358 SUBSEQUENT REMEDIAL MEASURES

Evidence has been presented that, after the (accident) (event) (injury) which is the subject of this action, the defendant (describe effort to warn, instruct, or correct after the event). Evidence of these subsequent measures cannot be considered by you to prove that the defendant was negligent or culpable in connection with the (accident) (event) (injury). However, you may consider the actions taken after the (accident) (event) (injury) as proof of (ownership) (control) (feasibility of precautionary measures[1]) (or credibility of any witnesses)[2].

COMMENT

This instruction and comment was approved by the Committee in 2021.

This instruction should be given when the feasibility of specified design changes is submitted to the jury, or one of the other issues as to which evidence of subsequent remedial measures is admissible is submitted to the jury.

This instruction is based on Wis. Stat. § 904.07, which 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 not admissible to prove negligence or culpable conduct in connection with the event. This section 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 or proving a violation of s. 101.11."

Wis. Stat. § 904.07 is substantially the same as Federal Rule of Evidence 407, which codifies, to a considerable extent, the common law rule which holds that evidence of subsequent remedial measures is not admissible to prove fault or negligence.

Evidence of post-event remedial measures may be introduced under both negligence and strict liability theories. D. L. v. Huebner, 110 Wis. 2d 581, 329 N.W.2d 890 (1983).

The underlying rationale for excluding subsequent remedial measures is generally twofold. First, evidence of subsequent repairs is not relevant to the issue of negligence or culpability because they do not necessarily imply that the actor acknowledges prior negligence. Second, the rule is grounded in social

policy concerns that allowing admission of subsequent remedial measures might discourage repairs or alterations that would enhance safety after an accident. D.L., supra at 605 - 606.

There are four distinct exceptions noted in the rule which would allow evidence of subsequent remedial measures to be admitted into evidence: (1) impeachment, (2) ownership, (3) control, and (4) feasibility or precautionary measures. Even if evidence qualifies under Wis. Stat. § 904.07, evidence of subsequent remedial measures must still satisfy the standards of Wis. Stat. §§ 904.01, 904.02, and 904.03.

1. In Chart v. General Motors Corp., 80 Wis.2d 91, 258 N.W.2d 680 (1977), the Wisconsin Supreme Court held that a design change to subsequent products was admissible under § 904.07. The issue arose out of a personal injury action in which the plaintiff alleged the defective design of the automobile she was riding in resulted in her injury. At trial, the circuit court admitted evidence relating to design changes the manufacturer made to subsequent models of the automobile in question. In addressing this issue, the Wisconsin Supreme Court adopted the holding in Ault v. International Harvester Co., 13 Cal.3d 113, 117 Cal.Rptr. 812, 528 P.2d 1148, 1151 (1974), and held that "if the (design) changes occur closely in time they may well illustrate the feasibility of the improvement at the time of the accident, one of the normal elements in the negligence calculus." Chart, supra at 100. The court in Chart went on to provide that in the area of products liability, the emphasis shifts from the manufacturer's conduct to the character of the product.

However, ignoring the distinction between that of the manufacturer's conduct and that of the character of the product may render a subsequent warning inadmissible. For example, in Krueger v. Tappan Co. 104 Wis. 2d 199, 311 N.W.2d 219 (Ct. App. 1981) the plaintiff brought a products liability action against the manufacturer of a gas range after suffering injuries when gasoline used to clean a floor was ignited by the range's pilot light. The court in Krueger held that the trial court did not err when it ruled that the warning in owner's manuals published nine years after the manufacture of the range in question was inadmissible.

This shift in emphasis from the manufacturer's conduct to the character of the product is true for strict liability based on product design but not for strict liability based on failure to warn. The duty to warn involves foreseeability, and failure to warn involves culpability. Strict liability in tort, as established by § 402A of the Restatement, Second, Torts (1965), has nothing to do with culpability. Strict liability for the sale of a defective product may arise even though the seller "has exercised all possible care." Krueger, supra at 207.

Therefore, whether a manufacturer had or should have had knowledge of a dangerous use prior to the plaintiff's injury necessarily shifts the focus back to the seller's conduct in a strict liability case based on a claimed failure to warn, which in turn, is grounds for holding evidence of a subsequent warning inadmissible.

2. Evidence of subsequent remedial measures may be admissible to impeach the credibility of a witness. For example, in D.L. v. Huebner, 110 Wis.2d 581, 607, 329 N.W.2d 890 (1983) the Wisconsin Supreme Court held that in the personal injury suit brought on behalf of an injured minor against the manufacturer of chopper wagon, the trial court did not err in admitting evidence of improvement in safety features of chopper wagons manufactured subsequent to the date of manufacture of the wagon involved in the case, as this was for impeachment purposes. The court in D.L. also held that "the circuit court could have given a limiting instruction as to use of evidence, sec. 901.06, or could have, in its discretion, excluded the evidence if its probative value was substantially outweighed by other considerations." Id., at 614.