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Evidence of Post-Accident Design Modification Held Admissable in Strict Products Liability Manufacturing Defect Action

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should cautiously apply the disqualification rule in a manner calculated to fulfill the dual purposes of avoiding impropriety and ensuring the fair and efficient administration of justice.

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Evidence of post-accident design modification held admissible in strict products liability manufacturing defect action

Evidence of post-accident repairs or design modifications traditionally has been held inadmissible in a negligence cause of action.[169] It had been unclear, however, whether this exclusionary

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[169] *See* Corcoran v. Village of Peekskill, 108 N.Y. 151, 155, 15 N.E. 309, 309-10 (1888); Reed v. New York Cent. R.R., 45 N.Y. 574, 580 (1871); C. McCORMICK, EVIDENCE § 275, at 666-67 (Cleary 2d ed. 1972); W. RICHARDSON, EVIDENCE § 168, at 136-37 (10th ed. J. Prince 1973). There are two well-accepted reasons for excluding evidence of post-accident design modifications in negligence suits. First, such evidence lacks probative force, since subsequent design modification, as well as subsequent repairs, represent "after-the-fact" conduct irrelevant to the issue of foreseeability. *See* 2 J. WIGMORE, EVIDENCE § 283, at 151 (McNaughton rev. ed. 1961); Note, *Products Liability and Evidence of Subsequent Repairs*, 1972 DUKE L.J. 837, 840-41; Note, *Evidence of Subsequent Repairs: Yesterday, Today, and Tomorrow*, 9 U. CAL. D. L. REV. 422, 422-23 (1976). The second reason for excluding evidence of post-accident design modifications rests on policy grounds. A tortfeasor may be deterred from making improvements or otherwise correcting a defective condition if evidence of the change could be introduced as an admission of prior negligence. *See, e.g.*, Bolm v. Triumph Corp., 71 App. Div. 2d 429, 436, 422 N.Y.S.2d 969, 974 (4th Dep't 1979); Costello & Weinberger, *The Subsequent Repair Doctrine and Products Liability*, 51 N.Y.S.B.J. 463, 464 (1979). This deterrence rationale has been criticized. *See, e.g.*, Schwartz, *The Exclusionary Rule on Subsequent Repairs—A Rule in Need of Repair*, 7 FORUM 1, 6 (1971). Nonetheless, some commentators believe that this policy consideration is the more compelling reason for not permitting evidence of subsequent design modifications or repairs. *See* 2 J. WIGMORE, *supra*, § 283, at 151; 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE, ¶ 407[02], at 407-09 & n.5 (1981).

Notwithstanding the relevancy and policy rationales which underlie the rule excluding post-accident design modifications or repairs as proof of negligence, such evidence has been found admissible for other relevant purposes. W. RICHARDSON, *supra* § 168, at 137. Evidence of subsequent repairs is admissible to prove maintenance and control, *see, e.g.*, Slattery v. Marra Bros., 186 F.2d 134, 137 (2d Cir. 1951); Xavier v. Grunberg, 67 App. Div. 2d 632, 632, 412 N.Y.S.2d 22, 23 (1st Dep't 1979); Mason v. City of N.Y., 29 App. Div. 2d 922, 923, 288 N.Y.S.2d 990, 991 (1st Dep't 1968); Olivia v. Gouze, 285 App. Div. 762, 765, 140 N.Y.S.2d 438, 441 (1st Dep't 1955), *aff'd*, 1 N.Y.2d 811, 135 N.E.2d 602, 153 N.Y.S.2d 71 (1956), to impeach the testimony of a witness, *see* Devaney v. Degnon-McLean Constr. Co., 79 App. Div. 62, 64, 79 N.Y.S. 1050, 1052 (2d Dep't 1903), *aff'd*, 178 N.Y. 620, 70 N.E. 1098 (1904), or to prove the feasibility of a safety precaution, *see* Bolm v. Triumph Corp., 71 App. Div. 2d 429, 436, 422 N.Y.S.2d 969, 974 (4th Dep't 1979); J. WEINSTEIN & M. BERGER, *supra*, ¶ 407[04], at 407-16; Note, *Products Liability and Evidence of Subsequent Repairs*, *supra*, at 842. For a discussion of the rule's apparent weakness as a consequence of these exceptions, see Slough, *Relevancy Unraveled—Part III: Remote and Prejudicial Evidence*, 5 KAN. L.

rule applied to a cause of action asserting strict products liability.[170] Recently, in *Caprara v. Chrysler Corp.*,[171] the Court of Appeals held that evidence of a post-accident design modification is admissible in a strict products liability action based upon a manufacturing defect.[172]

In *Caprara*, the plaintiff sued Chrysler Corporation for injuries sustained in an automobile accident.[173] It was alleged that an excessively worn ball joint in the plaintiff's car caused the steering mechanism to malfunction.[174] Over objection, the plaintiff introduced the testimony of a Chrysler designer who stated that 4 years

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REV. 675, 707-09 (1957). *See also* Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385, 411-12 (1952). When a plaintiff is able to take advantage of one of these exceptions, the court is under a duty to instruct the jury that the repair evidence must be considered only for the limited purpose for which it is offered, *see* Karlson v. 305 E. 43rd St. Corp., 370 F.2d 467, 472 (2d Cir.), *cert. denied*, 387 U.S. 905 (1967); Castleberry v. Hudson Valley Asphalt Corp., 60 App. Div. 2d 878, 879, 401 N.Y.S.2d 278, 279 (2d Dep't 1978), and not as proof of negligence or culpable conduct. *See* W. RICHARDSON, *supra*, § 168, at 137; 2 J. WIGMORE, *supra*, § 283, at 158.

[170] Two appellate division decisions have expressed conflicting opinions as to the applicability of the post-accident repair rule to strict products liability actions. In Barry v. Manglass, 55 App. Div. 2d 1, 389 N.Y.S.2d 870 (2d Dep't 1976), the trial judge ruled that a defendant auto manufacturer's recall letter was admissible to prove a defective condition in the plaintiff's vehicle. On appeal, the defendant claimed error, analogizing the letter to a subsequent repair. The court found the analogy inappropriate because the letter was "not an aftermath of the accident." *Id.* at 6, 11, 389 N.Y.S.2d at 874, 877. Moreover, the *Manglass* opinion expressed the view that the public policy of encouraging repairs is of "doubtful validity" in strict liability cases "since it is in the economic self interest of a manufacturer to improve and repair defective products . . . ." *Id.* at 8, 389 N.Y.S.2d at 875 (quoting Ault v. International Harvester Co., 13 Cal. 3d 113, 120, 528 P.2d 1148, 1152, 117 Cal. Rptr. 812, 816 (1974)). *See also* Note, *Products Liability and Evidence of Subsequent Repairs*, *supra* note 169, at 848-49. In Bolm v. Triumph Corp., 71 App. Div. 2d 429, 422 N.Y.S.2d 969 (4th Dep't 1979), however, the court held that the admission of subsequent design modifications as proof of defective design was reversible error. *Id.* at 435, 422 N.Y.S.2d at 973. The court reasoned that a manufacturer's liability for defective design is determined by the "traditional reasonable man test used in negligence actions." *Id.* at 435, 422 N.Y.S.2d at 973-74 (citations omitted). The court, therefore, concluded that the New York exclusion of post-accident modifications should not be abandoned in design defect cases. *Id.* at 437, 422 N.Y.S.2d at 974.

[171] 52 N.Y.2d 114, 417 N.E.2d 545, 436 N.Y.S.2d 251 (1981).

[172] *Id.* at 126, 417 N.E.2d at 551, 436 N.Y.S.2d at 257.

[173] *Id.* at 117-18, 417 N.E.2d at 546, 436 N.Y.S.2d at 252.

[174] *Id.* at 118-19, 417 N.E.2d at 546-47, 436 N.Y.S.2d at 253. The plaintiff's witness, an engineer specializing in automobile failure analysis, testified that he examined the wreck and found the lower-front ball joint prematurely worn to its replacement point. *Id.* at 119, 417 N.E.2d at 547, 436 N.Y.S.2d at 253. In this condition, he argued, it was possible for the joint to move and produce the alleged malfunction. *Id.* at 119, 417 N.E.2d at 547, 436 N.Y.S.2d at 253.

after the accident the ball joint design had been modified.[175] The plaintiff's expert witness testified further that this modification would have prevented the premature deterioration of the ball joint.[176] The trial judge denied the defendant's motion to strike the testimony and the case was submitted to a jury on manufacturing defect and negligence theories.[177] The jury returned a verdict for the plaintiff and the Appellate Division, Third Department, affirmed.[178]

On appeal, a divided Court of Appeals affirmed the appellate division, holding that the contested design modification evidence was admissible.[179] Writing for the majority,[180] Judge Fuchsberg reaffirmed the well-accepted rule that post-accident design modification evidence is inadmissible to prove negligence.[181] The Court observed that because the reasonableness of the defendant's conduct prior to the accident is in issue in a negligence suit, cautionary

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[175] *Id.* at 119, 417 N.E.2d at 547, 436 N.Y.S.2d at 253. Chrysler's engineer testified that Chrysler modified the design, four years after the plaintiff's accident, by adding a plastic insert that "eliminated the play which would wear down the ball." *Id.* at 119, 417 N.E.2d at 547, 436 N.Y.S.2d at 253. He insisted, however, that the insert functionally was irrelevant and was "adopted solely to discourage unscrupulous mechanics" from replacing the ball joints prematurely. *Id.* at 119, 417 N.E.2d at 547, 436 N.Y.S.2d at 253. He also admitted that eight years prior to Caprara's accident, Chrysler was aware that another car manufacturer was employing the improved design. *Id.* at 119, 417 N.E.2d at 547, 436 N.Y.S.2d at 253.

[176] *Id.* at 119, 417 N.E.2d at 547, 436 N.Y.S.2d at 253. Chrysler asserted that the plaintiff's witness was not qualified as an expert to testify on the design of the ball joints. Although the trial judge denied the defendant's original motion, he later granted a request to strike the witness' design testimony by stating that he "would handle the matter in [the] charge." *Id.* at 122, 417 N.E.2d at 549, 436 N.Y.S.2d at 255. This instruction was not given, however, and on appeal the defendant claimed that the omission was error. The *Caprara* Court viewed the judge's failure to advise the jury as proper because it represented an "ultimate de facto decision" to rest on the original denial of the motion. *Id.* at 122, 417 N.E.2d at 549, 436 N.Y.S.2d at 255.

[177] *Id.* at 120, 417 N.E.2d at 548, 436 N.Y.S.2d at 254. Upon the introduction of the design change evidence and additional testimony regarding the effect that design modification would have had on the durability of the ball joint, the case took on aspects compatible with both manufacturing and design defect theories. *Id.* at 120, 417 N.E.2d at 547-48, 436 N.Y.S.2d at 253-54. The trial judge, however, "in the interest of simplifying the case," decided to submit only the manufacturing defect theory to the jury. *Id.* at 120, 417 N.E.2d at 548, 436 N.Y.S.2d at 254.

[178] 71 App. Div. 2d 515, 423 N.Y.S.2d 694 (3d Dep't 1979), *aff'd*, 52 N.Y.2d 114, 417 N.E.2d 545, 436 N.Y.S.2d 251 (1981).

[179] 52 N.Y.2d at 126, 417 N.E.2d at 551, 436 N.Y.S.2d at 257.

[180] Chief Judge Cooke, Judge Gabrielli, and Judge Wachtler concurred in Judge Fuchsberg's majority opinion. Judges Jasen, Jones, and Meyer dissented.

[181] 52 N.Y.2d at 122, 417 N.E.2d at 549, 436 N.Y.S.2d at 255; *see* note 169 *supra*.

measures undertaken after the fact are not probative of liability.[182] In a strict products liability case, however, the Court emphasized that liability is not predicated on the defendant's culpable conduct, but on the mere existence of a defectively manufactured product.[183] Thus, the Court concluded that the rationale behind the evidentiary exclusion in negligence actions is inapplicable to strict products liability suits premised upon manufacturing defects.[184]

Three dissenting judges of the Court of Appeals voted to reverse the appellate division determination, stressing that evidence of a post-accident design change is not probative in a manufactur-

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[182] 52 N.Y.2d at 122, 417 N.E.2d at 549, 436 N.Y.S.2d at 255. In a negligence case, Judge Fuchsberg reasoned, "proof that goes to hindsight rather than foresight most often is entirely irrelevant and, at best, of low probative value." *Id.* Similarly, Professor Wigmore has noted that admitting subsequent repairs as proof of negligence "would be . . . to hold that, because the world gets wiser as it gets older, therefore it was foolish before." 2 J. WIGMORE, *supra* note 169, § 283, at 152-53 (quoting Baron Bramwell in Hart v. Lancashire & Yorkshire Ry., 21 L.T.R.(n.s.) 261, 263 (1869)). Some commentators have suggested, however, that post-accident repair evidence often meets relevancy standards. *See* C. MCCORMICK, *supra* note 169, § 275, at 666. *See generally* Note, *Evidence of Subsequent Repairs: Yesterday, Today, and Tomorrow, supra* note 169, at 431-33.

[183] 52 N.Y.2d at 123-24, 417 N.E.2d at 549-50, 436 N.Y.S.2d at 255-56. Negligence liability is predicated upon a foreseeable risk of harm and unreasonable conduct in proportion to the risk. *See* Pagan v. Goldberger, 51 App. Div. 2d 508, 509, 382 N.Y.S.2d 549, 550-51 (2d Dep't 1976); Morris v. Troy Sav. Bank, 32 App. Div. 2d 237, 238, 302 N.Y.S.2d 51, 52-53 (3d Dep't 1969), *aff'd*, 28 N.Y.2d 619, 268 N.E.2d 805, 320 N.Y.S.2d 78 (1971). *See generally* W. PROSSER, THE LAW OF TORTS § 31, at 146-47 (4th ed. 1971). Strict products liability, however, is predicated upon injuries caused by defective products. *See* Robinson v. Reed-Prentice Div. of Package Mach. Co., 49 N.Y.2d 471, 478, 403 N.E.2d 440, 443, 426 N.Y.S.2d 717, 720 (1980); Codling v. Paglia, 32 N.Y.2d 330, 342, 298 N.E.2d 622, 628, 345 N.Y.S.2d 461, 469-70 (1973); RESTATEMENT (SECOND) OF TORTS § 402A (1965). A product may be defective in manufacture, Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975); Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973), in design, Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976); Bolm v. Triumph Corp., 33 N.Y.2d 151, 305 N.E.2d 769, 350 N.Y.S.2d 644 (1973), or because of the inadequacy or absence of warnings. Torrogrossa v. Townmotor Co., 44 N.Y.2d 709, 376 N.E.2d 920, 405 N.Y.S.2d 448 (1978); *see* Robinson v. Reed-Prentice Div. of Package Mach. Co., 49 N.Y.2d 471, 478, 403 N.E.2d 440, 443, 426 N.Y.S.2d 717, 720 (1980); Wade, *A Conspectus of Manufacturers' Liability for Products*, 10 IND. L. REV. 755, 756-57 (1977). Thus, by focusing judicial inquiry on the defect in the product, the need to prove specific instances of negligent conduct is mooted. *See* Rainbow v. Elia Bldg. Co., 49 App. Div. 2d 250, 252, 373 N.Y.S.2d 928, 930 (4th Dep't 1975); Jerry v. Borden Co., 45 App. Div. 2d 344, 349, 358 N.Y.S.2d 426, 432-33 (2d Dep't 1974). *See generally* Hoenig, *Product Designs and Strict Tort Liability: Is There a Better Approach?*, 8 SW. U.L. REV. 109, 118 (1976); Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 33 (1973).

[184] 52 N.Y.2d at 125, 417 N.E.2d at 551, 436 N.Y.S.2d at 257.

ing defect suit.[185] In the alternative, the dissent asserted that even if evidence of design modification had some probative weight, such evidence is inadmissible when, as in *Caprara*, its prejudicial effect exceeds its probative value.[186]

While the *Caprara* decision permits evidence of post-accident design modification in a strict products liability action based upon a manufacturing defect,[187] the Court expressly reserved decision on whether the same rule will obtain in a design defect case.[188] None-

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[185] *Id.* at 127, 417 N.E.2d at 552, 436 N.Y.S.2d at 258 (Jasen, J., Jones, J., and Meyer, J., dissenting). The dissent contended that the majority failed to recognize the essential differences between a manufacturing defect and a design defect. *Id.* at 127-28, 417 N.E.2d at 552, 436 N.Y.S.2d at 258 (Jasen, J., Jones, J., and Meyer, J., dissenting).

[186] *Id.* at 131, 417 N.E.2d at 554, 436 N.Y.S.2d at 260 (Jasen, J., Jones, J., and Meyer, J., dissenting). Even if the subsequent design modification evidence was relevant, the minority argued, it should have been excluded since less prejudicial evidence already had been introduced to explain the nature of the defect. *Id.* at 131, 417 N.E.2d at 552, 436 N.Y.S.2d at 260 (Jasen, J., Jones, J., and Meyer, J., dissenting). The majority dismissed this view, stating that, "in truth finding, it is at times the quality and at times the quantity [of proof] which carries conviction." *Id.* at 126, 417 N.E.2d at 551, 436 N.Y.S.2d at 257.

[187] A defectively manufactured product is defined as a product which fails to comport with the manufacturer's intended design. *See* note 188 *infra*. The *Caprara* Court's analysis has been criticized because a comparison of the defendant's product with evidence of an alternate design does not prove that the product was manufactured or assembled improperly. *See* McLaughlin, *Subsequent Remedial Measures*, N.Y.L.J., Feb. 13, 1981, at 1, col. 1; Twerski, *Corporations Face Dilemma In Rulings on Design v. Manufacturing Defects*, N.Y.L.J., Mar. 2, 1981, at 4, col. 1. Judge Fuchsberg, however, attempted to justify the introduction of the design modification evidence in the *Caprara* case despite the fact that liability was premised on a manufacturing defect. Judge Fuchsberg stated:

> The juxtaposition, both by verbal description and physical examination, of a joint assembled with a plastic insert and one without, by offering a graphic explanation of the slack eventually taken up by the insert, was bound to help the jury understand the defect on which the plaintiff relied. It tended, too, to indicate that the appellants themselves eventually formed the opinion that the ball joints in Caprara's car had a potential for movement when installed.

52 N.Y.2d at 125, 417 N.E.2d at 551, 436 N.Y.S.2d at 257.

[188] 52 N.Y.2d at 126, 417 N.E.2d at 551, 436 N.Y.S.2d at 257. A distinction exists between a defectively manufactured product and a defectively designed product. *See* Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1542-43 (1973); Hoenig, *Product Designs and Strict Tort Liability: Is There a Better Approach?*, 8 SW. U.L. REV. 109, 118 (1976). To determine whether a defect in manufacture exists, the product is evaluated against the producer's intended design. *See* Birnbaum, *Unmasking The Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 599-600 (1980); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 367 (1965). Characterizing a product as defective in design, however, is a more difficult task because no standard of comparison or non-defective norm exists. The late Dean Prosser suggested that design defect liability "rest[s] primarily upon a departure from proper standards of care, so that the tort is essentially a matter of negligence." W. PROSSER, *supra* note 183, § 96, at 641, 644-45. *See* Hoenig, *supra*, at 120; note 189 *infra*. For a discussion of the

theless, given that New York courts consistently have applied general negligence principles to test a manufacturer's liability for defective design[189] and given the continuing applicability of the rule excluding evidence of post-accident design modifications in tradi-

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complications the courts face in determining a standard for defective design, see Birnbaum, *supra*, at 599 and Hoenig, *supra*, at 118.

[189] The New York position on the design defect issue has been significantly molded by three major Court of Appeals decisions. In Bolm v. Triumph Corp., 33 N.Y.2d 151, 305 N.E.2d 769, 350 N.Y.S.2d 644 (1973), the Court held that the standard of liability for design defects involved "general negligence principles." *Id.* at 157-58, 305 N.E.2d at 772-73, 350 N.Y.S.2d at 649. The plaintiff in *Bolm* brought the action on negligence, warranty, and strict products liability grounds, but ultimately alleged that the manufacturer was negligent in designing the product. 33 N.Y.2d at 154, 305 N.E.2d at 770, 350 N.Y.S.2d at 646. Therefore, it is not clear from the *Bolm* decision whether the Court was defining the standard to be applied in negligence cases or those grounded in strict products liability for defective design. The Court of Appeals' next major pronouncement in the area was Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976). In *Micallef*, the plaintiff sued the manufacturer in negligence and breach of warranty, alleging that the defective design of a product had caused him injury. In discussing the negligence claim, the Court essentially adhered to the *Bolm* reasonable man formulation. In the final paragraph of the opinion, however, the Court discussed what the proper standard should be for a design defect in a strict liability action. *Id.* at 387-88, 348 N.E.2d at 579, 384 N.Y.S.2d at 122. A majority of the Court appeared to advocate the adoption of the doctrine enunciated in Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973). The *Codling* standard permits recovery on a strict products liability theory if a "defect" can be proved to exist. *Id.* at 342, 298 N.E.2d at 628, 345 N.Y.S.2d at 469-70. The manufacturer's exercise of due care is irrelevant. Finally, in Robinson v. Reed-Prentice Div. of Package Mach. Co., 49 N.Y.2d 471, 403 N.E.2d 440, 426 N.Y.S.2d 717 (1980), the Court expressly enunciated a standard for recovery in strict products liability for defective design. The plaintiff in *Robinson* based his design defect claim on both negligence and strict products theories. Addressing the negligence claim, the Court recited the traditional rule that a manufacturer must use reasonable care in designing his product. *Id.* at 480, 403 N.E.2d at 444, 426 N.Y.S.2d at 721. Regarding the strict products liability claim, however, the Court adopted the combined risk/utility definition of design defect set forth in the second Restatement of Torts. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965). The Court stated that:

> [A] defectively designed product is one which, at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use; that is one whose utility does not outweigh the danger inherent in its introduction into the stream of commerce.

49 N.Y.2d at 479, 403 N.E.2d at 443, 426 N.Y.S.2d at 720 (citing RESTATEMENT (SECOND) OF TORTS § 402A (1965)). Nevertheless, the *Robinson* Court noted that the "ultimate question" in determining a design defect involves a "balancing of the likelihood of harm against the burden of taking precaution against that harm." 49 N.Y.2d at 479, 403 N.E.2d at 443, 426 N.Y.S.2d at 720 (citing Micallef v. Miehle Co., 39 N.Y.2d 376, 386, 348 N.E.2d 571, 577-78, 384 N.Y.S.2d 115, 121 (1976)). Thus, the New York strict liability test for design defects, like the standard for negligence, involves a weighing process, with the concept of reasonableness at the forefront. *See* 1 N.Y. PATTERN JURY INSTRUCTIONS 2d 2:141 at 109 (Cum. Supp. 1980); *cf.* Cann v. Ford Motor Co., No. 80-7603 (2d Cir. Aug. 19, 1981) (federal rule excluding evidence of post-accident modification applicable in strict products liability actions).

tional negligence cases,[190] it appears unlikely that the *Caprara* rule will be extended to defective design causes of action.[191]

In addition, it is submitted that an almost certain legacy of the *Caprara* decision, in manufacturing defect cases brought under a strict products liability theory, will be labored attempts by lower courts to limit the potentially prejudicial effect upon the defendant of design modification evidence.[192] Moreover, confusion may ensue when a strict products liability manfacturing defect suit also asserts negligence, since courts may then elect, in their discretion, either to admit design modification evidence without restriction, exclude it, or permit it to go to the jury with limiting instructions.[193] Admitting the evidence without restriction, it is submitted, would undermine the policies that prohibit its admission in negligence actions.[194] Excluding the evidence, on the other hand, might force a plaintiff to choose between a cause of action under strict products liability, which would permit him to introduce evidence of design modification, and negligence, which would not per-

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[190] *See* note 169 and accompanying text *supra.*

[191] Some lower court decisions interpret present New York law, *see* note 189 *supra,* as encompassing only a negligence standard. In Lancaster Silo & Block Co. v. Northern Propane Gas Co., 75 App. Div. 2d 55, 427 N.Y.S.2d 1009 (4th Dep't 1980), the fourth department declared that "*in a design defect case* there is almost no difference between a prima facie case in negligence and one in strict liability." *Id.* at 62, 427 N.Y.S.2d at 1013 (emphasis in original) (citations omitted); *accord,* Biss v. Tenneco Inc., 64 App. Div. 2d 204, 206-07, 409 N.Y.S.2d 874, 876 (4th Dep't 1978); *see* Rainbow v. Elia Bldg. Co., 79 App. Div. 2d 287, 292, 436 N.Y.S.2d 480, 484 (4th Dep't 1981). In *Rainbow,* decided subsequent to *Caprara,* the appellate division expressly refused to extend the *Caprara* rule to design defect cases. *Id.* at 293, 436 N.Y.S.2d at 484. The rule formulated in *Caprara* is consonant with the principles enunciated in New York's proposed Code of Evidence. The proposed Code 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.

N.Y. PROPOSED CODE OF EVID. § 407 at 47. Although the official comments to the Code provide that the rule does not apply in strict products liability actions, *id.,* commentary at 47-48, they fail to make the critical distinction between manufacturing and design defect theories of strict liability. *See id.* Given the inadmissiability of design modification evidence under the Code in negligence suits and the close correlation between design defect and negligence standards, it is submitted that the Code's exclusionary rule would apply in a strict product liability suit premised on a design defect.

[192] *See* note 186 and accompanying text *supra.*

[193] *See* Note, *Products Liability and Evidence of Subsequent Repairs, supra* note 169, at 851-52.

[194] *See generally* note 169 *supra.*

mit the admission of such evidence.[195] It is submitted that the use of limiting instructions, while not free from difficulty,[196] appears to be the most efficacious compromise. Indeed, such instructions already have proved workable in limiting the effect of evidence admitted solely for impeachment purposes.[197] It is suggested, therefore, that limiting instructions would provide some protection to the defendant being sued under multiple theories of tort liability.[198]

Kathryn A. Marinello

No cause of action may be maintained for negligent supervision by an unemancipated sibling

Under the doctrine of intrafamily immunity, tort actions between parents and their minor children had long been prohibited in New York.[199] Although the Court of Appeals ultimately abol-

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[195] *See* Note, *Products Liability and Evidence of Subsequent Repairs, supra* note 169, at 851.

[196] The use of limiting instructions as an effective means to remove unwanted inferences from jurors' minds has been debated. *See, e.g.*, Nash v. United States, 54 F.2d 1006 (2d Cir.), *cert. denied*, 285 U.S. 556 (1932). Judge Learned Hand noted that jury instructions are like "the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's." *Id.* at 1007.

[197] When jury instructions are used to limit the effect of evidence admitted for impeachment purposes the jury is instructed that the evidence is to be received for this limited purpose only and has no probative value. *See, e.g.*, People v. Summers, 49 App. Div. 2d 611, 612, 370 N.Y.S.2d 204, 206 (2d Dep't 1975); People v. Williams, 37 App. Div. 2d 686, 687, 323 N.Y.S.2d 377, 379 (4th Dep't 1971).

[198] Concededly, post-accident design modification evidence is prejudicial under any theory of liability. If, as the *Caprara* Court stated, the purpose of admitting subsequent design modifications in a strict products liability case is to aid the jury in understanding the alleged defect, 52 N.Y.2d at 125, 417 N.E.2d at 551, 436 N.Y.S.2d at 257, it would appear unnecessary and unduly prejudicial to identify the defendant as the originator of the design modification. *See* Twerski, *Corporations Face Dilemma in Rulings on Design v. Manufacturing Defects*, N.Y.L.J., Mar. 2, 1981, at 4, col. 1. It is suggested, therefore, that unless the plaintiff can establish a relevant purpose for the disclosure, the identity of the originator of the design change should not be disclosed to the jury. *See id.*

[199] *See* Sorrentino v. Sorrentino, 248 N.Y. 626, 162 N.E. 551 (1928) (per curiam) *overruled*, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969). The judicially created intrafamilial immunity doctrine first appeared in the United States in Hewellette v. George, 68 Miss. 703, 9 So. 885, 887 (1891). A variety of public policy concerns have been expressed to justify the doctrine including the preservation of domestic tranquility and the resources of the family treasury; the avoidance of fraudulent claims; and the protection of the parents' right to exercise discretion in the supervision of their children. *See* McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1072-77 (1930). Most states