Louisiana Law Review

Volume 51 | Number 5
May 1991

Subsequent Remedial Measures and the Louisiana Code of Evidence: Some Thoughts on Interpretation

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I. INTRODUCTION

The adoption of the Louisiana Code of Evidence[1] manifests legislative will aimed at modernizing and unifying existing statutory and jurisprudential authority which previously governed the admissibility of evidence in Louisiana courtrooms.[2] The Louisiana Code of Evidence follows the basic structure of the Federal Rules of Evidence and in so doing imbues Louisiana evidence law with principles and rules promulgated by the federal judicial system and state jurisdictions that have followed the federal model.[3] However, the Louisiana Code of Evidence is by no means a carbon copy of its federal counterpart. The work of the Louisiana State Law Institute and influence of groups actively involved in the legislative process has produced a divergence between Louisiana's evidentiary rules and the Federal Rules of Evidence.[4] The adherence of the Louisiana Code of Evidence to the structure and precepts of the federal rules is qualified by areas of dissatisfaction with substantive policy choices articulated by the Federal Rules of Evidence. Hence, the Louisiana Code of Evidence and the Federal Rules of Evidence are different breeds of the same animal, and the Louisiana Code is embodied with rules and concerns which reflect different policy choices along with various local interests involved in its creation.

Louisiana's present code article governing the admissibility of subsequent remedial measures exemplifies a rule which distinguishes the

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1. The Louisiana Code of Evidence became effective January 1, 1989 (1988 La. Acts No. 515).

2. G. Pugh, R. Force, G. Rault & K. Triche, Handbook of Louisiana Evidence Law V-IX (West 1989) [hereinafter La. Evid. Handbk.].

3. Id. at IX.

4. The day before the Code's consideration by the Senate Judiciary Committee was the setting for a massive compromise session by groups interested in the policies enunciated by the Louisiana Code of Evidence. Among those involved were the Louisiana Trial Lawyer's Association, the Louisiana District Attorney's Association, the Women's Lobby Network and the Louisiana Coalition Against Domestic Violence. The original bill, which reflected the work of the Louisiana State Law Institute, was amended to protect the concerns of the lobbying groups listed above. For a complete discussion of the Louisiana Code of Evidence's development, see Pugh, Force, Rault and Triche, The Louisiana Code of Evidence-A Retrospective and Prospective View, 49 La. L. Rev. 689 (1989). Subsequently reproduced in La. Evid. Handbk., supra note 2.

Louisiana Code of Evidence from the Federal Rules of Evidence. Although the Louisiana Code of Evidence article 407 is similar in structure and principle to Federal Rule 407, the article significantly deviates in substance from the federal provision.[5] Louisiana Code of Evidence article 407 reads:

> In a civil case, when, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This article does not require the exclusion of subsequent measures when offered for another purpose, such as proving ownership, authority, knowledge, control, or feasibility of precautionary measures, or for attacking credibility.

There are several reasons why interpretation and application of the new article will be problematical for courts. First, there has been considerable controversy over the application and proper interpretation of Federal Rule 407 since the enactment of the Federal Rules of Evidence.[6] Hence, even though federal sources are available for use in interpreting the Louisiana article when the federal rule is similarly worded, those sources can be confusing.[7] Second, where substantive differences between the Louisiana article and the federal rule exist, legislative history, substantive tort law, and pre-code jurisprudence[8] make interpretation of article 407 difficult. This comment will endeaver to explore and solve the various problems which might arise in interpreting Louisiana Code of Evidence article 407 in light of the article's language, prior federal and Louisiana jurisprudence, legislative history, and substantive tort law.

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5. Fed. R. Evid. 407 reads:

> When after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as providing ownership, control, feasibility of precautionary measures, if controverted, or impeachment.

6. The Federal Rules of Evidence became effective July 1, 1975. Pub. L. No. 93-595, 88 Stat. 926.

7. See Hoffman and Zuckerman, Tort Reform and Rules of Evidence: Saving the Rule Excluding Subsequent Remedial Actions, 22 Tort & Ins. L.J. 497 (1987); Note, Admissibility of Subsequent Remedial Measure Evidence in Diversity Actions Based on Strict Products Liability, 53 Fordham L. Rev. 1485 (1985); Note, Admissibility of Remedial Measures Evidence in Products Liability Actions: Towards a Balancing Test, 39 Hastings L.J. 1197 (1988); Comment, Admissibility of Subsequent Remedial Measures as Evidence in Texas, St. Mary's L.J. 121 (1988); Comment, The Impeachment Exception to Rule 407: Limitations on the Introduction of Subsequent Measures, 42 U. Miami L. Rev. 901 (1988); Note, Comity and Tragedy: The Case of Rule 407, 38 Vand. L. Rev. 585 (1985).

8. Toups v. Sears Roebuck and Co., 507 So. 2d 809 (La. 1988).

In accordance with the Code of Evidence, the analytic framework for resolving these problems shall be guided by dual concerns of fairness and efficiency in administering the law of evidence.[9]

The evolution of the rule excluding evidence of subsequent remedial measures in tort cases will be traced from its common law inception to its adoption by Congress for the Federal Rules of Evidence. The general rule against admissibility will be analyzed with special emphasis afforded to problems associated with applying the rule in areas other than pure negligence cases. Louisiana's provision will be analyzed in light of our state's tort system. The comment will conclude that the general rule of 407 should be applied to exclude evidence of subsequent remedial measures in all delictual action to insure fair application of the article's evidentiary protection.

The comment will also explore 407's unique exceptions to exclusion of subsequent remedial measure. Assessing the effect of the "knowledge" exception will pose the question whether Louisiana Code of Evidence article 407 is workable in light of its historical purpose. The comment will conclude that the "knowledge" exception might result in evidence of subsequent measures being admitted to prove negligence while being excluded to prove other issues of delictual liability.

II. Legal History

The common law of negligence provided the initial battleground which spawned the rule excluding subsequent remedial measures to show a defendant's culpable conduct.[10] Baron Bramwell of the English Court of Exchequer laid the cornerstone of the rule when he stated:

> [P]eople do not furnish evidence against themselves by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell jurors, to hold that, because the world gets wiser as it gets older, therefore it was foolish before.[11]

Likewise, the United States Supreme Court recognized the rule in *Columbia Railroad Company v. Hawthorne*.[12] The suit in *Columbia Railroad* was brought to recover damages resulting from an allegedly unsafe and defective machine used in a sawmill. The machine was altered

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9. La. Code Evid. art. 102.

10. Hoffman and Zuckerman, supra note 7, at 498-99.

11. Hart v. Lancashire & Yorkshire Railway Co., 21 L.T.R N.S. 261, 263 (1869) (Cited by the Advisory Committee on the Proposed Rules of Evidence in support of Fed. R. Evid. 407 (Advisory Committee's note)).

12. 144 U.S. 202, 12 S. Ct. 591 (1892).

after the accident and the plaintiff sought to introduce evidence of the alteration to prove the negligence of the corporation owning the sawmill. The Court held that admission of the evidence would "distract the minds of the jury from the real issue, and create a prejudice against the defendant."[13] The opinion illustrates early legal thought on issues regarding the admissibility of evidence by balancing the probative value of evidence, the risks of juror confusion, and prejudice to the defendant.[14]

Over the years, decisions excluding such evidence have focused less on the lack of probative value offered by the evidence. Instead, the exclusion has been justified by a policy of encouraging, or not discouraging, the undertaking of subsequent safety measures.[15] The argument in support of the rule postulates that admission of subsequent repairs would be tantamount to permitting an inference of fault and that all defendants, negligent and prudent, would be discouraged from improving the place, thing, or behavior which caused the injury.[16]

While the policy consideration is the primary justification offered by courts in excluding such evidence, the rule is also based in part on the relevancy judgment that other reasons exist for a defendant to make a change or repair after the occurrence of an accident. Once evidence of the repair is admitted, ensuing juror confusion from relevancy assessments is apt to prejudice the defendant by raising the inference that such repairs are acknowledgments of negligence by the party making the repair.[17] The common law rule excluding subsequent remedial measures as evidence of negligence has been accepted in some form by every state except Maine.[18]

Today, exceptions to the exclusionary rule include offering subsequent remedial measures to prove ownership or control[19] and presenting such evidence to illustrate the feasibility of precautionary measures.[20] Likewise, the rule is not applicable when assessing evidence which rebuts assertions made by an opposing party. Furthermore, when the repairs

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13. Id. at 207.

14. Id. at 208.

15. E. Cleary, McCormick on Evidence, § 275, at 815 (3d ed. 1984).

16. Wigmore, II Wigmore on Evidence, § 283 (3d ed. 1940).

17. Granada Steel Industries, Inc. v. Alabama Oxygen Co., 695 F.2d 883, 887 (5th Cir. 1983); 29 Am. Jur. 2d Evidence § 275; Note, Admissibility of Subsequent Remedial Measures Evidence in Diversity Actions Based on Strict Product Liability, 53 Fordham L. Rev. 1485, 1486 (1985).

18. Note, supra note 17, at 1486. Me. R. Evid. provides: "When after an event, measures are taken which if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is admissible."

19. Wigmore, supra note 16, § 283, at 158.

20. Fed. R. Evid. 407. See also Rule 407, Fed. R. Evid. 207 Advisory Committee's Note.

or changes are precipitated by third persons, the policy grounds for *per se* exclusion are no longer at issue and the tendency of courts is to admit the evidence subject to general relevancy requirements and the 403[21] balancing test.[22]

The merging of the common law rule into Federal Rule of Evidence 407 represents congressional recognition of two fundamental concerns. First, the conduct evidenced by subsequent measures has alternate explanations and is therefore not an admission of fault. Secondly, Congress sought to avoid discouraging persons from taking steps which make the world safer for fear of having subsequent prudence admissible at trial.[23] Louisiana's adoption of a provision similar to the federal rule evidences concerns similar to those held by federal policy makers.[24]

III. THE STRICT LIABILITY DILEMMA

The development of strict liability[25] over the past several decades has tested the applicability of the established rule which excludes evidence of subsequent remedial measures. Some courts have held that evidence of subsequent remedial measures is admissible in product liability cases.[26]

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21. Fed. R. Evid. 403 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."

22. E. Cleary, supra note 15, § 275, at 816.

23. A rule which allowed the admission of subsequent remedial measures would act as a deterrent toward taking prudent measures after an accident. Fed. R. Evid. 407, Advisory Committee's Note.

24. La. Evid. Handbk., supra note 2, at 217, Article 407, Author's Note (1).

25. To establish strict liability in tort, a plaintiff must prove that the defendant marketed a defective-unreasonably dangerous-product. Although the inquiry focuses on the condition of the product, the condition of the product imputes to the conduct of the manufacturer thereby providing a variation of the reasonable man standard applied in negligence. Keeton, Dobbs, Keeton and Owen, Prosser and Keeton on Torts, § 99, at 695 (5th ed. 1984) [hereinafter Keeton]. See also Restatement (Second) of Torts § 402A (1965):

> (1) one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
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> (a) the seller is engaged in the business of selling such a product, and
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> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
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> (2) The rule stated in Subsection (1) applies although
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> (a) the seller has exercised all possible care in the preparation and sale of his product, and
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> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

26. Sutkowski v. Universal Marion Corp., 5 Ill. App. 3d 313, 281 N.E.2d 749 (1972) (Illinois court does not extend rule to strict liability); Sanderson v. Steve Snyder Enterprises, 196 Ct. 134, 491 A.2d 389 (Conn. 1985) (Connecticut follows the Illinois court).

The landmark case recognizing the strict liability exception is the California Supreme Court pronouncement in *Ault v. International Harvestor*.[27]

In *Ault*, the court explored the rationale behind the exclusionary rule and concluded that the policy considerations of encouraging subsequent safety do not extend logically to strict liability. The court reasoned that it would be antithetical to a manufacturer's interest to forego improvements in its product and risk additional lawsuits simply to avoid admitting possible liability in a single suit.[28] This rumination is based on the assumption that different economies of scale breed different policy considerations.

In terms of statutory analysis, the court noted the deletion of the phrase "strict liability" from the language of the California Evidence Code provision.[29] The court, reasoning *a contrario*[30] in classic civilian fashion, found this deletion to be evidence of legislative intent to exclude strict liability from the parameters of the statute's general rule.[31]

Interpretation of Federal Rule 407 by the federal system has generated a split of authority. Two circuit courts, the Eighth and Tenth, have applied the *Ault* reasoning,[32] while the Fifth Circuit in *Granada Steel Industries v. Alabama Oxygen Company*[33] held that Rule 407 applies in strict liability cases. The *Granada Steel* court reasoned that evidence of subsequent repair or change has little relevance in determination of the ultimate issue in a strict liability case: whether the product was defective at the time of the accident.[34] The focal point of the court's concern was a juror's ability to concentrate on the issue of defectiveness without being confused by the evidence of subsequent repair.[35] The court, reasoning *a pari ratione*,[36] concluded that since the relevancy concerns

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27. 13 Cal. 3d 113, 117 Cal. Rptr. 812, 528 P.2d 1148 (1974).

28. Id. at 120, 117 Cal. Rptr. at 816, 528 P.2d at 1152.

29. Cal. Evid. C. § 1151 provides:

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

30. Rieg, Judicial Interpretation of Written Rules, 40 La. L. Rev. 49, 60 (1979): "This reasoning consists of turning around the statement of a text in order to draw a new inference therefrom and is, therefore, founded on the premise that if a text asserts something, it is supposed to negate the contrary."

31. 13 Cal. 3d at 120, 117 Cal. Rptr. at 816-17, 528 P.2d at 1152-53.

32. See Unterberger v. Snow Co., Inc., 630 F.2d 599 (8th Cir. 1980); Herndon v. Seven Bar Flying Service, Inc., 716 F.2d 1322 (10th Cir.), cert. denied, 466 U.S. 958, 104 S. Ct. 1970 (1983).

33. 695 F.2d 883 (5th Cir. 1983).

34. Id. at 887.

35. Id. at 888.

36. Levasseur, Materials for the Course in Louisiana Civil Law System, 342-1 (LSU

embodied in Federal Rule 407 are the same in both product liability and negligence cases, the rule should be applied with equal vigor in both.

The analysis of the *Granada Steel* opinion avoids the perplexity of trying to assess whether the policy considerations of Rule 407 are inapplicable to strict liability defendants. By electing an across-the-board application of the rule to all tort cases, the court rejects the *Ault* court's precarious distinctions based on psychoanalyzing manufacturer behavior.

The Fifth Circuit view is shared by the majority of federal appellate courts which likewise require the exclusion of remedial measures in strict liability actions.[37] A fruitful discussion of the issue was articulated by the U.S. Fourth Circuit Court of Appeals in *Werner v. Upjohn Co., Inc.*[38] In *Werner*, the plaintiff sought to introduce evidence that the defendant, a pharmaceuticals manufacturer, had published a subsequent warning which revealed that one of its drugs created dangerous side effects. The court conceded the existence of some distinction between negligence and strict liability but reasoned that a suit based on either theory is against the manufacturer and not the product.[39] The *Werner* court refused to deny 407's evidentiary protection to a defendant based on a precarious distinction between product liability and pure negligence. Expressing the difficulty inherent in trying to differentiate negligence from strict liability, the court wrote:

> The distinction between the two lessens considerably in failure to warn cases since it is clear that strict liability adds little in warning cases. Under a negligence theory the issue is whether the defendant exercised due care in formulating and updating the warning, while under a strict liability theory the issue is whether the lack of a proper warning made the product unreasonably dangerous. Though phrased differently the issue under either theory is essentially the same: was the warning adequate?[40]

SBA 1981). This method of reasoning is used to extend a given rule of law applicable to a certain situation to a similar situation not specifically contemplated by the rule of law. Initially, one must first ascertain the "reason" for the given rule of law. Secondly, one must establish a similarity between the facts of the text of the given law and the facts of the unresolved problem. Thirdly, the proponent of expending the existing rule of law must demonstrate that the reasoning underlying the rule of law should be applied with equal vigor to the unprovided for situation. See also Loyacano v. Loyacano, 358 So. 2d 304 (La. 1978).

37. Hall v. American Steamship Co., 688 F.2d 1062 (6th Cir. 1982); Josephs v. Harris Corp., 677 F.2d 985 (3d Cir. 1982); Oberst v. International Harvestor Co., Inc., 640 F.2d 863 (7th Cir. 1980); Werner v. Upjohn Co., Inc., 628 F.2d 848 (4th Cir. 1980), cert. denied, 449 U.S. 1080, 101 S. Ct. 862 (1981).

38. 628 F.2d 848 (4th Cir. 1980).

39. Id. at 857.

40. Id. at 858.

Louisiana tort doctrine might necessitate an interpretation of the Louisiana Code of Evidence article 407 similar to that given the federal rule by the U.S. Fourth and Fifth Circuit Courts of Appeals. Since 407 unequivocally applies to exclude evidence of subsequent remedial measures to prove "negligence or culpable conduct,"[41] the starting point of interpretation should attempt to define the scope of "negligence or culpable conduct." Both the jurisprudence and the Louisiana Product Liability Act along with the exegesis of "fault" support applying 407 to all cases involving delictual liability.

Black's Law Dictionary defines "culpable conduct" as synonymous with "blameable" conduct or conduct "involving the breach of a legal duty or the commission of a fault."[42] In Louisiana, the Civil Code sets forth the basis of Louisiana's system of "fault" in the broadest of terms.[43] Legal scholars have suggested that all torts committed under Louisiana law are "fault" based including those committed under both strict and absolute liability.[44] One court has suggested that "fault" is a broad term which connotes "all conduct falling below a proper standard."[45] The Louisiana Supreme Court has opined that the civilian concept of "fault" encompasses "within itself the potentiality of growth."[46] Indeed, "fault" is often determined by courts according to statutory duties imposed by the legislature and judicially created duties of conduct developed in compliance with broad, general principles of legislative will.[47] As a result, Louisiana courts apply the term "fault" to all conduct which gives rise to delictual or quasi-delictual obligations, but "blameworthiness" and "moral wrongs" are rejected as too narrow a test for legal responsibility.[48]

During the days of ancient Rome, early civilians referred to the wilful harming of another as "dolus" while labeling the negligent harming of another as "culpa."[49] Today, the concept of liability based on

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41. Lea v. Baumann Surgical Supplies, Inc., 321 So. 2d 844 (La. App. 1st Cir. 1975), writ denied, 325 So. 2d 279 (1976); La. Code Evid. art. 407 comment (b).

42. Black's Law Dictionary 341 (5th ed. 1979).

43. La. Civ. Code art. 2315 reads: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

44. See authorities collected in Galligan, The Louisiana Products Liability Act: Making Sense of It All, 49 La. L. Rev. 629, 640 n.66 (1989).

45. Williams v. Louisiana Machinery Co., Inc., 387 So. 2d 8, 11 (La. App. 3d Cir. 1980).

46. Langlois v. Allied Chemical Corporation, 249 So. 2d 133, 137 (La. 1971) (citing Stone, Tort Doctrine in Louisiana, 17 Tul. L. Rev. 159, 166).

47. Id. at 137. See also Tunc, Fault: A Common Name for Different Misdeeds, 49 Tul. L. Rev. 279 (1975).

48. *Langlois*, 249 So. 2d at 137.

49. F. Stone, 12 Louisiana Civil Treatise: Tort Doctrine § 59a, at 81 (1977) [hereinafter Stone].

fault expects each person in society to conform "with generally accepted standards of the society in which he lives" with courts determining where fault lies in a given situation.[50] Although liability based on "fault" has evolved greatly since the days of the Romans, modern day Louisiana courts still use the term "culpability" to describe the assignment of fault even in cases of strict liability.[51] For example, in determining whether a thing poses an unreasonable risk of harm under Louisiana Civil Code article 2317, the same courts consider "the degree of culpability assignable to each party's conduct."[52] Under this view, one might say that "culpability" is synonymous with the breach of a legal duty whether that duty be legislatively or judicially imposed.

Louisiana Code of Evidence article 407 does not resolve the difficulty of distinguishing between negligence or culpable conduct and other theories of liability. The official comments to the article state that 407 is inapplicable if the substantive law underlying the case is based on any theory other than negligence or culpable conduct.[53] The comment purposefully does not define those distinctions and does not expressly exclude "strict liability" and "product liability" from the parameters of "culpable conduct" or "negligence." This approach is wise in light of the inability of judges and tort scholars to clarify the distinctions between theories of delictual liability.[54] The comment is helpful in assessing admissibility once the conduct is defined as culpable or non-culpable, but the realm of tort law is suggested as the source for resolving ambiguities which arise in defining tort liability.

Viewing culpability as "blameworthiness" resolves the issue by restricting the application of 407 to causes of action based exclusively on

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50. Stone, supra note 49, § 59a, at 82.

51. "Quite to the contrary, the plaintiff's negligence should carry more, not less, consequence when the defendant is strictly liable, but less culpable than the plaintiff." Dorry v. Lafleur, 399 So. 2d 559, 560 (La. 1981). See also Turner v. Bucher, 308 So. 2d 270, 272 (La. 1975). "In the Louisiana Projet of 1825, as well as in the Code of 1825, the single long article delineating the liability of persons occupying positions of responsibility for others was broken into several articles. When this was done, a drastic change was made in the condition for *culpability*." (Emphasis added).

52. Verrett v. Cameron Telephone Company, 417 So. 2d 1319, 1325-26 (La. App. 3d Cir. 1982).

53. La. Code Evid. art. 407 comment (b).

54. V. Palmer, A General Theory of the Inner Structure of Strict Liability, 62 Tul. L. Rev. 1303, 1306 (1988). Professor Palmer writes:

> Guided only by intuition, strict liability has been a concept without a rudder, sailing a boundless sea. In court decisions, philosophical debates, legislative reform, and historical studies, the greatest uncertainty surrounds its meaning. The need to understand the nature of this nebulous notion is not simply a matter of intellectual curiosity. Our inability to define strict liability or to state its affirmative criteria undermines the foundation of the subject and renders suspect every assertion about it.

human conduct whether it be by act or omission. However, it can also be asserted that all delictual liability is "blameworthy." The blame need not arise from the negligence of the tortfeasor, but may result from the danger of the activity engaged in by the tortfeasor or the relative economic position of a manufacturer to absorb losses caused by its products. It is unpersuasive to eschew extension of "blameworthiness" to strict and product liability simply because the process of determining liability is different. The end result of all tort cases is a determination of "fault" which implies that a losing defendant has not measured up to societal expectations in a specific instance.

Utilizing this model also begets the question of whether this is a fair and consistent interpretation of 407. If a plaintiff alleges both strict liability and negligence as bases of recovery in an action, it might not be possible to avoid juror confusion when the evidence is ruled admissible for one theory of recovery and inadmissible for the other. Both actions place responsibility on the person whether through conduct, relational interest, or ownership of the dangerous thing or building.[55] Although common law strict liability is "no fault" in the sense that the sole inquiry is on the product and not the manufacturer's behavior,[56] Louisiana jurisprudence has consistently held that the duty is the same in strict liability and ordinary negligence cases, although the process for determining the existence of the duty is different.[57]

The language of the Louisiana Product Liability Act[58] presents a plausible argument for applying Louisiana Code of Evidence article 407 to cases arising under the Act. The Act provides that conduct or circumstances that give rise to a cause of action under its provisions constitute "fault" within the meaning of Louisiana Civil Code article 2315.[59] The Act is the exclusive remedy for recovery against manufacturers for injury from defective products, and the Act uses the word "conduct" to describe "fault" in the context of product liability.[60] The language of the Act creates a legal duty preventing manufacturers from placing unreasonably dangerous products into the stream of commerce, yet the Act avoids the terms "negligence" and "strict liability."[61] The

55. La. Civ. Code art. 2315 requires the *man* to repair the damage caused by his fault.

56. Keeton, supra note 25, § 99, at 695.

57. Dodson v. Webster Parish Police Jury, 564 So. 2d 760, 764 (La. App. 2d Cir.), writ denied, 567 So. 2d 1127 (1990); Charles v. Bill Watson Hyundai, Inc., 559 So. 2d 872, 875 (La. App. 4th Cir.), writ denied, 563 So. 2d 1154 (1990); Bell v. State, 553 So. 2d 902, 907 (La. App. 4th Cir. 1989).

58. La. R.S. 9:2800.51-.59 (1990).

59. La. R.S. 9:2800.52 (1990). The Louisiana Product Liability Act became effective September 1, 1988. 1988 La. Acts 64 § 1.

60. Id.

61. Id.

only label gleaned from the language of the Act is "liability for manufacturers of products."[62] Violation of the legal duty found in the Act is "fault" under Louisiana tort doctrine and is, therefore, "culpable conduct" if one finds culpability subsumed in the concept of fault.

The practical result of the affirmative defenses found in the Act is to create a negligence inquiry which allows the manufacturer to escape liability if it did not and could not have known of a safer design alternative or warning which could have prevented the accident.[63] The plaintiff need not show that the manufacturer was negligent to recover, but the defendant can avoid liability upon a showing of non-negligence. This scheme effectively shifts the burden of proof and creates a negligence inquiry.[64] If the plaintiff uses a subsequent design change or new warning to rebut the defendant's unknowability defense, then the core purpose of the rule is violated and the evidence is used to show the manufacturer's negligence. In design and warning cases, the Act walks the middle ground between negligence and strict liability.[65]

The availability of victim fault as a defense in product liability and strict liability further blurs the distinction between negligence and strict liability and provides another plausible argument for extending 407 to all tort cases.[66] The issue of victim fault allows evidence of the plaintiff's conduct to shift the focus away from the alleged defects, and directs attention to the other facts in the case. Analysis of the plaintiff's behavior in a case where victim fault is raised is similar to the analysis of a defendant's behavior in a negligence action.

The historic notions behind 407 might permit viewing "culpable conduct" as a shibboleth for all delictual liability. At common law, the idea of strict liability was not early recognized and torts arose from either the negligent or wilful acts of the tortfeaser.[67] Allowing evidentiary

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62. Id.

63. La. R.S. 9:2800.59 (1990).

64. "Overall, in view of the character of the manufacturer's foregoing affirmative defenses, the manufacturer's duty under the new Products Liability Act appears, in practical effect, to be a negligence standard. In measuring the manufacturer's design liability, the focus of the new Act is on the manufacturer's conduct and knowledge equally as much as the focus is on the product itself." Crawford and McDonald, Product Liability for Design, 50 La. L. Rev. 531, 552 (1990).

65. One possible way of avoiding the problems addressed by 407 is to allow the subsequent warning or design change to come into evidence without attributing the remedial measure to the defendant facing potential liability. The subsequent change can be offered to show the knowability of the design or warning change and feasibility of such a change. The evidence would be admissible upon a showing of relevancy under 401 and the 403 balancing test.

66. La. Civ. Code art. 2323; Bell v. Jet Wheel Blast, 462 So. 2d 166 (La. 1985) (Comparative fault should be assessed on a case by case basis in order to provide consumers with an incentive to use a product safely.).

67. Oliver Wendell Holmes, Jr., The Common Law and Other Writings 79-80 (1888).

protections to escape the evolution of tort law appears unjust. As the law of torts expands to permit recovery based on novel theories, the law of evidence should attempt to synthesize its rules in order to ensure fairness among litigants. The distinctions between theories of tort recovery are simply not clear enough to deny 407's evidentiary protection to some classes of defendants and not to others. Sweeping application of Louisiana Code of Evidence article 407 to all delictual and quasi-delictual actions might avoid anachronistic application of evidence law which occurs when the evidence rules fall behind developments in the substantive law of torts.

Prior to the enactment of the Louisiana Code of Evidence, the Louisiana Supreme Court grappled with the issue of a product's subsequent modifications in *Toups v. Sears Roebuck and Company*.[68] The plaintiffs in *Toups* brought a product liability action against the manufacturer of a water heater which ignited into a flash fire that severely burned the plaintiff's three year old son. The water heater was located in a small shed behind the Toups family residence. The shed also housed a container of gasoline which produced vapors that were ignited by the water heater's pilot light. The water heater bore no warning to caution against storage of flammable liquids close to the water heater. After the accident, Sears added such a warning to its heater.[69]

A unanimous court held that the rule excluding subsequent remedial measures has no place in the field of product liability where warnings or alternative designs are at issue.[70] First, the court accepted the *Ault* reasoning that the policy considerations behind the rule are not germane when strict liability is involved.[71] Secondly, the court concluded that the California court's position was in accord with proposed Louisiana Code of Evidence article 407[72] which had yet to be put in its present form and adopted. Since the earlier proposed form of 407 was in accord with prior Louisiana law, said the court, 407 added nothing substantial to the analysis because prior Louisiana law did not extend the rule to non-negligence cases.[73] Thirdly, the court found that the evidence was relevant because it might have persuaded the jury of the warning's necessity.[74] The supreme court reversed the appellate court finding which had ex-

68. 507 So. 2d 809.
69. 507 So. 2d 809, 811.
70. Id. at 818.
71. Id. at 816-17.
72. The article proposed by the Louisiana State Law Institute used the identical language found in Federal Rules of Evidence 407. The proposed article facing the court in *Toups* was the article proposed by the Law Institute and not the rule finally adopted by the legislature for inclusion in the Louisiana Code of Evidence.
73. Id. at 817-18.
74. Id. at 818.

onerated the manufacturer, and the case was remanded to the court of appeal to fix the quantum of damages.[75]

With the adoption of the Louisiana Code of Evidence, the holding of *Toups* might be reconsidered for several reasons. The court's finding that admission of such evidence is in accord with prior Louisiana law is unfounded. Prior jurisprudence excluded evidence of subsequent remedial measures to prove negligence.[76] No Louisiana legal authority has made exception for strict liability cases and at least one Louisiana appellate court, in an opinion not cited in *Toups*, upheld exclusion of such evidence in a tort action against a manufacturer for allegedly defective brakes.[77] In addition, the *Toups* court relied on authority from other jurisdictions but ignored the contrary federal jurisprudence which interpreted the same rule.

The mere fact that the rule excluding evidence of subsequent remedial measures did not apply should not have automatically resulted in admission of the subsequent modifications into evidence. For the evidence to be deemed admissible, it must be relevant and the relevance must not be substantially outweighed by the possibility of juror confusion and prejudice to the defendant.[78] The court, without any clear explanation, simply concluded that the evidence was probative of the manufacturer's duty to provide a warning.[79]

The trial court in *Toups* excluded the evidence because the court concluded the prejudice outweighed any probative value that the evidence might have provided. In reviewing the trial court's decision to exclude the warning, the supreme court should not have disturbed the trial court's ruling absent a clear abuse of discretion.[80] By overruling the trial judge without discussion of the prejudice issue, the supreme court implies that exclusion of such evidence based on Louisiana Code of Evidence article 403 is a clear abuse of trial court discretion as a matter of law. This observation is buttressed by the fact that the court chose not to remand the case for a new trial and allow the defendant to rebut the evidence of the subsequent warning. The thrust of this analysis portends that trial judges apparently may not exclude evidence of subsequent modifications under the authority of either Louisiana Code of Evidence article 407 or article 403 because of its potential to persuade a jury of the defendant's fault.

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75. Id. at 819.

76. See Note, Toups v. Sears Roebuck and Co.: Re-Assessing Admissibility of Subsequent Remedial Measures in a Products Liability Suit, 48 La. L. Rev. 985, 997 n.71 (1988).

77. Landry v. Adam, 282 So. 2d 590 (La. App. 4th Cir. 1973).

78. State v. Ludwig, 423 So. 2d 1073, 1977 (La. 1982).

79. 507 So. 2d 809, 818.

80. State v. Chaney, 423 So. 2d 1092 (La. 1982).

Toups might be limited by the holding expressed in the actual opinion which reads: "In a strict product liability case, evidence of such remedial measures should be allowed insofar as they are relevant in establishing what the manufacturer knew or should have known."[81] Such a statement places the court's reasoning on the horns of a dilemma. The court stated earlier in the opinion that a manufacturer is conclusively presumed to know of the defects of its product.[82] If that proposition is true, then evidence of the manufacturer's knowledge is never relevant because "knowledge" is not a disputed issue in the case. On the other hand, if knowledge is an issue in the case, then the action is no longer one purely concerned with strict liability. "Constructive knowledge" inquiries focus on the manufacturer and not the product, so that culpability becomes an issue. If culpability is an issue, then 407 applies to exclude the evidence. Under either scenario, evidence of subsequent remedial measures should have been inadmissible according to the rule utilized by the court.

It is evident that a *Toups* interpretation of Louisiana Code of Evidence article 407 will encourage forum shopping by plaintiffs asserting a cause of action under product liability. Defendant manufacturers will remove cases when possible to federal court to avoid the evidentiary handicap that *Toups* imposes. Conversely, plaintiffs will probably name local sellers in their suit to avoid diversity of citizenship thereby litigating the issue in Louisiana courts bound to apply the *Toups* rule. Both federal and state courts will apply the Louisiana Product Liability Act substantively in Louisiana,[83] but the evidentiary rules work differently against defendants in Louisiana state court. Broad application of Louisiana Code of Evidence article 407 avoids such an anomalous result.

Notwithstanding a broad interpretation of Louisiana Code of Evidence article 407, it is possible for the balancing test of Louisiana Code of Evidence article 403 to ameliorate resulting unfairness which results from the difference in rules in two forums. Such an approach lacks the certainty of allowing the legislative determination of Louisiana Code of Evidence article 407 to govern the admissibility of subsequent remedial measures since exclusion under 403 is determined according to the discretion of the trial court. The major problem with utilizing the 403 balancing process is the standard of review on appeal. If the admissibility is balanced using 403, the appellate court will afford the trial judge with a great deal of discretion.[84] However, the *per se* rules of nonadmissibility found in 407 give the trial judge much less discretion—

81. 507 So. 2d 809, 816-17.
82. Id. at 816.
83. Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817 (1938).
84. Supra note 80.

presumably because the legislature does not want any balancing done with evidence excluded by 407. Efficiency is likewise undermined since plaintiffs will still be encouraged to "forum shop" in an attempt to utilize favorable Louisiana evidence law.

IV. Louisiana Code of Evidence Article 407: The Law Giveth and the Law Taketh Away

The Louisiana version of 407 differs significantly from its federal counterpart in the language chosen for the second sentence of the article. First, exceptions to the general rule need not be controverted in order for the trial judge to allow their application. The absence of this requirement deviates from both the common law and the federal rule.[85] Secondly, the article allows evidence of subsequent remedial measures to show knowledge or authority, or to attack credibility. These areas of proof supplement exceptions in the federal rule which include evidence offered to prove ownership, control, and feasibility of precautionary measures.[86]

Under literal reading of the article, the exceptions, particularly the exception for evidence to show "knowledge," partially nullify the general rule excluding evidence of subsequent remedial measures to prove negligence because in a traditional negligence case against the owner of a thing, it is knowledge which gives rise to the duty to take reasonable steps to protect against injurious consequences resulting from the risk.[87] While the comments indicate the law is consistent with prior Louisiana law,[88] this writer is unable to find any prior existence of a "knowledge" exception. Likewise, if a court is assessing a claim against a vendor for selling an unreasonably dangerous product, knowledge of the potential danger is the key element in finding the defendant liable.[89] The general intent of the article is to exclude evidence of subsequent remedial measures to prove negligence, yet the "knowledge" exception seemingly consumes the general rule because a finding of "knowledge" is crucial to a finding of negligence.[90]

In a strict liability case, one standard for determining liability is to presume the owner's knowledge of the risk presented by the thing under the owner's control.[91] In light of this presumption, the court must still assess the reasonableness of the owner's conduct "according to tradi-

85. See supra note 5. See also Hoffman and Zuckerman, supra note 7.

86. See Wigmore, supra note 16, § 283, at 158. See supra note 20.

87. Kent v. Gulf States Utilities, 418 So. 2d 493, 497 (La. 1982).

88. La. Code Evid. art. 407 comment (a).

89. La. Civ. Code art. 2545; Harris v. Atlanta Stove Works, Inc., 428 So. 2d 1040 (La. App. 1st Cir.), writ denied, 434 So. 2d 1106 (1985).

90. Supra note 87.

91. Id.

tional notions of blameworthiness"[92] which include balancing the probability of risk occurring, the gravity of the consequences, and the burden of adequate precautions.[93] In determining whether a thing poses an unreasonable risk of harm under Louisiana Civil Code article 2317, the court inquires as to blameworthiness and, in essence, culpability. The net effect is that 407 does not apply to many negligence cases because of the "knowledge" exception, yet it applies with full vigor to strict liability cases due to the inherent blameworthiness inquiries. Ironically, the addition of the "knowledge" exception exempts 407's applicability only in instances where "knowledge" is an issue.

Another possible problem is evident with the absence of the "if controverted" requirement for the exceptions' applicability. Commentators suggest that such problems can be resolved with the 403 balancing test.[94] This approach leaves the deferential decision of admissibility with the trial court even though Louisiana Code of Evidence article 407 is premised on *per se* exclusion of such evidence. While the results may be the same under either Louisiana Code of Evidence articles 403 or 407, the process of assessing admissibility is subverted by diverting per se questions of admissibility to an analytic framework which balances competing interests. However, the commentators are persuasive in their assessment of ultimate admissibility since it is very doubtful whether uncontroverted issues will be allowed to supply the admission of otherwise inadmissible evidence.

Since the adoption of the Louisiana Code of Evidence, the First Circuit Court of Appeal has strictly applied the rule excluding subsequent remedial measures. The plaintiff in *Northern Assurance Company of America v. Louisiana Power and Light*[95] attempted to show corrective measures taken by an electrical company to recircuit electricity after electrical fires. The plaintiff was an insurance company subrogee attempting to collect reimbursement for benefits paid to the insured for a residential fire. The fire was allegedly caused by the residential supplier of electricity. The trial court admitted evidence of the corrective measures and the Court of Appeal reversed the ruling after applying the principles of Louisiana Code of Evidence article 407 by analogy to the case at the time of the trial.[96]

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92. Id.

93. Verrett v. Cameron Telephone Company, 417 So. 2d 1319, 1324 (La. App. 3d Cir. 1982).

94. La. Evid. Handbk., supra note 2, at 227, Author's Note 2.

95. 561 So. 2d 770 (La. App. 1st Cir.), writ granted, 565 So. 2d 422 (1990).

96. 561 So. 2d 770, 773 (La. App. 1st Cir. 1990).

In conclusion, the language of the article is clear. The careful choice of exceptions to the rule may indicate a legislative policy to narrow the rule's applicability to few circumstances when negligence is at issue. Absent legislative change in allowable exceptions to 407's general rule, it is questionable whether subsequent repairs will be excluded in negligence cases. However, since "knowledge" is not an issue in strict liability due to the fact that knowledge is imputed absent evidence to the contrary, the article should apply to all "blameworthiness" inquiries in those cases.

V. Conclusion

As the legal issues and policy considerations of Louisiana Code of Evidence article 407 become more entangled, it appears that considerable confusion has erupted in applying the rule. The first step in assessing the applicability of Louisiana Code of Evidence article 407 to unforeseen circumstances should focus on issues of relevancy. Relevancy should be a requisite condition for the admissibility of subsequent measures. If the relevancy concerns are the same in a strict liability case (in which applicability of article 407 may seem doubtful) as they would be in a negligence case (in which article 407 undoubtedly applies), then an *a pari ratione* interpretation of Louisiana Code of Evidence article 407 justifies the exclusion of subsequent remedial measures.

Courts which recognize the strict liability exception concentrate more on the policy consideration of favoring beneficial over detrimental human behavior. Attempts to distinguish between delictual theories of liability result in artificial distinctions which are not legally persuasive because all torts under Louisiana law possess degrees of culpability or negligence. Across-the-board application of Louisiana Code of Evidence article 407 to all tort litigation allows the legislative choice of exclusion to prevail, and the result is a greater emphasis on fairness and efficiency in dispute resolution and avoidance of needless speculation. However, in the light of the broad exceptions which accompany the general rule of 407, it seems questionable whether the present article is workable in light of its historical purpose.

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