is not a defense. Nevertheless, a plaintiff could attempt to use subsequent remedial measures evidence to prove defect.

See also, *Caprara*, 52 N.Y.2d at 128-30, 417 N.E. 2d at 552-54, 436 N.Y.S.2d at 258-59.
84. Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 447 A.2d A.2d 539 (1982). The court voiced doubts concerning the definability of "undiscoverable knowledge" and the determination at any given time of technologically discoverable knowledge. Because of "complicated, costly, confusing, and time-consuming" evidence, the court stated that "vast confusion . . . is virtually certain to arise from any attempt to deal in a trial setting with the concept of scientific knowability." Thus, the court advocated "avoiding the concept altogether by striking the state-of-the-art defense." Id. at 207, 447 A.2d at 548.

For problems involving the concept of "scientific unknowability," see Keeton, The
Distinguishing LaFleur

The Toups court relies heavily on LaFleur v. John Deere, which it cites as authoritative on the admissibility of subsequent remedial measures. However, LaFleur does not pertain to this issue. In LaFleur, a grain drill which planted seed malfunctioned, resulting in the loss of much of the plaintiffs' crop. The plaintiffs brought a products liability claim based on design defect to recover lost profits and consequential emotional damages. To prove the drill's defective design, and the manufacturer's and vendor's knowledge of that defect, the plaintiffs sought to introduce a video tape of their agricultural engineering expert adjusting the grain drill. The Louisiana Supreme Court held that since there was no audio and since the plaintiffs' expert was available at trial for full cross-examination, no prejudice occurred.

The issue of subsequent remedial measures evidence, however, was not before the LaFleur court. The defendants did not appeal the admissibility of the two objects which the third circuit labeled "subsequent remedial measures," a service bulletin to customers and an operator's manual addition which warned of the need for adjustment, because in this situation neither was a post-accident remedial measure. The third circuit held "neither the service information bulletin nor the operator's manual [were] evidence of post-sale or post-injury modifications," hence, they were not excludable under the subsequent remedial measures rule. Likewise, the third circuit did not consider the video to be a remedial measure within the scope of the rule because it was an act undertaken by a third person, not the defendant. Consequently, the Louisiana Supreme Court in the LaFleur opinion never addressed the issue of subsequent remedial measures.

As LaFleur is inapplicable, neither logic nor Louisiana's prior jurisprudence supports an Ault policy of admissibility in products liability.
Where a remedial act will be construed against a defendant, whether as an admission of defect or on some other issue, no remedial action will be taken, regardless of the applicable theory of liability. No statutory rule dictates admissibility, and proposed Code of Evidence article 407 cannot be deemed corroborating.

Limiting Toups

The Toups holding could be interpreted consistently with the bulk of Louisiana jurisprudence which excludes this evidence in products liability just as in negligence. The opinion stands merely for the proposition that Louisiana has begun to recognize the existence of certain limited exceptions to the rule of exclusion. However, the holdings of the jurisprudence that the Toups court cites suggest that such a limitation may not be proper. Those opinions suggest that the exclusionary rule does not apply to strict products liability because neither negligence nor culpable conduct are at issue. They do not suggest a general exclusionary rule with limited exceptions. Consequently, the danger arises that a future court will use this jurisprudence to justify a holding inconsistent with the wording and application of the exclusionary rule in Toups. Specifically, a court might hold that the rule has no application.

De Soto Bldg. Co., 156 La. 377, 380, 100 So. 534, 535 (1924):

True policy and sound reason require that men should be encouraged to improve, or repair, and not be deterred from it by the fear that if they do so their acts will be construed into an admission that they had been wrongdoers. A rule, which so operates as to deter men from profiting by experience and availing themselves of new information, has nothing to commend it, for it is neither expedient nor just.

92. See supra text accompanying notes 42-59. The Toups court used the evidence to prove knowledge of Sears, feasibility of warning, and knowledge, and to impeach the credibility of Sears’ expert witness.

An interesting point is that courts regularly ascertain feasibility of warning as the Toups court did. See, e.g., Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980). While feasibility of precautionary measures seems acceptable, any analysis of the feasibility of a “warning” appears improper. Because any warning will have minimal impact on the utility of a product, while contemporaneously decreasing probabilities of harm, the warning will always be feasible unless the possible harm is greatly insignificant. Hence, any question of feasibility of warning will be resolved affirmatively. For an excellent discussion, see A. Winstien, A. Twerski, H. Picker & W. Donaher, Products Liability & the Reasonably Safe Product 62-63 (1978). See also, Freund v. Cellofilm Props., 87 N.J. 229, 238 n.1, 432 A.2d 925, 930 n.1 (1981).

93. Toups, 507 So. 2d at 816.

94. The following courts held that the exclusionary rule does not apply to strict products liability and did not recognize a general rule with limited exceptions: Farner v. Paccar, Inc., 562 F.2d 518 (8th Cir. 1977); Robbins v. Farmers Union Grain Terminal Ass’n, 552 F.2d 788 (8th Cir. 1977); Unterburger v. Snow Co., 630 F.2d 599 (8th Cir. 1980); Ault v. International Harvester Co., 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974).
in strict products liability, and not that the rule applies but has exceptions.

Additionally, the *Toups* opinion suggests that the admissibility exceptions are not limited to failure to warn and design defect products liability cases, or to merely those issues contained in proposed article 407. Instead, the exceptions to the rule of admissibility may become applicable in all theories of strict liability law. In a *Loescher v. Parr* type case, a subsequent repair might be offered to prove an unreasonably dangerous condition for strict liability purposes. An example suggested would be a highly polished floor, covered with a rug that could slip from underneath a passerby. Removal of the rug after a slip could be used to prove the existence of the unreasonable dangerous condition in the house, a condition within the scope of liability imposed by Civil Code article 2317. Likewise, in a *Holland v. Buckley* type case, a subsequent act to contain or control a vicious animal would suggest ownership or control, thereby supplying the perhaps otherwise unknown defendant. The remedial act could be used against the good Samaritan to attack his credibility and prevent his denial of ownership. Admissibility of subsequent remedial measures evidence deters remedial acts in any of these situations, thus increasing the likelihood of further injury. Ultimately, a reassessment of *Ault* is required, as its essential ingredient, a large corporate defendant able to optimally spread risks and losses, is replaced by the marginally solvent actor.

**Conclusion**

The *Toups* court answers the question of admissibility of evidence of subsequent remedial measures by recognizing exceptions to the exclusionary rule. However, it is unclear whether the *Toups* opinion will be employed to adopt a much broader policy of extending the admissibility of such evidence to strict liability. The holding undermines decades of prior jurisprudence and manifests a belief that admission not only has probative value toward relevant issues in products liability without prejudicing defendants, but also has desirable policy effects of encouraging manufacturers to repair and create safer products. The defense of scientific unknowability exists in these cases, allowing a defendant a means to dispel the inferences of knowledge created by such evidence. Because of its limited application to only two theories of products liability and its complex nature, however, this defense will not prevent manufacturers from being discouraged from taking remedial

95. *Toups*, 507 So. 2d at 816.
96. 324 So. 2d 441 (La. 1975).
97. 305 So. 2d 113 (La. 1974).
action. Additionally, the defense offers no protection for defendants in strict liability cases outside of products liability who may be attacked by evidence of their subsequent remedial action. Both the probative value of subsequent remedial action evidence and the ability of the *Toups* holding to expedite its desired policy of social reform remain suspect. Little justification exists for this holding, especially where the issue of manufacturer culpability may be proven by alternative methods which are less confusing, clearly probative, and beneficial to a long-standing policy of encouraging remedial measures.

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