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Proof of Product Defect

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Defectiveness lies at the center of products liability law. Merely making and selling a product that causes accidental harm to another fails to provide a sufficient basis for moral or legal responsibility. Instead, the defendant is liable in products liability law only if the defendant supplied a product that was deficient in some respect, rendering the product “defective.” In Roman law, responsibility for product harm rested to a large extent on the notion of product defect, as it did under medieval church law and the law of early America. Defectiveness continues to provide the core concept of modern products...
liability law around the world. Determining how defectiveness should be defined and proved has preoccupied courts, commentators, and products liability lawyers since the rise of modern products liability law in America during the 1960s. Apart from special claims involving misrepresentation, negligent entrustment, and certain others, every products liability claim requires proof that an unnecessary hazard in the defendant’s product caused the injury. Regardless of the underlying cause of action, plaintiffs in products liability cases ordinarily must establish that something was wrong with the product. Virtually every product is dangerous in some manner and to some extent, at least when put to certain uses. But most such dangers are simple facts of physics, chemistry, or biology. There is no reasonable way to avoid them. For such natural risks of life, product users, rather than product suppliers, properly bear responsibility for avoiding and insuring against any injuries that may result. But some products carry excessive risks that users and consumers should not fairly be required to shoulder, either because the risks are unexpected, or because they feasibly can be avoided by manufacturers or other product suppliers. And so the law properly requires that a product contain some excessive level of danger before shifting the loss to the seller. The label that the law attaches to products carrying such excessive risks is “defective.”

At least implicitly, each of the three major causes of action in products liability law requires that the product be defective. First, negligence claims are predicated on the defectiveness of a product, because its supplier ordinarily cannot be faulted for selling a product that
is not defective. Second, a breach of the implied warranty of merchantability occurs when a product is “unfit” for ordinary use, meaning virtually the same thing as “defective.” Finally, strict liability in tort is based explicitly on the sale of a defective product. The centrality of the concept of defectiveness to products liability law is reflected in the Restatement (Second) of Torts and Restatement (Third) of Torts, both of which ground liability on the notion of product defect. In short, product defectiveness is the heart of products liability law.

In most products liability cases, the plaintiff’s basic claim is that a defective condition in the defendant’s product proximately caused the plaintiff’s harm. The plaintiff has the burden of proving each element of such a case, including the product’s defectiveness. Sometimes the precise reasons for harm caused by a product will be a mystery, but the circumstances may logically suggest that the product was defective and perhaps that the manufacturer was negligent in selling it in that condition. In such cases, the doctrines of product malfunction and res ipsa loquitur may help the plaintiff establish the product’s defectiveness and the liability of the manufacturer. In other cases, a plaintiff may introduce evidence that the product violated an industry or

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11 See, e.g., Merrill v. Navegar, Inc., 28 P.3d 116, 124 (Cal. 2001) (stating that under both negligence and strict liability, plaintiff must prove a defect causing the injury and, under negligence, “plaintiff must also prove ‘an additional element, namely, that the defect in the product was due to negligence of the defendant’” (citing William Prosser, Strict Liability to the Consumer, 18 HASTINGS L.J. 9, 50–51 (1966))); Oanes v. Westgo, Inc., 476 N.W.2d 248, 253 (N.D. 1991) (“In negligent design claims it is well established that a manufacturer or seller is not liable in the absence of proof that a product is defective. Thus, an element of a negligent design case is that the product is defective or unsafe.”). The Products Liability Restatement makes this point: “Negligence rests on a showing of fault leading to product defect. Strict liability rests merely on a showing of product defect.” RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. n.; see also OWEN, PRODUCTS LIABILITY LAW, supra note 2, §§ 2.1 & 5.9.


14 See RESTATEMENT (SECOND) OF TORTS § 402A (1977) (strict liability for sale of product in “defective condition unreasonably dangerous” to user or consumer); OWEN, PRODUCTS LIABILITY LAW, supra note 2, at ch. 5.

15 See RESTATEMENT (SECOND) OF TORTS § 402A; PRODUCTS LIABILITY RESTATEMENT §§ 1 & 2.

16 See PRODUCTS LIABILITY RESTATEMENT § 2 cmts. c (manufacturing defects), d & f (design defects), & i (instruction and warning defects).

17 See OWEN, PRODUCTS LIABILITY LAW, supra note 2, § 7.4.

18 See id. § 2.4.
government safety standard to establish the product's defectiveness and possibly the manufacturer's negligence as well. On the other hand, the defendant may rely on its compliance with such standards as evidence of the product's non-defectiveness. Sometimes a plaintiff may rely in part upon similar accidents involving the defendant's other similar products. Likewise, a defendant may demonstrate that the absence of similar accidents—that is, the product's record of safe performance—proves the reverse. Finally, a plaintiff may try to prove a product's defectiveness or the defendant's negligence by showing that the defendant acknowledged the problem by remedying the hazard after the plaintiff's injury. This article addresses these recurring issues of proof.

I. SAFETY STANDARDS

Proof that a product violates or conforms to certain safety standards pertaining to the hazard that caused the plaintiff's harm may be probative of whether the product was defective. Such standards may be adopted by the industry, perhaps through standard-setting organizations such as the American National Standards Institute (ANSI), the National Safety Council (NSC), or the Society of Automotive Engineers (SAE). Safety standards may also be promulgated by the government through a statute, or through the regulatory standards of a governmental agency, like the Federal Food and Drug Administration (FDA) or the National Highway Traffic Safety Administration (NHTSA). In general, evidence that a products liability defendant violated or complied with an applicable safety standard is admissible on the issue of defectiveness.

The role of such evidence in proving or disproving defectiveness derives from and parallels the law governing its use in proving and disproving negligence, a topic examined elsewhere.

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19 See discussion infra Part I.
20 The effect on a negligence claim of proof that a defendant violated a safety standard, often referred to as the doctrine of negligence per se, is addressed in OWEN, PRODUCTS LIABILITY LAW, supra note 2, § 2.3.
21 Defendant may also demonstrate its compliance with such standards to help disprove its negligence. See id; see also discussion infra Part I.A., II.B.
22 See discussion infra Part II.C.
23 See discussion infra Part III.
24 Special issues in proving negligence are examined in OWEN, PRODUCTS LIABILITY LAW, supra note 2, ch 2; see also David G. Owen, Proof of Negligence in Modern Products Liability Litigation, 36 Ariz. St. L. Rev. (forthcoming Spring 2005).
25 See OWEN, PRODUCTS LIABILITY LAW, supra note 2, § 2.4.
A. Industry Standards—Custom

A common type of evidence introduced during a defect dispute is an industry's prevailing safety standard with respect to the particular product characteristic at issue. For example, in an effort to prove a product's defectiveness, a plaintiff may seek to demonstrate that other manufacturers in the industry regularly use a safer design or a warning that the defendant failed to adopt. Conversely, in an effort to show that its product is not defective, a defendant manufacturer may seek to introduce evidence that other manufacturers customarily use the same design or warnings as the defendant on similar products. The admissibility of customary industry standards derives from the use of this type of evidence for nearly two centuries in negligence law—a good place to start unraveling the custom-as-evidence conundrum in the context of strict liability in tort.

Industry safety standards for products often develop informally over time, as a matter of custom, as engineers and other technical experts around the nation (and the world) migrate between companies and exchange ideas in papers, at conferences, and otherwise. Many industry safety provisions are spawned more formally by organizations that specialize in developing practicable standards of efficacy and safety, such as the American National Standards Institute (ANSI), the American Society for Testing and Materials (ASTM), the American Standards Association (ANSI), the American Society for Testing and Materials (ASTM), and the American Standards Association (ANSI).
There are also a host of more arcane and specialized organizations, including the American Society of Agricultural Engineers, the National Spa and Pool Institute, the Scaffolding and Shoring Institute, the Industrial Stapling and Nailing Technical Association, and the American Conference of Governmental and Industrial Hygienists.

Although sometimes referred to as "quasi-public," these are actually private organizations, many of which derive from and are essentially controlled by the industries they serve. Thus, while some of these organizations are actually quite independent, other organizations produce standards that are little more than formal versions of standards already established by the industry. As a result, though an industry may rely on these safety standards, most courts treat them the same as less formally recognized types of industry standards.

33 See, e.g., Alfred v. Caterpillar, Inc., 262 F.3d 1083 (10th Cir. 2001) (Okla. law) (design of asphalt paver’s speed control as lever rather than as rotary dial).
34 See Masters v. Hesston Corp., 291 F.3d 985, 991 (7th Cir. 2002) (Ill. law) (American Society of Agricultural Engineers standards relevant to setting standard of design safety for hay baler).
38 See Potter v. Chicago Pneumatic Tool Co., 694 A.2d 1319 (Conn. 1997) (vibration limits for tools). These and other standards—setting organizations are described in 6 FRUMER & FRIEDMAN, PRODUCTS LIABILITY, supra note 26, §§ 76.01 & 76.03.
41 However, because some standards—setting groups are comprised of members outside the industry, and because their standards are voluntary guidelines of minimum safety, they are not to be equated with “industry custom.” See Fayerweather, 2003 WL
A great majority of courts allow use of relevant evidence of industry custom. To be relevant, normally a standard must have existed at the time the defendant manufactured the product and must otherwise be germane to the particular characteristic of the specific type of product involved in the dispute. For example, to prove a design defect, a plaintiff may introduce evidence that a defendant-manufacturer failed to comply with an applicable industry standard for the design of a speed control mechanism of an asphalt paver, a grader back-up alarm that was not tamper-proof, power tools that vibrated excessively, aircraft actuators that could mistakenly be installed backwards, or the guarding of pinch points on industrial machinery. Similarly, in seeking to prove a warning is defective, a plaintiff may demonstrate that the warning is inadequate for failing to comply with industry standards concerning, for example, the risk that a crane operator might be shocked if the crane were to hit electrical wires, that a kitchen cleaning chemical might cause severe burns, or that a winch should use a safety-latched hook.

238788, at *3 (because two-thirds of ANSI ladder standards committee members came from outside the industry, "the standards are not evidence of 'custom and usage' within an industry as contemplated" by standard jury instructions, so that court's failure to give it was not error).

42 See 3 FRUMER & FRIEDMAN, PRODUCTS LIABILITY, supra note 26, § 18.04 [1]. Industry "custom," meaning prevailing use of technology, differs from the higher standard of "state of the art," meaning the best technology reasonably available at the time. See OWEN, PRODUCTS LIABILITY LAW, supra note 2, §§ 2.4 & 10.4.


44 See, e.g., Chapman v. Bernard's Inc., 167 F. Supp. 2d 406, 422-23 (D. Mass. 2001) (industry standards that plaintiff sought to use as evidence pertained to cribs, toddler beds, and bunk beds, not daybeds like the one causing baby's death when he slipped between its mattress and side rail).

45 See Alfred v. Caterpillar, Inc., 262 F.3d 1083 (10th Cir. 2001) (Okla. law) (Society of Automotive Engineers ("SAE") standards called for control to be a lever rather than a rotary dial; operator backed up, pinning plaintiff to tree, rather than proceeding forward as intended).


48 See Nesselrode v. Executive Beechcraft, Inc., 707 S.W.2d 371 (Mo. 1986).


By the same token, a manufacturer seeking to establish that its product’s design is not defective53 may show that its product complied with industry standards regarding, for example, a stepladder,54 a chair,55 the fuel system of a pickup truck,56 the protective guard of a log skidder57 or a grinder.58 To refute a defective warnings claim, the manufacturer may present evidence that it adequately complied with industry standards for warnings and instructions for its product, such as a hot water heater59 or a trampoline.60 A manufacturer may also utilize compliance with industry customs to prove that its product was free of manufacturing defects.61

A great majority of jurisdictions maintain that a manufacturer’s compliance or noncompliance with industry custom is some evidence that the

53 PRODUCTS LIABILITY RESTATEMENT § 2(b) cmt. d (2004) explains the relevance of industry custom to the feasibility requirement of design defect determinations:

This Section states that a design is defective if the product could have been made safer by the adoption of a reasonable alternative design. If such a design could have been practically adopted at time of sale and if the omission of such a design rendered the product not reasonably safe, the plaintiff establishes defect under Subsection (b). When a defendant demonstrates that its product design was the safest in use at the time of sale, it may be difficult for the plaintiff to prove that an alternative design could have been practically adopted. The defendant is thus allowed to introduce evidence with regard to industry practice that bears on whether an alternative design was practicable. Industry practice may also be relevant to whether the omission of an alternative design rendered the product not reasonably safe. While such evidence is admissible, it is not necessarily dispositive. If the plaintiff introduces expert testimony to establish that a reasonable alternative design could practically have been adopted, a trier of fact may conclude that the product was defective notwithstanding that such a design was not adopted by any manufacturer, or even considered for commercial use, at the time of sale.

Id.

54 See DiCarlo v. Keller Ladders, Inc., 211 F.3d 465, 468 (8th Cir. 2000) (Mo. law) (ANSI standards; affirming judgment on verdict for manufacturer).
product was or was not defective. Occasionally, courts give such evidence somewhat greater weight. A few state products liability reform statutes address the topic. At least one provides that evidence of industry custom and nongovernmental standards is admissible, while another accords a presumption of non-defectiveness to products that "conformed to the generally recognized and prevailing standards." However, a small number of courts altogether refused to allow evidence of industry custom on the issue of product defect in strict liability cases. These courts reason that evidence of the manufacturers' customary behavior with respect to safety issues improperly injects into a strict liability case issues of conduct and due care that are irrelevant to the legal standard of product defectiveness. Finally, borrowing from


63 See, e.g., Jordan v. Massey–Ferguson, Inc., No. 95–5861, 1996 WL 662874, at *2 (6th Cir. Nov. 12, 1996) (Ky. law) ("[A] manufacturer rarely ‘will be held liable for failing to do what no one in his position has ever done before.’") (quoting W. PROSSER, HANDBOOK OF THE LAW OF Torts § 33, at 167 (4th ed. 1971))); Del Cid v. Beloit Corp., 901 F. Supp. 539, 545–49 (E.D.N.Y. 1995), aff'd, No. 96–7009, 1996 U.S. App. LEXIS 15842 (2d Cir. July 24, 1996); Mears v. Gen. Motors Corp., 896 F. Supp. 548, 551 (E.D. Va. 1995) (noting that while compliance with industry practices does not conclusively establish product's safety, manufacturer will seldom be liable for failing to adopt safety measures no other member of industry employs); see also PRODUCTS LIABILITY RESTATEMENT § 2(b) cmt. d (2004) ("When a defendant demonstrates that its product design was the safest in use at the time of sale, it may be difficult for the plaintiff to prove that an alternative design [required for a finding of design defect] could have been practically adopted."); Vermett v. Fred Christen & Sons Co., 741 N.E.2d 954, 971 (Ohio Ct. App. 2000) ("compliance with ANSI is a compelling factor").

64 See WASH. REV. CODE ANN. § 7.72.050(1) (West 2004) (stating that trier of fact may consider such evidence with respect to design, warnings, or manufacturing defects).

65 See KY. REV. STAT. ANN. § 411.310(2) (Banks–Baldwin 2004) ("[I]t shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the product was not defective if the design, methods of manufacture, and testing conformed to the generally recognized and prevailing standards or the state of the art in existence at the time the design was prepared, and the product was manufactured.").

negligence law’s *T.J. Hooper* rule,\(^67\) courts in strict liability cases almost universally maintain that evidence of a defendant’s compliance\(^68\) or noncompliance\(^69\) with industry safety standards does not conclusively establish whether a product is defective.\(^70\) Yet, in unusual cases, proof of a defendant’s compliance\(^71\) or noncompliance\(^72\) may conceivably be a proper basis for a dispositive determination of a product’s defectiveness.

consumers that it injures or maims through its defective designs by showing that ‘the other guys do it too.’\(^67\)


\(^{67}\) See *The T.J. Hooper v. N. Barge Co.*, 60 F.2d 737, 740 (2d Cir. 1932) (discussed in OWEN, PRODUCTS LIABILITY LAW, *supra* note 2, § 2.4).

\(^{68}\) See, e.g., *Clarke v. LR Sys.*, 219 F. Supp. 2d 323, 334 (E.D.N.Y. 2002) (stating that, because compliance with ANSI standard was not dispositive of design defect issue, other evidence on design and safety of machine may be considered); *Brooks v. Beech Aircraft Corp.*, 902 P.2d 54, 64 (N.M. 1995) (“[I]n assessing whether a manufacturer was negligent in adopting a particular product design or whether the product design poses an unreasonable risk of injury, a court should not be restricted to determining whether the manufacturer’s design complied with any applicable government regulations and industry standards. Such regulations and standards, while probative of what a reasonably prudent manufacturer would do, should not be conclusive.”).

\(^{69}\) See, e.g., *Alfred v. Caterpillar, Inc.*, 262 F.3d 1083, 1088 (10th Cir. 2001) (Okla. law); *Poches v. J.J. Newberry Co.*, 549 F.2d 1166, 1168 (8th Cir. 1977) (S.D. law).

\(^{70}\) See, e.g., *Del Cid v. Beloit Corp.*, 901 F. Supp. 539, 545 (E.D.N.Y. 1995) (“Compliance or lack of compliance with industry standards ... is not dispositive of the issue of a design defect and other evidence concerning the design and safety of the machine may be considered.”) (citations omitted), *aff’d*, No. 96–7009, 1996 U.S. App. LEXIS 15842 (2d Cir. July 24, 1996); *Allen v. Long Mfg. NC, Inc.*, 505 S.E.2d 354, 358 (S.C. Ct. App. 1998) (suggesting that compliance with an industry safety standard conclusively establishes product’s non–defectiveness is “unsound since it would allow the industry to set its own standard of safety, a proposition which finds no support from other jurisdictions, and which is antithetical to the underlying premise of strict liability”). *See generally 3 FRUMER & FRIEDMAN, PRODUCTS LIABILITY, *supra* note 26, § 18.04(1).

\(^{71}\) See *Wilder v. Toyota Motor Sales*, U.S.A., Inc., 23 Fed. App. 155, 157 (4th Cir. 2001) (Va. law) (“While conformity with industry custom does not absolve a manufacturer or seller of a product from liability, such compliance may be conclusive when there is no evidence to show that the product was not reasonably safe.”).

B.  Governmental Standards and the Doctrine of Defectiveness Per Se

1. Violation

The effect of a manufacturer's violation of a safety statute or regulation on the issue of negligence in a products liability case is controlled by the doctrine of negligence per se. This doctrine states that a defendant's breach of an applicable statute or regulation—one addressing the type of risk that harmed the plaintiff or a person in a similar position to the plaintiff—is at least evidence (and possibly conclusive) of the negligence issue. The question examined here is whether the law recognizes an equivalent method of proving product defectiveness for purposes of strict products liability in tort, a doctrine that might be labeled "defectiveness per se." 

It is useful to remember that a finding of product defectiveness is typically a kind of "lesser included offense" in a negligence determination, since the latter normally requires a conclusion that the defendant negligently made or sold a defective product. In other words, a finding of negligence (whether by normal proof or negligence per se) usually implies a finding of defectiveness. So, if a plaintiff establishes negligence per se, logically the plaintiff has also demonstrated that the product was defective. This is the premise of the Restatement (Third) of Torts: Products Liability ("Restatement"), which sets out a defectiveness per se principle in terms of traditional negligence per se. Section 4(a) of the Restatement provides that "a product's noncompliance with an applicable product safety statute or administrative regulation renders the

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73 See generally Owen, Products Liability Law, supra note 2, § 2.4.
75 This is especially true with defendant manufacturers. Other types of negligence claims that are much less common include negligent misrepresentation and negligent entrustment. See Owen, Products Liability Law, supra note 2, §§ 2.2, 5.9, & 15.2.
77 The formulation is traditional except that it conflates the conventional two-pronged test—protecting (1) persons like plaintiff from (2) risks that caused harm—into a single scope-of-risk prong.
product defective with respect to the risks sought to be reduced by the statute or regulation.78 Acknowledging that the rule derives from the doctrine of negligence per se,79 the Restatement extends the principle to products liability theories, whether based on strict liability or traditional negligence.80

**a. Rationale**

While a doctrine of defectiveness per se might appear logically embedded in the concept of negligence per se, the underlying rationale of any type of per se liability for breach of statute is unclear. Negligence per se itself has always been theoretically suspect,81 and it is uncertain why a statutory or regulatory violation should establish a product defect. The idea may be that governmental product safety standards necessarily rest on implicit determinations of product defectiveness by taking into account consumer expectations and the costs and benefits of alternative safety approaches. Or perhaps the notion is that consumers can reasonably expect manufacturers to obey the law, but they cannot reasonably expect more.82 Rationales like these seem rather contrived. The Restatement's purported policy explanation for the rule is tautological,83 which may reflect the fact that most courts that have applied the per se principle to defectiveness in strict liability have borrowed this approach from negligence law without critical consideration.84 Case law on the issue is sparse, and the few courts that

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78 Restatement (Third) of Torts: Products Liability § 4(a).
79 See id. Reporters' Note to cmt. d.
80 Treating products liability doctrine broadly, without regard to distinctions between the traditional claims (negligence, implied warranty, and strict liability in tort), his consistent with the Third Restatement's "functional" approach to products liability which seeks to transcend the different causes of action, melding them into simple products liability claims. See id. §§ 1–4.
82 See Soproni v. Polygon Apartment Partners, 971 P.2d 500, 505–06 (Wash. 1999) (en banc) ("Whether or not a product was in compliance with legislative or administrative regulatory standards is merely relevant evidence that may be considered by the trier of fact [together with the availability of feasible alternative designs, in determining] if the product was unsafe to an extent beyond that which would be expected by an ordinary consumer."); see also Eriksen v. Mobay Corp., 41 P.3d 488, 494 (Wash. Ct. App. 2002) (stating that customers expect designs to comply with legislative regulations).
83 "The rule in [§ 4(a)] is based on the policy judgment that designs and warnings that fail to comply with applicable safety standards established by statute or regulations are . . . defective." Restatement (Third) of Torts: Products Liability § 4 cmt. d.
84 The courts are not alone in assuming that the per se principle for breach of statute may be transferred from negligence law to strict products liability. See, e.g., Robert L. Rabin, Reassessing Regulatory Compliance, 88 Geo. L.J. 2049, 2051 (2000) ("If, in fact,
apply the doctrine are often federal courts sitting in diversity, sometimes drawing support dubiously from one another. In short, the doctrine of defectiveness per se balances on a slender reed. But a couple of state statutes, a handful of scattered opinions, and the Restatement do support this method of proving a product defect. For whatever reason, in the final analysis a product’s failure to meet minimal government safety rules does seem somehow relevant, perhaps very relevant, to a defectiveness determination.

b. Relevance

To be admissible in a product defect dispute, evidence of a statutory violation must be relevant to that issue, which is another way of stating that the plaintiff must have been injured by the risk the statute sought to prevent. Probably the most contentious issue on the question of relevancy concerns OSHA regulations that govern the guarding of machinery and many other workplace safety matters. OSHA’s machinery-guarding regulations are directed solely at employers rather than manufacturers, which renders such regulations immensely suspect in the halls of relevance. Even so, both plaintiffs and defendants may

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85 See id.

86 See COLO. REV. STAT. ANN. § 13-21-403(2) (West 2004) (violation creates a rebuttable presumption of defectiveness); KAN. STAT. ANN. § 60-3304(b) (2004) (violation renders product defective unless manufacturer establishes that violation was appropriate).

87 See, e.g., Stanton v. Astra Pharm. Prods., Inc., 718 F.2d 553 (3d Cir. 1983) (Pa. law) (holding that manufacturer of Xylocaine anesthetic was negligent per se for failing to file adverse reaction reports required by FDA regulation; violation also rendered drug defective under § 402A since FDA was unable to assure that warnings of adverse reactions were disseminated to doctors); Lukaszewicz v. Ortho Pharm. Corp., 510 F. Supp. 961 (E.D. Wis. 1981), amended by 532 F. Supp. 211 (E.D. Wis. 1981) (holding that manufacturer of Ortho-Novum birth control pills was negligent per se and liable under § 402A for failure to warn user directly of side effects pursuant to FDA regulation).

88 “Indeed, it seems anomalous to accord such a standard of conduct, promulgated by the community through its elected representatives, anything less than the force of law . . . in the context of a civil suit.” Ballway, supra note 74, at 1391.

89 See, e.g., Hagan v. Gemstate Mfg., Inc., 982 P.2d 1108, 1112 (Or. 1999) (requiring, in a trailer-accident case the lower courts look to a regulation’s purpose when determining relevancy).

90 See 3 FRUMER & FRIEDMAN, PRODUCTS LIABILITY, supra note 26, § 18.05[3].

seek to have such standards admitted into evidence in a products liability case.\textsuperscript{92} Quite naturally, a plaintiff will want to demonstrate that the manufacturer failed to adopt the pertinent OSHA standard. Machine-guarding and most other OSHA safety regulations are not directed at manufacturers,\textsuperscript{93} so that their breach by employers cannot establish a manufacturer's liability per se. However, such standards may prescribe the types of safety devices a federal workplace safety agency deems necessary for the safety of particular machinery and thus help define the standard of acceptable safety practices—the prevailing custom—in the industry of machinery manufacturers.\textsuperscript{94} Therefore, while plaintiffs sometimes introduce evidence of OSHA standards, manufacturers will do so as well.\textsuperscript{95} Arguing that it cannot violate a safety regulation that applies only to employers, a manufacturer of industrial machinery may seek to use such a regulation to inform the jury (if indirectly) of two important points: 1) that the employer, which is not a party in a products liability action,\textsuperscript{96} was primarily responsible for the accident because it owed and breached a duty under federal law to protect the worker;\textsuperscript{97} and

\textsuperscript{92} See, e.g., Hannah v. Gregg, Bland & Berry, Inc., 840 So. 2d 839 (Ala. 2002) (OSHA standards admissible to show that defendant, who reconfigured machinery, should have noticed that absence of barrier guard was safety hazard); Couch v. Astec Indus., 53 P.3d 398, 403–04 (N.M. 2002) (OSHA standards admissible as custom).

\textsuperscript{93} Note that other OSHA regulations, such as the OSHA Hazard Communication Standard, 29 C.F.R. § 1910.1200(g)(6)(j) (2004), requiring manufacturers and importers of chemicals to supply purchasers with Material Safety Data Sheets, are indeed directed at employers. See, e.g., Messer v. Amway Corp., 210 F. Supp. 2d 1217, 1230 (D. Kan. 2002), aff'd, 2004 U.S. App. LEXIS 16445 (10th Cir. 2004).

\textsuperscript{94} See, e.g., Couch, 53 P.3d at 403–04 (admitting OSHA standards as evidence of custom); Hannah, 840 So. 2d at 849 (admitting OSHA standards to show that defendant, who reconfigured machinery, should have noticed that absence of barrier guard was safety hazard). See generally DAN B. DOBBS, THE LAW OF TORTS § 133, at 313 (2000). But cf. 29 U.S.C. § 653(b)(4), (providing that the OSHA statute does not affect the common law "rights, duties, or liabilities of employers and employees").

\textsuperscript{95} See, e.g., Sims v. Washex Mach. Corp., 932 S.W.2d 559, 565 (Tex. Ct. App. 1995) (stating that machine's compliance with OSHA regulations was "strong evidence" that it was not defective); Slisz v. Stanley--Bostitch, 979 P.2d 317, 321 (Utah 1999) (allowing introduction of OSHA standards to establish rebuttable presumption of nondefectiveness).

\textsuperscript{96} Workers’ compensation statutes protect employers from tort suits by employees in exchange for providing workers compensation insurance benefits. See OWEN, PRODUCTS LIABILITY LAW, supra note 2, § 15.6.

\textsuperscript{97} See, e.g., Brodsky v. Mile High Equip. Co., 69 Fed. App. 53, 56–57 (3d Cir. 2003) (Pa. law) (admitting evidence that OSHA imposed fines upon decedent’s employer for failing to properly train employee to show that employer’s intervening negligence was a superseding cause of employee’s death); Porchia v. Design Equip. Co., 113 F.3d 877, 881 (8th Cir. 1997) (Ark. law) (admitting this information to help determine whether employer’s actions were the sole proximate cause of injury). But see Colegrove v.
2) that the injured worker is already being compensated by workers’
compensation benefits and thus will not be left destitute if the jury finds
the product not defective. Deciding how best to mesh workers’
compensation and products liability law is an exceedingly complex
issue.\textsuperscript{98} Clearly, however, violations of OSHA regulations applicable
only to employers simply cannot establish product defectiveness per se.\textsuperscript{99}
While some courts bar the admission of such evidence as irrelevant\textsuperscript{100} or
confusing,\textsuperscript{101} others allow it against manufacturers to portray the
environment in which industrial machines are sold and used.\textsuperscript{102}

c. Application

Most strict liability in tort cases concerning noncompliance with
safety statutes and regulations involve alleged defects in a product’s
warnings\textsuperscript{103} or design.\textsuperscript{104} The \textit{Restatement} limits the per se principle to

\begin{footnotesize}
\textsuperscript{98} See OWEN, \textit{PRODUCTS LIABILITY LAW}, \textit{supra} note 2, § 15.6.
press guarding standards inadmissible).
\textsuperscript{100} See, \textit{e.g.}, Colegrove, 172 F. Supp. 2d at 617–18.
\textsuperscript{101} See, \textit{e.g.}, Byrne v. Liquid Asphalt Sys., Inc., 238 F. Supp. 2d 491, 493 (E.D.N.Y.
2002) (refusing to admit OSHA standards, which are not intended to impose duties upon
manufacturers, because they would likely mislead or confuse jury).
\textsuperscript{102} See, \textit{e.g.}, Messer v. Amway Corp., 210 F. Supp. 2d 1217, 1230 (D. Kan. 2002);
Gemstate Mfg., Inc., 982 P.2d 1108, 1113 (Or. 1999). For a discussion of a
manufacturer’s use of OSHA standards against plaintiffs, see OWEN, \textit{PRODUCTS LIABILITY
LAW}, \textit{supra} note 2, § 14.3.
\textsuperscript{103} See, \textit{e.g.}, Stanton v. Astra Pharm. Prods., Inc., 718 F.2d 553, 565 (3d Cir. 1983)
(Pa. law) (holding that manufacturer of Xylocaine anesthetic was properly found liable
under § 402A for failing to file adverse reaction reports required by FDA regulation,
since FDA was unable to assure that warnings of adverse reactions were disseminated
to doctors); Lukaszewicz v. Ortho Pharm. Corp., 510 F. Supp. 961 (E.D. Wis.) (finding a
manufacturer of Ortho–Novum birth control pills negligent per se, and liable under
§ 402A, for failure to warn user directly of side effects pursuant to FDA regulation, 21
CFR § 310.501), \textit{amended by} 532 F. Supp. 211 (E.D. Wis. 1981); Toole v. Richardson–
\textsuperscript{104} See, \textit{e.g.}, Ellis v. K–Lan Co., 695 F.2d 157, 161–62 & n.5 (5th Cir. 1983) (Tex.
law) (dictum) (discussing whether drain–cleaner cap design complied with or violated
Special Packaging of Household Substances for Protection of Children Act, 15 U.S.C.
§§ 1471–76, and regulations thereunder; such evidence was admissible but not conclusive
on design defectiveness); Bennett v. PRC Pub. Sector, Inc., 931 F. Supp. 484, 501 (S.D.
Tex. 1996) (discussing NIOSH standards for design of work station that caused repetitive
motion injury); McGee v. Cessna Aircraft Co., 188 Cal. Rptr. 542, 547 (Ct. App. 1983)
(finding that aircraft firewalls between engine and passenger compartment failed to meet
FAA requirement that they resist flame penetration for at least fifteen minutes); Brooks v.
these types of cases, but a safety statute or regulation may pertain to manufacturing defects as well. For example, a regulation may prescribe the maximum level of contamination or flaws allowable in products (such as food, drugs, or lumber) or the appropriate manufacturing processes for medical materials. In this context, the Restatement's per se principle would seem to apply with equal force and logic.

\[d. \text{Restatement}\]

The Restatement provides that a products liability defendant generally may not avail itself of the array of excuses and justifications for violating a statute or regulation allowed in ordinary negligence law, reasoning that excuses are not applicable where a manufacturer has occasion to know the facts and safety standards and has time to conform its behavior to the standard's provisions. It is true that valid justifications for violating safety statutes and regulations will arise less frequently in the products liability context than in ordinary negligence contexts, where emergencies and reasonable mistakes more commonly occur without notice of clear safety standards. But case authority for the Restatement's dual position is ephemeral, to say the least, and courts might well be leery of adopting a truly "strict" form of liability for


See discussion supra notes 77–80 and accompanying text.

See Coffer v. Standard Brands, Inc., 226 S.E.2d 534, 538 (N.C. Ct. App. 1976) (examining case where plaintiff injured teeth biting down on unshelled nut in bottle of shelled nuts; statute and regulation allowing 1.00% to 2.50% unshelled peanuts per unit of shelled peanuts).


Id.

See D’Angelo, supra note 74, at 469 (asserting that only one state, Alaska, accords such violations conclusive effect). The Reporters cite another Alaska case, Bachner v. Rich, 554 P.2d 430 (Alaska 1976), but Bachner was a workplace safety action against a contractor in which the court acknowledged the general availability of excuses to negligence per se, but found them inapplicable to the facts.
design and warnings cases without allowing truly justifiable violations of statutory and regulatory safety standards.113

Jurisdictions vary in the weight given to a finding of noncompliance with a governmental safety standard. Most of the few opinions on point treat the violation of a safety standard as evidence of a product's defectiveness.114 In a few states, such a violation gives rise to a presumption of defectiveness that may shift the burden of proof.115 At least one court holds that breach of such a provision conclusively establishes that the product is defective,116 a position endorsed by the

113 Cf. St. Louis Univ. v. United States, 182 F. Supp. 2d 494 (D. Md. 2002) (noting that some of nation's best scientists, employed by NIH to enforce polio vaccine "neurovirulence" standards, approved a vaccine that did not comply with those standards because they believed the standards, subsequently abolished, were unreasonably high).

114 See, e.g., Redman v. John D. Brush & Co., 111 F.3d 1174, 1177-78 (4th Cir. 1997) (Va. law) (stating, in dictum, that courts should consider whether a product's design meets relevant standards); Ellis v. K-Lan Co., 695 F.2d 157, 161 (5th Cir. 1983) (Tex. law) (discussing federal child-packaging rules for household substances); "while plainly relevant, would not have been conclusive of its product's defectiveness or fitness"); see also WASH. REV. CODE ANN. § 7.72.050(1) (West 2004); Gibson v. Wal-Mart Stores, Inc., 189 F. Supp. 2d 443, 447 (W.D. Va. 2002) (finding no violation of relevant federal regulations governing packaging of charcoal lighter fluid: "[I]n determining what constitutes an unreasonably dangerous defect, a court will consider safety standards promulgated by the government or the relevant industry, as well as the reasonable expectations of consumers.") (quoting Alevromagiros v. Hechinger Co., 993 F.2d 417, 429 (4th Cir. 1993)); Bennett v. PRC Public Sector, Inc., 931 F. Supp. 484, 501 (S.D. Tex. 1996) (holding that government standards are relevant to, but not conclusive of, worker's claim that workstation was defectively designed); Quay v. Crawford, 788 So. 2d 76, 84 (Miss. Ct. App. 2001) (discussing a federal trucking regulation requiring effective rear-underride guard); Hall v. Fairmont Homes, 664 N.E.2d 546, 551 (Ohio Ct. App. 1995) (finding that formaldehyde emissions from materials used in mobile home exceeded HUD standards).

115 See, e.g., COLO. REV. STAT. ANN. § 13-21-403(2) (West 2004) (rebuttable presumption); KAN. STAT. ANN. § 60-3304(b) (2003) (deeming product defective unless manufacturer shows that violation was reasonably prudent action); McGee v. Cessna Aircraft Co., 188 Cal. Rptr. 542, 457 (Ct. App. 1983) (discussing the FAA specification that aircraft firewalls between engine and passenger compartment resist flame penetration for at least fifteen minutes). See also OWEN, PRODUCTS LIABILITY LAW, supra note 2, § 14.3 (discussing the rebuttable presumption approach in the context of the regulatory compliance defense).

116 See Stanton v. Astra Pharm. Prods., Inc., 718 F.2d 553, 569-71 (3d Cir. 1983) (Pa. law) (finding manufacturer of Xylocaine anesthetic failed to file adverse reaction reports required by FDA regulation rendering drug defective under § 402A, since FDA was unable to assure that warnings of adverse reactions were disseminated to doctors).
Restatement, which parallels what was thought to be the conventional rule in negligence per se.

In sum, the putative doctrine of “defectiveness per se” is undeveloped and ethereal. To the extent that this doctrine does exist, the cases suggest that a defendant’s noncompliance with an applicable safety statute or regulation may be considered evidence, though not dispositive, of a product’s defectiveness.

2. Compliance

The rule regarding a manufacturer’s compliance with governmental safety standards largely mimics the rule regarding violations: compliance with a safety standard is widely considered proper, but inconclusive, evidence of a product’s non-defectiveness. Notwithstanding such compliance, a jury normally is free to find a warning or design “defective” because governmental safety requirements generally are set at minimally acceptable levels. Section 4(b) of the Restatement is in

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118 See OWEN, PRODUCTS LIABILITY LAW, supra note 2, § 2.4. Most assertions to this effect draw their support from other sources from the 1940s, 1930s, or earlier. Research has uncovered no recent jurisdictional tally.
120 See, e.g., Kurer v. Parke, Davis & Co., 679 N.W.2d 867, 875 (Wis. Ct. App. 2004), review denied, 684 N.W.2d 137 (Wis. 2004) (drug warnings). Perhaps the classic examples of extraordinarily minimal standards in a federal “safety” act are the flammability standards in the Flammable Fabrics Act; Raymond v. Riegel Textile Corp.,
accord, providing that, in connection with liability for defective design or warnings:

a product’s compliance with an applicable product safety statute or administrative regulation is properly considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation, but such compliance does not preclude as a matter of law a finding of product defect.  

Some states provide that a manufacturer’s compliance with an applicable statute or regulation gives rise to a rebuttable presumption that the product is not defective. In unusual situations, a court may rule as a matter of law that a defendant’s conformity to a statutory or regulatory safety standard amounts to due care. This principle of special applicability surely applies to claims for strict liability torts as well.

II. OTHER SIMILAR ACCIDENTS

A common, and often persuasive, form of proof of defectiveness is evidence of other similar accidents. Plaintiffs commonly offer such

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121 PRODUCTS LIABILITY RESTATEMENT § 4 (b).


123 See, e.g., Ramirez v. Plough, Inc., 863 P.2d 167, 172 & 176–77 (Cal. 1993) (holding that compliance with FDA’s English–language–only warning requirement shielded drug manufacturer from also having to warn in Spanish that giving aspirin to children might cause Reyes Syndrome); Beatty v. Trailmaster Prods., Inc., 625 A.2d 1005, 1014 (Md. 1993) (compliance with bumper–height statute was complete defense); see also RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 16 cmt. e (Tentative Draft Nov. 1, 2001) (stating that in “unusual situations,” statutory or regulatory compliance may be conclusive); cf. Taylor v. Smithkline Beecham Corp., 658 N.W.2d 127 (Mich. 2003) (upholding as constitutional a Michigan statute shielding drug manufacturers from liability if their drugs comply with FDA regulations).

evidence to show, circumstantially, that a product has a dangerous or defective condition, the defendant had notice of it, and the defect caused the plaintiff's injury. Less often, defendants offer evidence to prove the absence of other similar accidents: that a product's condition was not especially dangerous, that the defendant had no reason to know about it, or that it did not cause the plaintiff's harm. In addition, such evidence is sometimes allowed to rebut or impeach the other party's witness. Plaintiff attorneys consider other-accident evidence to be an especially powerful form of proof, while defense attorneys view it as largely, if not entirely, irrelevant and prejudicial to the fair adjudication of a products liability case.
A. Relevance

Other-accident evidence may be relevant to any of the following three factual matters commonly disputed in products liability litigation: (1) the nature and extent of a product’s dangerous condition,\(^{128}\) (2) the defendant’s awareness of that condition,\(^{129}\) and (3) the causal relationship between the condition and the plaintiff’s harm.\(^{130}\) Assume, for example, that a driver is injured in a rollover of a sport utility vehicle (“SUV”).\(^{131}\) Each of these three matters might be controverted, for example, in an action against the SUV’s manufacturer for injuries in a rollover that occurred during a particular steering maneuver on a particular grade at a particular speed. Evidence of one hundred accidents involving the same model SUV under similar circumstances might tend to show all three facts: (1) that this model SUV is especially prone to rolling over under these particular conditions; (2) that the manufacturer was informed of this danger because of the large number of similar accidents; and (3) that certain aspects of the vehicle’s design (and perhaps the absence of adequate warnings and instructions) may have contributed to the accidents. In short, other-accident evidence may be probative of a product’s dangerous condition,\(^ {132}\) notice to the manufacturer of the

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\(^{128}\) These factors comprise the \(P \times L\) side of the Hand risk-utility formula for negligence and defectiveness, examined in Owen, Products Liability Law, \textit{supra} note 2, at chs. 2, 5, & 8.

\(^{129}\) More particularly, this is the issue of notice, actual or constructive (that defendant knew or should have known), which commonly includes foreseeability.

\(^{130}\) See Arabian Agric. Servs. Co. v. Chief Indus., Inc., 309 F.3d 479, 485 (8th Cir. 2002) (Neb. law) (allowing evidence that other silos of manufacturer also collapsed because “[e]vidence of other accidents may be relevant to prove the defendant’s notice of defects, the defendant’s ability to correct known defects, the magnitude of the danger, the product’s lack of safety for intended uses, or causation.”) (citation omitted); Nissan Motor Co. v. Armstrong 32 S.W.3d 701, 710 (Tex. Ct. App. 2000) (holding that 750 reports of others incidents of unintended acceleration of Nissan 300ZX is admissible to rebut manufacturer’s claim that driver error caused accident and to show notice), rev’d, 145 S.W.3d 131 (Tex. 2004).

\(^{131}\) Cf. McCathern v. Toyota Motor Corp., 23 P.3d 320, 327 (Or. 2001) (finding that, in the case of a Toyota 4Runner rollover, the existence of fifteen other substantially similar incidents was relevant to understanding expert’s opinion).

\(^{132}\) See, e.g., Lovick v. Wil–Rich, 588 N.W.2d 688, 697–98 (Iowa 1999), \textit{modified}, 588 N.W.2d 688 (Iowa. 1999) (involving a cultivator wing that fell on plaintiff after he removed a pin; evidence of other accidents showed dangerous location of wing lock bracket subjecting operator to risk from collapse); Santos v. Chrysler Corp., 715 N.E.2d 47, 53 (Mass. 1999) (holding that similar occurrences of rear of minivan skidding after hand application of the brakes is relevant to dangerousness, defect, and notice).
condition, or causation linking the condition to the accident. Moreover, because punitive damages may be based upon a defendant's failure to address a serious hazard of which it is aware, evidence of other similar accidents may be relevant to this issue as well.

Some courts may admit other-accident evidence as proof of either a manufacturer's negligence or the product's defectiveness. While such evidence may indeed help prove these things, it logically establishes only foreseeability, notice, and the type and level of danger of the similar products. At best, such evidence provides only circumstantial proof that a shared design feature or absence of a warning (including the one that harmed the plaintiff) was dangerous, or that the danger was a

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134 See, e.g., Arabian, 309 F.3d at 485 (allowing evidence that other silos of manufacturer also collapsed because "[e]vidence of other accidents may be relevant to prove the defendant's notice of defects, the defendant's ability to correct known defects, the magnitude of the danger, the product's lack of safety for intended uses, or causation") (quoting Lovett v. Union Pac. R.R., 201 F.3d 1074, 1081 (8th Cir. 2000)); Nissan Motor, 32 S.W.3d at 712 (holding that 750 reports of others incidents of unintended acceleration of Nissan 300ZX are admissible to show notice and rebut manufacturer's claim that driver error caused accident); Newman v. Ford Motor Co., 975 S.W.2d 147, 152 (Mo. 1998) (holding that evidence of five other rear–end collisions was properly admitted in case involving ejection from seat that collapsed despite passenger's wearing seatbelt, with limiting instruction that jury consider the evidence only for determining seatbelt's effectiveness in restraining occupants, not for determining defectiveness).

135 See OWEN, PRODUCTS LIABILITY LAW, supra note 2, at ch. 18.


138 See, e.g., Melton v. Deere & Co., 887 F.2d 1241, 1245 (5th Cir. 1989) ("The question is not simply danger itself but unreasonable dangerousness as measured by consumer expectations.").
common cause of the accidents. However, to prevail in a strict products liability or negligence action, a plaintiff must go beyond simply proving that the product that injured him was dangerous. In strict products liability, the plaintiff must also prove that the product’s design or the absence of warning was defective. In a negligence action, the plaintiff must further prove that the defendant was negligent for selling the product in such a dangerous condition.\(^{139}\)

In addition to evidence that a product’s condition was dangerous, both negligence and strict liability generally require additional proof that the dangerous condition was both foreseeable and reasonably preventable.\(^{140}\) Other-accident evidence may help establish foreseeability because a manufacturer is likely to have learned about such accidents, particularly if they are numerous or severe. Indeed, the more numerous and serious the similar accidents caused by a product, the more likely it is that the manufacturer knew or should have known of the product’s danger, thus providing the manufacturer with actual or constructive notice of the danger. But other-accident evidence does not help establish the second requirement: the availability of a reasonable alternative design or warning that could have prevented the plaintiff’s accident. For this, the plaintiff must provide other types of proof.\(^{141}\)

B. Substantial Similarity

The relevancy of other-accident evidence depends largely on whether other accidents are “substantially similar” to the plaintiff’s accident.\(^{142}\) First, the product involved in the other accidents must be the same as or similar to the product claimed to have injured the plaintiff.\(^{143}\)

\(^{139}\) See OWEN, PRODUCTS LIABILITY, supra note 2, at ch. 2.

\(^{140}\) See id. chs. 2, 5, & § 10.4.

\(^{141}\) In particular, proof by expert testimony that a reasonable alternative design or warning was available when the product was made and sold. See id. § 6.3.

\(^{142}\) “In products liability cases, the ‘rule of substantial similarity’ prohibits the admission into evidence of other transactions, occurrences, or claims unless the proponent first shows that there is a ‘substantial similarity’ between the other transactions, occurrences, or claims and the claim at issue in the litigation.” Cooper Tire & Rubber Co. v. Crosby, 543 S.E.2d 21, 23 (Ga. 2001); see also Lovick v. Wil-Rich, 588 N.W.2d 688, 697 (Iowa 1999) (“[A] foundational showing must indicate the prior accidents occurred under substantially the same circumstances.”).

\(^{143}\) See, e.g., Ray v. Ford Motor Co., 514 S.E.2d 227, 230–31 (Ga. Ct. App. 1999) (holding that 546 other incidents of inadvertent vehicle movement were properly excluded where database was not limited to any year or model of vehicle). But see Smith v. Ingersoll–Rand Co., 214 F.3d 1235, 1248 (10th Cir. 2000) (N.M. law) (discussing different models, but with same design problem: “The substantial similarity rule does not require identical products; nor does it require us to compare the products in their entireties [but only as to] variables relevant to the plaintiff’s theory of defect.”); Santos v.
The relevance of such evidence also rests on the similarity between the principal causative facts and circumstances involved in the other accidents and those in the plaintiff's case. Accordingly, evidence of other accidents generally is admissible if the plaintiff establishes their substantial similarity to the plaintiff's accident in both the product type and usage contexts. Such evidence will be excluded in the absence of such qualifications. But "similar" does not mean identical, and evidence of other accidents is admissible if the facts and circumstances surrounding the accidents are shown to be reasonably similar. The jury

Chrysler Corp., 715 N.E.2d 47, 53 (Mass. 1999) (holding that six other incidents of rear-wheel lockup in minivan admissible, although five minivans were from different model years and four had braking systems with different design features); see also Preston v. Mont. Eighteenth Jud. Dist. Ct., 936 P.2d 814 (Mont. 1997) (finding that trial court erred in restricting discovery of similar accidents to those involving specific model involved in plaintiff's accident).

See, e.g., Arabian Agric. Servs. Co. v. Chief Indus., Inc., 309 F.3d 479, 485 (8th Cir. 2002) (Neb. law) (allowing other silos manufactured by defendant which collapsed in similar manner as plaintiff's); Santos, 715 N.E.2d at 52–53 (using other instances of minivans skidding due to hard application of breaks); Newman v. Ford Motor Co., 975 S.W.2d 147, 152 (Mo. 1998) (involving situation where other occupants were thrown from seats despite wearing seatbelts); Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328 (Tex. 1998) (allowing other accidents with 16" tire, although the plaintiff's tires had a pictographic warning); Jones v. Ford Motor Co., 559 S.E.2d 592, 602 (Va. 2002) (using prior accidents from cars accelerating without warning).


See, e.g., Clark v. Chrysler Corp., 310 F.3d 461, 473 (6th Cir. 2002), vacated and remanded on other grounds, 540 U.S. 801 (2003) (Ky. law) ("In order to prove ... that an accident occurred under similar circumstances, it is not necessary to prove that the prior accidents involved a vehicle identical to the one driven by [decedent] or that all of the circumstances of the accidents are identical."); Smith, 214 F.3d at 1248–49.

See, e.g., Moulton v. Rival Co., 116 F.3d 22, 26–27 (1st Cir. 1997) (Me. law) (holding that reports to potpourri pot manufacturer of previous burns to young children were admissible despite difference in circumstances); Lovick, 588 N.W.2d at 697–98 (involving several prior instances of farm cultivator wings falling on farm workers); Ulm v. Ford
may also consider any dissimilarities when evaluating the weight of the
evidence.\textsuperscript{148} It is sometimes noted that the substantial similarity
requirement is heightened if the other incidents are offered to prove
defectiveness or causation. Likewise, the requirement is relaxed if the
evidence merely reveals the defendant's notice of the possibility that its
product is dangerous or defective.\textsuperscript{149}

Ultimately, the question of substantial similarity is a matter for the
sound discretion of the trial court, reversible only for abuse of
discretion.\textsuperscript{150} As with other forms of evidence, a court should exclude
other-accident evidence, even if relevant, "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."\textsuperscript{151} In

\begin{itemize}
\item \textsuperscript{148} See, e.g., Nissan Motor Co. v. Armstrong, 32 S.W.3d 701, 711–12 (Tex. Ct. App.
2000), rev'd, 145 S.W.3d 131 (Tex. 2004); Santos, 715 N.E.2d at 53.
\item \textsuperscript{149} See, e.g., Smith, 214 F.3d at 1248–49; Weir v. Crown Equip. Corp., 217 F.3d
453, 457–58 (7th Cir. 2000). See generally MCCORMICK ON EVIDENCE, supra note 124, §
200, at 707–08 (arguing that the similarity between the accidents need not be great when
used to prove notice); 2 WEINSTEIN'S FEDERAL EVIDENCE, supra note 124, § 401.08[2], at
401–52 (requiring less similarity for notice, while a very high degree of similarity is necessary to
prove product was unreasonably dangerous).
\item \textsuperscript{150} See, e.g., Lovett, 201 F.3d at 1080 (finding no abuse of discretion in exclusion of
other-accident evidence); Cooper Tire, 543 S.E.2d at 25 (holding that trial court did not
abuse discretion in excluding adjustment data regarding tire failure without a showing of
substantial similarity because "[a]bsent clear abuse, the trial court's exercise of discretion
is entitled to deference."); Palmer, 2003 WL 22006296, at *28 (finding that trial court
was within its discretion); see also Andrews v. Harley Davidson, Inc., 796 P.2d 1092,
1096 (Nev. 1990) (seeming less deferential in finding it was error not to allow evidence
of other accident, where difference was trivial between motorcycle hitting parked vs. moving
vehicle).
\item \textsuperscript{151} FED. R. EVID. 403; see, e.g., Weir, 217 F.3d at 458 (involving other brake failures
on same type of forklift); Drabik v. Stanley–Bostitch, Inc., 997 F.2d 496, 510–11 (8th
Cir. 1993) (overturning $7.5 million punitive damages award); Brooks v. Chrysler Corp.,
786 F.2d 1191, 1198 (D.C. Cir. 1986) (affirming trial court's exclusion of evidence of
consumer complaints because of minimal probative value and substantial delay, but
remarking that "Chrysler would have attempted to rebut the substance of each of the 330
complaints or to distinguish the nature of the complaints contained therein from the
alleged defect in this case."); Blevins v. New Holland N. Am., Inc., 128 F. Supp. 2d 952,
961 (W.D. Va. 2001) (excluding prior accident on hay baler under Rule 403 because "to
explore the similarities and dissimilarities of the Hornsby case with the present accident
will prolong the trial and risk jury confusion and prejudice"); Gen. Motors Corp. v.
of $101 million).
\end{itemize}
balancing the probative value of this form of evidence, a court may allow evidence of only those other accidents deemed most similar and exclude the rest.\(^{152}\)

C. Absence of Other Accidents

Because plaintiffs are normally permitted to use similar-accident evidence to prove dangerousness, notice, and causation, it is only logical and fair to allow defendants to use the absence of such evidence to prove their case.\(^{153}\) Generally, defendants may introduce the absence of similar accidents to help establish that a product was not dangerous or defective, that the defendant had no notice of danger or defect, or that causation was absent.\(^{154}\) This reverse type of other-accident evidence, called "safe-use" evidence, also requires a proper foundation of substantial similarity: a defendant must demonstrate the safe use\(^{155}\) of the same type of product under conditions substantially similar to those of the plaintiff's accident.\(^{156}\)

It may be that evidence of the absence of prior accidents is less probative than evidence of the existence of prior accidents since proof of the absence of accidents really shows only that none have been discovered, not that they did not occur.\(^{157}\) Thus, it has been asserted "that proving a negative by the lack of accidents is 'more complex' than


\(^{156}\) See, e.g., Pandit v. Am. Honda Motor Co., 82 F.3d 376, 380 (10th Cir. 1996); Espeaignnette v. Gene Tierney Co., 43 F.3d 1, 9-10 (1st Cir. 1994).

\(^{157}\) See MCCORMICK ON EVIDENCE, supra note 124, § 200, at 709; LILLY ON EVIDENCE, supra note 124, § 5.17, at 189.
proving the happening of an accident." Notwithstanding, while case law on the admisibility of the absence of accidents is less voluminous, a number of cases have allowed evidence of a product's good safety history to help refute a plaintiff's other-accident evidence and consequently disprove dangerousness, causation, or notice. But evidence of the absence of other accidents normally is relevant only in cases involving design and warnings defects, not in manufacturing defect cases.

D. Subsequent Accidents

Most other-accident evidence admitted in products liability litigation involves accidents that occurred before the plaintiff's accident. While some courts disagree, a number of courts allow evidence of other accidents that occurred after the defendant's product was sold or involved in the plaintiff's accident. These courts reason that the probative force of such evidence for demonstrating causation or a product's dangerous (or defective) condition in no way depends on when the other accidents occurred. It is clear, however, that evidence of

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158 Schaefer, 791 A.2d at 1064 (discussing the distinction between other-accident and no-accident evidence).

159 See, e.g., id.


164 See, e.g., Mercer v. Pittway Corp., 616 N.W.2d 602, 615 (Iowa 2000) ("[T]he rule allowing evidence of similar incidents is generally limited to incidents occurring prior to the one in question.").

subsequent accidents can have no relevance to the issue of notice, and the relevance of such evidence rests upon the substantial similarity between subsequent accidents and the plaintiff's accident. At least one jurisdiction allows evidence of subsequent similar accidents to show a defendant's culpability for purposes of punitive damages.

III. SUBSEQUENT REMEDIAL MEASURES

The longer a product is on the market, the more a manufacturer learns about the product's hazards and how best to eliminate them. Over time, a manufacturer with due concern for product safety will tend to improve its manufacturing processes, enhance the design safety of its products, and provide consumers with better information on product dangers and how to avoid them. This natural evolution of product safety gives rise to an important issue as to the admissibility of evidence that a manufacturer, after making and selling the product that injured the plaintiff, improved the product's safety in a manner that would have prevented the injury.

The fact that a manufacturer has eliminated the very danger responsible for a plaintiff's injury is powerful evidence that the particular safety enhancement was both practicable and otherwise reasonable at the time the safety change was made. So, by improving a product's design safety or by providing additional warnings or instructions, a manufacturer acknowledges the fact that, at that time, the benefits of the safety improvement exceeded the costs. Absent a technological breakthrough between the time the product causing the plaintiff's injury was manufactured (or when the plaintiff is injured) and the time the product's safety is improved, evidence of such a safety enhancement may well suggest that, prior to its improvement, the product was defective. This in turn may show that the manufacturer was negligent. Therefore, evidence that a manufacturer adopted a subsequent remedial measure would normally be relevant to liability and presumptively admissible in a products liability case.

166 See, e.g., Smith, 214 F.3d at 1248.
169 See FED. R. EVID. 402 ("All relevant evidence is admissible . . . .").
A. Development of the Repair Doctrine

Evidence that an actor cured a dangerous condition after it injured a plaintiff may be relevant to both the condition's defectiveness and the actor's negligence, but it establishes neither. The use of such evidence may unjustly punish persons for their care and prudence and diminish safety by providing parties in control of dangerous conditions a disincentive to reduce or cure existing hazards. For these reasons, at an early date courts developed a special rule of relevancy called the "repair doctrine," which bars evidence of a defendant's post-accident repairs used to prove the defendant's negligence. The doctrine spread from Britain to America and was announced by the United States Supreme Court in an 1892 case in which the Court explained:

"It is now settled . . . [that post-accident repair] evidence is incompetent for the purpose of proving negligence, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant."

Today, the rule barring evidence of subsequent remedial measures to prove negligence is the law in almost every state by common law or

170 A post-accident repair afford[s] no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law required, and yet in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence.

Morse v. Minneapolis & St. L. Ry., 16 N.W. 358, 359 (Minn. 1883).

171 It is also known as the "subsequent repair," "subsequent remedial measure," and "post-accident corrective measure" rule or doctrine.

172 In Hart v. Lancashire & Yorkshire Ry., 21 L.T.R. 261, 263 (Ex. 1869), Lord Bramwell of the Court of Exchequer explained that it would be "barbarous . . . to hold, that because the world gets wiser as it gets older, therefore it was foolish before."


175 Rhode Island appears to be the only state that liberally allows the admission of evidence of subsequent remedial measures. See R.I. R. EVID. R. 407.
formal rule of evidence. The doctrine applies to products liability litigation by barring evidence of subsequent safety improvements to prove negligence and, in some jurisdictions, product defectiveness.

It is a controversial rule because of the myriad exceptions that swallow the general rule of exclusion, as well as for the logic of its premises, the ambiguity of its formulation, and its economic and other policy implications. The repair doctrine applies to products liability litigation, barring evidence of subsequent safety improvements to prove negligence and, in some jurisdictions, product defectiveness.

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177 See generally 1 MICHAEL H. GRAHAM, MODERN STATE AND FEDERAL EVIDENCE: A COMPREHENSIVE REFERENCE TEXT 480 (1989) ("[T]he opportunities for admissibility may fairly be said to come close to swallowing up the rule [of exclusion].").

178 See generally J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE MANUAL, § 7.04[1] (same) [hereinafter WEINSTEIN'S EVIDENCE MANUAL]; 23 FED. PRAC. & PROC. EVID., supra note 124, § 5282 (2002) (challenging the justifications of Fed. R. Evid. 407); Carver, Subsequent Remedial Measures 2000 and Beyond, 27 WM. MITCHELL L. REV. 583, 587 (2000) (criticizing the rule on all these grounds and characterizing the current rule as "a post hoc litigation artifice for clever lawyers to use to their client's advantage").

B. Federal Rule of Evidence 407

The general rule prohibiting evidence of post-accident repairs to prove negligence was adopted in Federal Rule of Evidence 407, "Subsequent Remedial Measures," which originally provided:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.\(^{180}\)

In this original iteration, Rule 407 generated interpretative problems concerning: (1) whether the rule barred evidence of subsequent remedial measures in strict liability cases, or was limited to negligence claims;\(^{181}\) and (2) whether, regardless of the theory of recovery, the rule applied to safety measures a manufacturer adopted after the date of manufacture and sale but before the plaintiff was injured, or applied only to measures adopted after the plaintiff's injury. To resolve these questions, the first sentence of Rule 407 was amended in 1997 to read:

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction.\(^{182}\)

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1220 (1978) (recall letters); Bruce I. McDaniel, Annotation, Admissibility of Evidence of Subsequent Repairs or Other Remedial Measures in Products Liability Cases, 74 A.L.R. 3D 1001 (1978) (admissibility in products liability cases generally).

\(^{180}\) FED. R. EVID. 407 (original 1975 version).

\(^{181}\) The interpretive question was whether "culpable conduct" included strict products liability.

In federal court, the revised rule makes it clear\(^{183}\) (1) that it applies and bars evidence of safety improvements in strict products liability cases, as well as negligence, and that it applies to all three types of defect;\(^{184}\) and (2) it excludes only evidence of safety improvements adopted after the plaintiff's injury, leaving the admissibility of safety improvements made after manufacture but before the plaintiff's injury to the general rules of relevancy and prejudice.\(^{185}\) While a large number of other issues remain unresolved,\(^{186}\) the revisions to Federal Rule of Evidence 407 clarify considerably how the repair doctrine applies to products liability cases under federal law.

**C. Strict Liability Claims Under State Law**

While a few states already have adopted the clarifications of the new federal rule,\(^{187}\) the evidence codes and common law of most states still track the repair doctrine’s traditional formulation in terms of negligence and culpability.\(^{188}\) The states agree that the repair doctrine applies to

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\(^{184}\) See, e.g., Stahl v. Novartis Pharm. Corp., 283 F.3d 254, 271 n.10 (5th Cir. 2002) (warning added to package insert after plaintiff’s injury is not admissible to show that earlier warning was defective); J.B. Hunt Transp., Inc. v. Gen. Motors Corp., 243 F.3d 441, 445 (8th Cir. 2001) (holding that GM’s subsequent safety improvements in seat integrity are inadmissible to prove that earlier design was defective).

\(^{185}\) See, e.g., Carballo–Rodriguez v. Clark Equip. Co., 147 F. Supp. 2d 66, 77 (D.P.R. 2001) (admitting evidence of pre-accident service bulletin and warning decal on crane); United States Fid. & Guar. Co. v. Baker Material Handling Corp., 62 F.3d 24, 27 (1st Cir. 1995) (refusing to apply Rule 407 to evidence of pre-accident design change). See generally Rule 407 advisory committee’s note to 1997 Amendment: “Evidence of subsequent measures that is not barred by Rule 407 may still be subject to exclusion on Rule 403 grounds when the dangers of prejudice or confusion substantially outweigh the probative value of the evidence.”

\(^{186}\) On Fed. R. Evid. 407, see Shields, supra note 176.

\(^{187}\) See FLA. STAT. ANN. § 90.407 (West 2004) (omitting “defect in product’s design, or a need for a warning or instruction”); IDAHO R. EVID. 407; ME. R. EVID. 407; N.D. R. EVID. 407.

\(^{188}\) Although many states have some version of the federal rules of evidence, most have not formally amended their rules to conform to the 1997 change to Rule 407, which explicitly applies to strict products liability claims. See, e.g., PA. R. EVID. 407, construed in Duchess v. Langston Corp., 769 A.2d 1131, 1137–50 (Pa. 2001) (traditional rule providing that evidence of subsequent remedial measures is not admissible to prove
products liability claims based on negligence, but they split on whether the rule should be expanded to shield manufacturers against evidence of subsequent remedial measures in products liability claims. Many states, by formal rule of evidence or judicial opinion, limit the exclusionary rule to negligence claims and so allow a plaintiff to introduce evidence of subsequent remedial measures in strict liability cases. The classic case adopting this view is *Ault v. International Harvester Co.*, which rejected the empirical assumptions underlying the rule in the modern products liability context:

The contemporary corporate mass producer of goods, the normal products liability defendant, manufactures tens of thousands of units of goods; it is manifestly unrealistic to suggest that such a producer will forego making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse effect upon its public image, simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the improvement.

Ruling to the contrary, many other states have opted to broaden the rule beyond its traditional negligence basis by also excluding evidence of subsequent remedial measures in the strict liability context. These culpable conduct or negligence also applies in strict products liability cases; *Hyjek v. Anthony Indus.*, 944 P.2d 1036, 1040 (Wash. 1997) (same).


191 *Ault*, 528 P.2d at 1152.

courts reason that the policies that support excluding such evidence in negligence cases—the questionable relevance of safety measures taken subsequent to a product’s manufacture, the undesirability of discouraging safety improvements, and the risk of juror confusion—are equally applicable to strict products liability cases. Oddly, New York straddles the issue by excluding evidence of subsequent remedial measures in strict liability cases regarding design and warning defects (unless feasibility is contested), while allowing such evidence in the less typical context of manufacturing defects.

D. Feasibility, Impeachment, and Other Limitations

The repair doctrine is subject to various exceptions. The post-accident repair rule bars the use of such evidence only for the purpose of proving the defendant’s negligence, culpability, or, in many jurisdictions, the product’s defectiveness. By its terms, the doctrine does not affect the admissibility of post-accident repair evidence “when offered for another purpose.” In particular, the rule does not require the exclusion of evidence of subsequent remedial measures to prove “the feasibility of precautionary measures, if controverted,” or to impeach a witness. These exceptions often overlap.

See, e.g., Duchess, 769 A.2d at 1138–50 (5–2 decision) (examining applicability of traditional rationales to strict products liability).


FED. R. EVID. 407.

Id. Note that the question of the feasibility of a safety improvement may give rise to another evidentiary issue: the admissibility of state-of-the-art evidence. In cases where technology has advanced between when the product was manufactured and when the manufacturer adopted a safety improvement, the state-of-the-art doctrine is likely to bar evidence of the safety enhancement if the enhancement was practicably unavailable at the time of manufacture. See, e.g., Patton v. Hutchison Wil-Rich Mfg. Co., 861 P.2d 1299, 1312–13 (Kan. 1993) (interpreting KAN. STAT. ANN. 60-3307(a)(1) (1992)). See generally OWEN, PRODUCTS LIABILITY LAW, supra note 2, § 10.4.


The overlap is most pronounced when a manufacturer denies the feasibility of a safety measure it adopted shortly after the plaintiff’s accident.
The significance of the "feasibility" and "impeachment" exceptions depends largely on how narrowly or widely they are interpreted and applied. The integrity of this rule depends upon the exceptions not swallowing the general rule of exclusion. A manufacturer, of course, must be deemed to have controverted feasibility if it denies the technological possibility of a safety measure it subsequently adopts, even if it does so only implicitly, as by asserting that the product was already the safest possible.\footnote{See 3 FRUMER & FRIEDMAN, PRODUCTS LIABILITY, supra note 26, § 18.06[1][f].} So, too, a manufacturer obviously controverts the feasibility of a safety measure if it explicitly denies that fact.\footnote{See, e.g., Reese v. Mercury Marine Div., 793 F.2d 1416, 1428 (5th Cir. 1986) (defendant denied feasibility of warnings subsequently added to instruction manual); Dixon v. Int'l Harvester Co., 754 F.2d 573, 584 (5th Cir. 1985) (defendant's witness asserted that plaintiff's proposed design was not feasible because it would block tractor operator's view).} By the same token, if a manufacturer explicitly admits the feasibility of precautionary measures, proof that it subsequently adopted them normally should be excluded.\footnote{See, e.g., J.B. Hunt Transp., Inc. v. Gen. Motors Corp., 243 F.3d 441, 445 n.3 (8th Cir. 2001) (defendant stipulated feasibility of stiffer seats by admitting that it had "tested proposed seating systems that were both stronger and not as strong as the seating system in the 1991 Camaro"); Kallio v. Ford Motor Co., 407 N.W.2d 92, 98 (Minn. 1987) (defendant conceded feasibility of altering transmission design).} The repair doctrine rests on the premise that a defendant normally should be allowed to assert that both its product and its actions were safe and reasonable at the time of manufacture without having to deal with proof that it later decided to improve the product. This suggests that the exceptions should not be interpreted so broadly as to allow a plaintiff to use a back door exception to introduce evidence of a type and for a purpose that the general rule bars at the front. So, if a manufacturer

\footnote{But a manufacturer may be too clever in first admitting "feasibility" and then attempting to limit its definition to technological possibility. See Duchess v. Langston Corp., 769 A.2d 1131, 1145–50 (Pa. 2001) (rejecting defendant's effort to avoid evidence of subsequent safety measures by admitting its feasibility, but only in terms of technological possibility, and arguing that its use would preclude the product from functioning properly).}
concedes the economic and technological feasibility of a particular safety enhancement that it eventually adopted, it still may argue that “the safety problem was not great enough to warrant the trade-off of consumer frustration, increased complexity of the product, and risk of consumer efforts to disconnect the safety device” without opening the door to proof that it adopted the enhancement under the feasibility or impeachment exceptions. Thus, the feasibility and impeachment exceptions normally should be applied, and evidence of a subsequent corrective measure admitted, only if a manufacturer asserts that the measure was impracticable at the time of manufacture.

A variety of other issues lurking within the repair doctrine may restrict or expand its use, and the resolution of such issues in state court may rest upon the particular state’s formulation of the repair doctrine. While a great majority of the subsequent repair cases involve design or warning defects, the doctrine may also apply to defects in a product’s manufacture. One important issue that continues to divide the states is whether the exclusionary rule should be limited to remedial measures adopted after the plaintiff’s accident, as under the revised federal rule, or whether it should be applied more broadly to exclude evidence of any safety improvements made after the date a product is manufactured or sold. Another question is whether the repair doctrine applies to safety measures taken by a third party, such as an employer who adds a safety

204 See Gauthier v. AMF, Inc., 788 F.2d 634, 638 (9th Cir. 1986) (admitting evidence of subsequent remedial measures was improper in view of manufacturer's concession of feasibility).

205 Compare Duchess, 769 A.2d at 1145-50 (applying both exceptions and holding that trial court erred in excluding evidence of subsequently adopted interlock safety device where defendant challenged practicability of that device), with Keating v. United Instruments, Inc., 742 A.2d 128, 130-31 (N.H. 1999) (finding that trial court properly excluded evidence of subsequent safety measure in aircraft altimeter because measure did not “directly” impeach defendant’s expert).

206 But see, e.g., Rix v. Gen. Motors Corp., 723 P.2d 195, 202 (Mont. 1986) (disallowing such evidence in manufacturing defect claim); see also Fed. R. Evid. 407 (barring admission of subsequent remedial measures to prove, inter alia, “a defect in a product, a defect in a product’s design, or a need for a warning or instruction” (emphasis added)). For an early example of a court disallowing subsequent measures in a manufacturing defect case, see Foley v. Coca-Cola Bottling Co., 215 S.W.2d 314, 316-18 (Mo. Ct. App. 1948) (tacks in soft drink).

207 See, e.g., Myers v. Hearth Techs., Inc., 621 N.W.2d 787, 792 (Minn. Ct. App. 2001) (rule did not apply to, and so did not bar admission of, safety enhancement made before accident); Tucker v. Caterpillar, Inc., 564 N.W.2d 410, 413 (Iowa 1997) (same).

feature to a product after an employee is injured. While most courts hold that the doctrine is limited to manufacturers and does not bar evidence of safety improvements by third parties, at least two courts have extended the exclusionary rule beyond manufacturers to remedial measures adopted by third parties.\(^{209}\) Another issue on which the courts are split is whether the rule applies to remedial measures required by the government, such as mandatory safety improvements ordered by NHTSA or another federal agency in charge of safety regulation. Here, the safety-disincentive rationale disappears.\(^{210}\)

IV. CONCLUSION

In litigating a products liability case, the plaintiff's most fundamental task is to prove that the product was defective; typically, there is no case without a product defect. Proof that a product violated some safety standard promulgated by the industry or the government is often compelling proof that the product's dangers were excessive, that the product was defective, and possibly that the manufacturer was negligent in selling it in that condition. So, too, a manufacturer or other defendant may rely on its compliance with such a standard as evidence of the absence of a defect, although such evidence often is less probative when used to prove a negative. Evidence that a product failed previously in a similar manner logically points to an inference of product defect, just as


\(^{210}\) See generally E. Lee Reichert, Note, The "Superior Authority Exception" to Federal Rule of Evidence 407: the "Remedial Measure" Required to Clarify a Confused State of Evidence, 1991 U. ILL. L. REV. 843 (1991); Shields, supra note 177, § 5 (citing cases that address a "superior authority" exception to Rule 407). Evidence of product recalls, which are sometimes voluntary and at other times ordered by a regulatory agency, raise various evidentiary issues including the subsequent repair doctrine. See generally WEINSTEIN'S EVIDENCE MANUAL, supra note 178, § 7.04[3]; AM. LAW PROD. LIAB. 3d, supra note 26, §§ 14:64–14:66; Herbrand, supra note 179 (admissibility of recall letter by defendant–manufacturer). On product recalls, see OWEN, PRODUCTS LIABILITY LAW, supra note 2, § 10.7.
a product's long history of safe use suggests the opposite: that the product in fact contains no design or warnings defects. Finally, a manufacturer's subsequent removal of a product hazard tends to suggest its recognition that the hazard was a problem and that its remedy was feasible, which often goes far to prove defectiveness and negligence. But the law has properly struggled with whether to allow such evidence of subsequent remedial measures when such a rule of evidence might deter manufacturers from repairing product hazards. These are among the more prominent issues of proof of defectiveness that recur in modern products liability litigation.