(2) On the ____ day of _____, the defendant entered a plea of _____ before me to the charge of _____.

(3) Before and during h____ offer of said plea of _____ said defendant was fully advised and fully waived all constitutional rights and defenses, federal and state.

(4) Accordingly, I find that said plea of _____ was properly entered; that the defendant was of sound mind both at the time of the commission of the crime and at the time of h____ plea of _____ and that the same was h____ free and voluntary act, being without coercion and/or inducement and with full knowledge and understanding of all possible consequences of such plea of _____.

_____
Judge

ADMISSIBILITY OF EVIDENCE OF POST-ACCIDENT REPAIRS: THE GRAYING OF A BLACK-LETTER RULE

John D. Lloyd†

I. INTRODUCTION

It is a well recognized and long-standing black-letter rule that evidence of a change in conditions or repairs made or occurring after an accident is not admissible to prove negligence. Like other black-letter rules there have been engrafted to it numerous exceptions and qualifications over the years. Nevertheless, the general rule still retains its vitality in the negligence area.[1] However, where theories of strict liability in tort or implied warranty are relied upon, the general rule is under fire.[2] Because this criticism arises in connection with ever more important theories of litigation, it seems desirable to examine the general rule, its underlying rationale, and its exceptions as applied in negligence cases. Further, the applicability of the rule in cases utilizing theories of strict liability in tort and implied warranty and the attacks levied against it will be analyzed. It is the purpose of this article to undertake this dual analysis, with a particular emphasis on the state of the law in Iowa.

II. THE GENERAL RULE

The general rule excluding evidence of a change in conditions or repairs made or occurring after the accident is premised predominantly on two rationale—relevancy and public policy.[3] In considering relevance, the cases generally argue that such evidence is as consistent with a belief that an injury was caused by sheer accident as that it was caused by some fault of the repairer. Such evidence is therefore not probative of the issue of negligence.[4] As explained in an early case, "[a] place may be left for a hundred years unfenced, when at last some one falls down it; the owner, like a sensible and humane man, then puts up a fence; and upon this the argument is that he has been guilty of negligence, and shows that he thought the fence was necessary because he put it up."[5] More important, however, in excluding such evidence

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1. *See generally* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 17.3 at 981-82 (1956); C. MCCORMICK, LAW OF EVIDENCE § 275 (2d ed. Cleary 1972) [hereinafter cited as MCCORMICK]; 2 J. WIGMORE, A TREATISE ON THE LAW OF EVIDENCE AT COMMON LAW § 283 (3d ed. 1940, Supp. 1975) [hereinafter cited as WIGMORE]; Annot., 64 A.L.R.2d 1296 (1959); 29 AM. JUR. 2d *Evidence* §§ 275, 628 (1967, Supp. 1975). *See also* FED. R. EVID. 407; UNIFORM R. EVID. 407 (both of which adopt the general rule).
2. *See* text accompanying notes 66 to 77, *infra*.
3. MCCORMICK, *supra* note 1, at 666; WIGMORE, *supra* note 1, at 151.
4. MCCORMICK, *supra* note 1, at 666; WIGMORE, *supra* note 1, at 151.
5. Beever v. Hanson, 25 L.J. *Notes of Cases* 132 (1892) [Cobridge, L.C.J.].

have been considerations of public policy.[6] It has been long recognized in American case law that where defects or unsafe conditions exist which may cause injury it is wise to encourage repair of such defects or conditions. If evidence of such repairs is deemed to be an admission of legal fault, potential defendants will be extremely reluctant to make such repairs where an injury has occurred. To encourage such repairs, the courts have rendered such evidence inadmissible.[7]

Although the general rule made an early appearance in Iowa case law,[8] the rationale of the Iowa cases is not at all clear. Most frequently, the general rule is cited with no discussion and few, if any, citations of authority.[9] The difficulty arises because the factual setting of the early cases allowed the evidentiary question to be answered in terms of agency law or the ambiguity of the concept of *res gestae*.[10] In *Cramer v. City of Burlington*,[11] a witness was allowed to testify that a handrailing was fastened more securely after the plaintiff had fallen through the railing. The Iowa supreme court, conceding that acts of an agent in the scope of his agency may bind the principal, nevertheless held such evidence inadmissible where there are no showing that the repair had been made contemporaneously with the injury or as part of the *res gestae*.[12] In *Hudson v. Chicago & Northwestern Railroad*,[13] evidence of subsequent repairs was rejected for the same reasons and also because there

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Despite the Lord Chief Justice's persuasive appeal, it is likely that, were relevancy the only factor to be considered, such evidence would be admissible and the parties would be free to argue which inference was less or more probable. *See* McCORMICK, *supra* note 1; WIGMORE, *supra* note 1.

6. *See* FED. R. EVID. 407. The Advisory Committee comments that relevancy alone would be insufficient to exclude such evidence in the absence of a strong social policy supporting exclusion.

7. Terre Haute & Ind. R.R. v. Clem, 123 Ind. 15, 23 N.E. 965 (1890) ("A rule which so operates as to deter men from profiting by experience, and availing themselves of new information, has nothing to commend it . . . ." *Id.* at 17, 23 N.E. at 966); Morse v. Railroad, 30 Minn. 465, 16 N.W. 358 (1883) ("The more careful a person is, the more regard he has for the lives of others, the more likely he would be to [make repairs], 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 . . . virtually holds out an inducement for continued negligence." *Id.* at 470, 16 N.W. at 359).

8. Cramer v. City of Burlington, 45 Iowa 627 (1877). The matter was considered settled as early as 1882. *See* Hudson v. Chicago & Northwestern R.R., 59 Iowa 581, 13 N.W. 735 (1882). One commentator states that the early Iowa case law was contrary to the general rule. *See* WIGMORE, *supra* note 1, at 152 n.1. No authority for this conclusion is cited, however, and none has been found in researching this article.

9. *See, e.g.*, Luse v. Sioux City, 253 Iowa 350, 112 N.W.2d 314 (1961); Fitter v. Iowa Tel. Co., 129 Iowa 610, 106 N.W. 7 (1906) (". . . we need do no more than cite some of the cases." *Id.* at 613, 106 N.W. at 8); See v. Wabash R.R., 123 Iowa 443, 99 N.W. 106 (1904) (court referred to such evidence as "clearly incompetent" but cited no supporting authority. *Id.* at 447, 99 N.W. at 108).

10. For a discussion of the difficulties and limitations involved in the concept of *res gestae*, see McCORMICK, *supra* note 1, § 288 at 686-87. For a discussion of the *res gestae* doctrine as employed by the early Iowa decisions, see *Kuhns v. Wisconsin, I. & N. Ry.*, 76 Iowa 67, 40 N.W. 92 (1888).

11. 45 Iowa 627 (1877).

12. Cramer v. City of Burlington, 45 Iowa 627, 630 (1877).

13. 59 Iowa 581, 13 N.W. 735 (1882).

was no showing that the agent was acting within the scope of his authority.[14] These early cases have been cited repeatedly in later cases as support for the general rule without further explication, yet both rely on concepts of agency or *res gestae*, not relevancy or public policy.

Two other cases shed some light on the rationale underpinning the Iowa cases but hardly leave the question free of doubt. In *Blake v. City of Bedford*[15] the Iowa supreme court stated the rule this way: " . . . proof of subsequent repairs does not imply any admission by the defendant of the alleged defect, but ordinarily it is competent to show . . . that the walk . . . is not in the same condition as when the alleged injury occurred."[16] The fair implication of this statement is that evidence of subsequent repairs is not competent to prove the defendant's negligence. The court also refers to such evidence as incompetent in one other case,[17] but without explanation. This language comes close to the idea of relevance.

In addition, the Iowa supreme court has cited authorities which have used the public policy rationale[18] but has not itself ever expressly relied on the policy rationale. Several cases, however, seem to indicate that the Iowa court relies primarily on the policy rationale. These cases have generally held that the mere admission of the evidence is not reversible, nor is the evidence incompetent per se.[19] This is consistent with a belief that the evidence is arguably relevant and that, since the public policy rationale is designed for the defendant's benefit, the defendant must assert his objection.

Whatever the rationale might be, though, it is clear that Iowa has applied the general rule excluding evidence of post-accident repairs or changes. Iowa, like other courts, has also found numerous exceptions to the general rule and it is these exceptions which will be examined next.

III. Exceptions

As noted earlier, the general rule excluding evidence of post-accident changes or repairs has been circumscribed by a number of exceptions that have arisen over the years. Analytically, it seems that, within the limits of relevancy, evidence of post-accident changes or repairs should be admissible for any purpose *except* proof of negligence.[20] Nevertheless, the courts have generally

14. Hudson v. Chicago & Northwestern R.R., 59 Iowa 581, 583, 13 N.W. 735, 736 (1882). *See also* Treadway v. The S.C. & St. P. R.R., 40 Iowa 526, 527 (1875).
15. 170 Iowa 128, 151 N.W. 74 (1915).
16. Blake v. City of Bedford, 170 Iowa 128, 129, 151 N.W. 74, 77 (1915).
17. Beard v. Guild, 107 Iowa 479, 78 N.W. 201 (1899).
18. *See, e.g.*, Hammarmeister v. Illinois Cent. R.R., 254 Iowa 253, 117 N.W.2d 463 (1962).
19. *See* Meyer v. Meyer, 169 Iowa 204, 151 N.W. 74 (1915); Sylvester v. Town of Casey, 110 Iowa 256, 81 N.W. 455 (1900).
20. It has been argued by at least two writers that in fact the rule should be stated as a positive one; *i.e.*, that there is a rule *favoring* admissibility of evidence of subsequent repairs unless used against the defendant as an admission of negligence. *See* Note, *Products Liability and Evidence of Subsequent Repairs*, Duke L.J. 837, 845 (1972) [hereinafter cited as Duke Note]; 18 A.T.L.A. News Letter 43, 44 (1975).

required that such evidence fall into one or more of a few generally recognized exceptions:[21] (1) to show that repairs have been made by a third-party who is not a defendant in the suit,[22] (2) to contradict or impeach defendant's witnesses,[23] (3) to show that remedial measures were feasible or practical,[24] (4) to show ownership or control of the premises where the injury occurred,[25] and (5) to show the actual condition of the premises at the time of the injury.[26] Additionally, the Iowa supreme court has apparently held that such evidence is admissible where it is only incidental to a witness' testimony.[27]

Where such evidence is admitted for one of these limited purposes, it is entirely proper for the trial court to limit the jury's use of the evidence.[28] The trial court is not required to give a limiting instruction on its own motion. Rather, the party desiring such an instruction must request it.[29]

A. *Repairs by Non-Defendant Third Party*

As noted above, exclusion of the evidence of subsequent repairs is to prevent inferences of negligence arising from gratuitous repairs made by the defendant. Thus, when the repairs have been made by someone other than the defendant, evidence of the repairs should be admissible, if relevant, as tending to show the existence of a defect. By removing the repairer as a defendant, the public policy rationale supporting the general exclusionary rule is eliminated, and the sole question is one of relevancy. In such situations, the trend seems to favor admissibility.[30] For example, in *Brown v. Quick Mix Co.*[31] evidence was admitted showing repairs which had been made by the plaintiff's employer, who was not a party to the suit. The repairs were found to be relevant to the question of the defectiveness of the machine; the court reasoned that the jury would not construe such a repair as an admisssion of control over the machine or of guilt since the defendant had not made the repairs.[32] Other cases have reached a similar result.[33]

The Iowa supreme court has not been faced with the particular type of

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21. Lists of exceptions vary from writing to writing, depending usually on how narrowly or broadly the exceptions are drawn. *Compare* McCormick, *supra* note 1; Wigmore, *supra* note 1; 18 A.T.L.A. News Letter 43, 44 (1975) *with* Comment, *Admissibility of Evidence of Subsequent Safety Measures*, 37 Texas L. Rev. 478 (1959) [hereinafter cited as Texas Comment].
22. *See* text accompanying notes 30 to 36, *infra*.
23. *See* text accompanying notes 37 to 41, *infra*.
24. *See* text accompanying notes 42 to 50, *infra*.
25. *See* text accompanying notes 51 to 55, *infra*.
26. *See* text accompanying notes 56 to 60, *infra*.
27. *See* text accompanying notes 61 to 65, *infra*.
28. Hammarmeister v. Illinois Cent. R.R., 254 Iowa 253, 117 N.W.2d 463 (1962).
29. Blake v. City of Bedford, 170 Iowa 128, 151 N.W. 74 (1915).
30. McCormick, *supra* note 1. One should be aware of the potential hearsay problem if conduct is construed to be hearsay. *Id.* § 250.
31. 75 Wash. 2d 833, 454 P.2d 205 (1969).
32. Brown v. Quick Mix Co., 75 Wash. 2d 833, 840, 454 P.2d 205, 210 (1969).
33. *See, e.g.*, Wallner v. Kitchens of Sara Lee, Inc., 419 F.2d 1028 (7th Cir. 1970); Louisville & Nashville R.R. v. Williams, 370 F.2d 839 (5th Cir. 1966).

factual situation discussed above.[34] However, the court has ruled in favor of admission of evidence of post-accident repairs where the defendant denied that a particular defect had existed at the time of the injury.[35] The Iowa court held that the evidence was admissible to show the existence of a defect as well as to corroborate the witnesses who testified to the existence of the defect.[36] Presumably, the Iowa court would also admit such evidence on the defectiveness issue where the repairing party was not a defendant.

B. *To Contradict or Impeach*

Evidence of subsequent repairs or changes is admissible to contradict or impeach a witness. Numerous cases over the years have reached this result.[37] In *Parker v. City of Ottumwa*,[38] the plaintiff was permitted to introduce testimony showing that repairs had been made to a wooden sidewalk at and near the site of the plaintiff's injury, after the defendant offered evidence to show that the sidewalk had been in good repair since before the injury.[39] Similarly, evidence that a door had been placed on a hack some six months after the plaintiff was injured was held to be inadmissible where the absence of a door at the time of the injury was not denied.[40] It seems clear that where the evidence of repairs tends to contradict or impeach on a material point it will be admissible.[41]

C. *Feasibility of Remedial Measures*

Where the defendant has denied that repairs were feasible or practical prior to the accident, the courts have, by and large, admitted evidence of post-accident remedial measures when offered to rebut this contention.[42] The interjection of such an issue by the defense has been characterized as impru-

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34. *But see* note 62, *infra*.

35. Kuhns v. Wisconsin, I. & N. Ry., 76 Iowa 67, 40 N.W. 92 (1888).

36. This case is similar to the cases where evidence of subsequent repairs is admitted to prove actual conditions at the time of the accident. *See* text accompanying notes 56 to 60, *infra*. However, the issue in this case was one of causation; the dangerousness of the condition, if it existed, was apparently conceded. This is not necessarily the situation in the other cases.

37. *See, e.g.*, Reynolds v. Maine Mfg. Co., 81 N.H. 421, 128 A. 329 (1925). Note also that the evidence can cut both ways. The defendant could argue that the evidence shows that the machine was beyond its control. Hercules Powder Co. v. Automatic Sprinkler Corp., 311 P.2d 907 (Cal. Dist. Ct. App. 1957); Kansas City So. Ry. v. Martin, 253 P.2d 600 (Okla. 1956).

38. 113 Iowa 649, 85 N.W. 805 (1901).

39. Parker v. City of Ottumwa, 113 Iowa 649, 650, 85 N.W. 805 (1901).

40. Beard v. Guild, 107 Iowa 476, 78 N.W. 201 (1899).

41. *See also* Storey v. J.C. Mardis Co., 186 Iowa 809, 173 N.W. 115 (1919) (evidence that scaffold boards were nailed shortly after accident admissible where defendant contended the boards were nailed at the time of the accident); Meyer v. Meyer, 169 Iowa 204, 151 N.W. 74 (1915) (evidence admitted to show that sidewalk was not in the same condition at time of trial as at time of accident); Korab v. Chicago, R.I. & P. Ry., 165 Iowa 1, 146 N.W. 765 (1913); Cramer v. City of Burlington, 42 Iowa 315 (1875).

42. *See, e.g.*, Johnson v. United States, 270 F.2d 488 (9th Cir. 1959); Hickey v. Kansas City So. Ry., 290 S.W.2d 58 (Mo. 1956); Hyndman v. Pennsylvania R.R., 152 A.2d 251 (Pa. 1959). *Contra*, Cox v. General Elec. Co., 302 F.2d 389 (6th Cir. 1962); Northwest Airlines, Inc. v. Glenn L. Martin Co., 224 F.2d 120 (6th Cir. 1955).

dent, since the defendant should be aware that repairs were made.[43] Such a defense need not have been pleaded, however, for the issue to be raised. In *Hickey v. Kansas City Southern Railway*,[44] for example, defense counsel indicated in opening argument that the crossing involved was not capable of repair and plaintiff was permitted to introduce evidence of subsequent repairs to rebut this statement.

Obviously, the defense can prevent the evidence from being offered by removing the issue of feasibility or practicality from the suit. However, such a removal must be specific and meet fairly the substance of the plaintiff's evidence. In a leading decision, the Ninth Circuit Court of Appeals affirmed the admission of evidence of design changes made in an airplane alternator drive.[45] The defendant had offered to concede that changes would have been possible before the accident and were in fact made after the accident, but refused to admit what specific changes had been made. The circuit court ruled that "an admission that unspecified 'changes' would have been feasible and were actually made does not render irrelevant evidence as to specific changes subsequent to the accident when offered for the limited purpose of proving the feasibility of such changes to correct the specific defects in issue."[46]

Two Iowa decisions have discussed this exception and both have upheld admissibility of the evidence.[47] In *La Sell v. Tri-States Theatre Corp.*[48] the issue under consideration was the safety of the design of the access from an aisle to rows of seats in a dimly lit movie theatre. The defendant's expert witness testified that the step design used by the defendant was not only an approved method of theatre construction but that the step design was also necessary.[49] On cross-examination, plaintiff elicited testimony from the expert showing that shortly after the plaintiff's injury the theatre had been remodeled, the steps removed, and ramps installed. The Iowa supreme court upheld the admission of such testimony, ruling that the jury should be permitted to consider such evidence and all inferences derived from it in connection with the expert's testimony.[50]

D. *Ownership or Control*

Where the control or ownership of the premises where the injury occurred,

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43. TEXAS Comment, *supra* note 21.
44. 290 S.W.2d 58 (Mo. 1956).
45. Boeing Airplane Co. v. Brown, 291 F.2d 310 (9th Cir. 1961).
46. *Id.* at 315.
47. In *Butkovich v. Centerville Block Coal Co.*, 188 Iowa 1176, 177 N.W. 479 (1920), the Iowa supreme court upheld without extended discussion admission of evidence where the defendant had contended that changes were impossible. Admission was also upheld on grounds that it affected measurements made by the defendant. *See* text accompanying note 60, *infra*.
48. 233 Iowa 929, 11 N.W.2d 36 (1943).
49. La Sell v. Tri-States Theatre Corp., 233 Iowa 929, 960, 11 N.W.2d 36, 51 (1943).
50. The trial court, apparently believing it had erred in permitting cross-examination along the lines indicated, had instructed the jury that "the fact that the building has been remodeled and changes made in the floor should not be considered by you in arriving at your verdict in this case." *Id.* at 961-62, 11 N.W.2d at 52.

or the instrumentality which caused the injury is in question, evidence showing that a particular party had made repairs has been held to be admissible to show that the repairing party had control over the premises or instrumentality.[51] Such evidence can also be used efficaciously by one defendant against a co-defendant.[52]

In a problem closely related to control, evidence of subsequent repairs has been admitted as tending to show the existence of a duty on the part of a defendant. In *Murphy v. City of Waterloo*,[53] evidence that the city had installed a fence around a creek entrance adjacent to a public sidewalk was held to be admissible to show the applicability of a statutory duty to prevent conditions on private land from presenting a hazard to persons using a public sidewalk.[54] Other cases have apparently reached similar results.[55]

E. *To Show Actual Condition of Premises*

There are essentially two ways in which the actual condition of the premises at the time of an injury can become important. First, it may be essential to show the existence of a particular defect to raise an inference that the defect was the mechanism which caused the plaintiff's injury. Second, it may be necessary to explain or elaborate on pictures, diagrams, or other evidence which was prepared after the injury and introduced at trial.

In the first situation, the existence of a particular defect or condition is most usually a point of contention between the parties, and the evidence of subsequent repairs is admitted to contradict defendant's contention that the premises were in good repair at or after the time that the injury in question occurred.[56] Even if there is no particular contest involved over the existence of the condition, it may still be necessary for the plaintiff to prove the circumstances which caused his injury and to corroborate his theory of the case, especially if there were no witnesses to the injury. In such a situation, evidence of subsequent repairs would be admissible where the defect is such that its existence at the time of the repair fairly implies its existence at the time of the injury.[57] Thus, testimony concerning repairs that occurred on the morning

51. *See* Murphy v. City of Waterloo, 255 Iowa 557, 123 N.W.2d 49 (1963); Manderschild v. City of Dubuque, 29 Iowa 73 (1870).

52. *See, e.g.*, Wallner v. Kitchens of Sara Lee, Inc., 419 F.2d 1028 (7th Cir. 1970).

53. 255 Iowa 557, 123 N.W.2d 49 (1963).

54. Murphy v. City of Waterloo, 255 Iowa 557, 572, 123 N.W.2d 49, 58 (1963).

55. TEXAS Comment, *supra* note 21. The theory of admissibility is that the evidence is being used to show *duty*, and not negligence (*breach* of duty). The author of the Comment believes that jurors will not be able to distinguish the two concepts.

56. *See, e.g.*, Beck v. Beck Coal & Mining Co., 180 Iowa 1, 162 N.W. 861 (1917). Such evidence would be admissible, also, as tending to impeach or contradict defendant's witnesses. *See* text accompanying notes 37 to 41, *supra*.

57. Parkhill v. Town of Brighton, 61 Iowa 103, 15 N.W. 853 (1883). In this case, the evidence was rejected because the repairs took place some six or seven months after the accident. *See also* Scagel v. Chicago, M & St. P. Ry., 83 Iowa 380, 49 N.W. 990 (1891).

following the accident has been admitted where the nature of the defect—badly rotted boards in a wooden sidewalk—was such that its existence in the morning fairly implied its existence the night before.[58] Such evidence is also admissible to show that the defect has existed for a sufficient length of time to charge the defendant with notice of the existence of the defect.[59]

Where it becomes necessary to explain or elaborate on pictures or diagrams introduced at trial, it is clearly a situation where the defendant has put the matter in issue by introducing such evidence. It is then clearly competent for the plaintiff to show every material difference between the place or instrumentality as it existed at the time of the injury and as it is depicted in the evidence defendant introduced.[60]

F. *Incidental to Testimony*

In a series of cases which seem to be unique to Iowa, admission of evidence of subsequent repairs has been upheld where it came under circumstances which can best be described as incidental to the witness' testimony. In *Frohs v. City of Dubuque*[61] a witness testified concerning the condition of stringers (supports) under a board sidewalk. In order to show how the witness could have seen these boards, it was necessary to show that the sidewalk had been torn up and replaced after the accident. Admission of the evidence was upheld as being only incidental to the main testimony and therefore not erroneous.[62] Similarly, in *Achey v. City of Marion*[63] evidence of the repairs was admitted where it was offered only to show the witness' familiarity with the accident scene. In *Scagel v. Chicago, Milwaukee & St. Paul Railway*,[64] evidence of changes in a railroad grade was admitted to show the witness' recollection of the accident scene. These cases do seem to go a step too far. It would be an extremely unresourceful trial counsel who could not convincingly argue in almost any case that such evidence was used merely to establish the

58. Clark v. City of Cedar Rapids, 129 Iowa 358, 105 N.W. 651 (1906).
59. Patton v. Town of Sanborn, 133 Iowa 650, 110 N.W. 1032 (1907).
60. Butkovich v. Centerville Block Coal Co., 188 Iowa 1176, 177 N.W. 479 (1920); Achey v. City of Marion, 126 Iowa 47, 101 N.W. 435 (1904).
An interesting variation of this theme arose in *Wendling v. Community Gas Co.*, 254 Iowa 1158, 120 N.W.2d 401 (1963). Plaintiff attempted to introduce photographs taken 3½ years after the accident. These photos showed a changed condition without explanation of when, how or why the change was made. The dissent (Garfield, C.J.) argues cogently that such evidence was admissible to explain, qualify and rebut some of defendant's testimony (rather than the usual use of testimony to explain pictures). Apparently, however, plaintiff offered the pictures to prove that defendant was aware of a defect and remedied the same after plaintiff's injury, a clear attempt to prove negligence. The majority affirmed the trial court's refusal to admit the pictures.
61. 109 Iowa 219, 80 N.W. 341 (1899).
62. Frohs v. City of Dubuque, 109 Iowa 219, 221, 80 N.W. 341 (1899). Under the factual situation presented in this case, however, admissibility could be premised on other grounds. Apparently, the new sidewalk was installed by a non-party abutting landowner rather than the defendant city. *Id.* at 220, 80 N.W. at 341. For a discussion of admissibility under this theory, see text accompanying notes 30 to 36, *supra.*
63. 126 Iowa 47, 101 N.W. 435 (1904).
64. 83 Iowa 380, 49 N.W. 990 (1891).

witness' recollection of or familiarity with the accident scene. Such an exception would surely swallow the general rule whole.[65]

IV. Evidence of Subsequent Repairs in Cases of Strict Liability and Implied Warranty

While the rules governing admission of evidence of subsequent repairs are generally well established in negligence cases, the rapid expansion in recent years of litigation involving theories of strict liability and implied warranty has created a whole new area of development in the law of torts and the evidence used in the trial of tort cases. The authorities which have expressly considered the admissibility of evidence of subsequent repairs, while few in number, have generally rejected the importation of the exclusionary rule from the negligence field and seem to suggest a modest trend favoring admission of the evidence.[66] Consideration of the nature of strict liability and implied warranty and the cases and authorities which have examined the problem will demonstrate the propriety of this trend.

The essential inquiry which is basic to proving either a theory of strict liability or of implied warranty is the existence of a defect in the product, a flaw which is either unreasonably dangerous[67] or which renders the product unmerchantable.[68] The Illinois appellate court, in considering admissibility of subsequent repairs in a strict liability and implied warranty context, aptly observed that the underlying policy of strict liablility and implied warranty has "shift[ed] the emphasis from the defendant manufacturer's conduct to the character of the product."[69] When the character of the product is the essential

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65. As noted above, however, *supra* note 62, admissibility of *Frohs v. City of Dubuque* could be based on an established exception. In both *Achey v. City of Marion* and *Scagel v. Chicago, Milwaukee and St. Paul Railway*, the evidence of subsequent repairs was also found to be admissible to show the condition as it existed at the time of the accident. Thus, it would be possible to analyze the three cases in terms of existing exceptions to the rule and characterize the remainder of their holdings as dicta.

66. *See* Ault v. International Harvester Co., 528 P.2d 1148, 117 Cal. Rptr. 812, (1974); Sutkowski v. Universal Marion Corp., 281 N.E.2d 749 (Ill. App. 1972); 18 A.T.L.A. News Letter 3 (1975); Duke, Note, *supra* note 20.

67. Restatement (Second) of Torts § 402A (1965). *See generally* Carmichael, *Strict Liability in Tort—An Explosion in Products Liability Law*, 20 Drake L. Rev. 528 (1971).

Proof of strict liability usually requires proof of the following:

(1) Sale of a product.
(2) Sale by a seller engaged in the business of selling the product.
(3) Existence of a defect in the product.
(4) The defect renders the product unreasonably dangerous to the user or consumer or his property.
(5) The product is expected to, and does, reach the consumer who uses the product without inspection for defects.
(6) The defect was a proximate cause of the injuries complained of.

The element of unreasonableness has been rejected by the California court. *See* Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

68. Uniform Commercial Code § 2-314; Iowa Code § 554.2314 (1975). A product is unmerchantable if it is not fit "for the ordinary purposes for which such goods are used." Uniform Commercial Code § 2-314(2)(c).

69. Sutkowski v. Universal Marion Corp., 281 N.E.2d 749, 753 (Ill. App. 1972).

issue, the fact of a repair having been made subsequent to an injury would be clearly relevant to the inquiry in two respects—(1) the existence of a defect in the product, and (2) the defendant's control over the product.

It has been recognized in negligence cases that evidence of subsequent repairs may be admissible to establish the control of the product or premises and the existence of a defect therein.[70] Where the defendant has made some repair in a product, the use of evidence of that repair in a strict liability or implied warranty context would be equally useful to prove control or defectiveness.[71] By comparing the improved or changed product with the allegedly defective product, the jury will be assisted in determining whether the product was unreasonably dangerous or unmerchantable. This comparison by the jury could be assisted by appropriate expert testimony.[72] Where control is at issue, the fact of a subsequent repair helps to establish that the product was defective while in the defendant's hands, rather than in the hands of the plaintiff or some intermediate distributor. There is already substantial supporting authority in negligence cases for use of evidence of subsequent repairs in this manner.[73] With evidence of subsequent repairs clearly probative on two crucial issues, and with the emphasis not on the conduct of the defendant but rather on the character of the product, there is absolutely no question that such evidence is relevant. Public policy must next be considered.

The factor which decisively justified exclusion of post-accident repairs in negligence cases was the public policy in favor of encouraging repairs.[74] In considering the public policy aspect of the problem, the California supreme court has flatly rejected the argument that admissibility would discourage repairs.[75] The court stated:

> [I]t 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.[76]

The public policy argument has also been rejected by at least one commentator on two grounds.[77] First, a manufacturer of mass produced goods is actually encouraged to make repairs because the manufacturer is trading one case where the evidence is admitted against an unknown potential liability if defective

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70. *See* text accompanying notes 51 to 60, *supra*.
71. DUKE Note, *supra* note 20. The author of the Note also urges that such evidence could be admitted on an analogy to the admission of such evidence to prove feasibility in a negligence context. *Id.* at 842.
72. *See* Rosin v. International Harvester Co., 262 Minn. 445, 115 N.W.2d 50 (1962). Such a comparison must be based on recognized standards of the industry and due care. Wagner v. Larson, 257 Iowa 1202, 136 N.W.2d 312 (1965).
73. *See* text accompanying notes 56 to 60, *supra*.
74. *See* note 6, *supra*, and text accompanying notes 6 and 7, *supra*.
75. Ault v. International Harvester Co., 528 P.2d 1148, 117 Cal. Rptr. 812 (1974).
76. *Id.* at 1152, 117 Cal. Rptr. at 816.
77. DUKE Note, *supra* note 20.

products are left on the market and further defective goods are sold. Second, the manufacturer can avoid potentially adverse publicity which would surely arise from litigation.[78] Thus, it seems clear that the public policy argument must and should be characterized as untenable in the strict liability and warranty fields. As we have seen, there is direct support for this conclusion which should be persuasive to other courts.[79] Based on the foregoing analysis, and the limited number of authorities,[80] a modest trend seems clear and wholly justified.

V. CONCLUSION

The general rule requiring exclusion of subsequent repairs in negligence cases and the exceptions to that rule have been examined, as well as the rationale supporting the exclusionary rule. This rationale as it applies in strict liability and implied warranty has also been examined and found wanting in two respects. First, the fact of a subsequent repair is extremely relevant to the factors under consideration in those theories. Second, the public policy involved actually favors admission of the evidence, not its exclusion. Although the Iowa supreme court has not yet been presented with the issue in a strict liability or implied warranty context, the cases which have been decided in the negligence context have been explored and presented, and there clearly exist strong arguments favoring admission when the Iowa court is presented with the issue for the first time.

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78. *Id.* at 848-49.

79. The *Ault* decision turns on an interpretation and construction of section 1151 of the *California Evidence Code*, which provides that "[w]hen, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event." CAL. EVID. CODE § 1151 (West 1966). This section is, for all practical purposes, identical to the first sentence of Rule 407 of the *Federal Rules of Evidence*, and should make the *Ault* case persuasive authority in cases under the federal rules. *See* FED. R. EVID. 407. The Advisory Committee Notes on the proposed federal rules expressly state that *California Evidence Code* section 1151 is comparable to Federal Rule 407.

80. In addition to the authorities cited in notes 67 and 74, *supra*, see also *Bowman v. General Motors Corp.*, 64 F.R.D. 62 (E.D. Pa. 1974).