Finding Fault With *Ault* – Why The Exclusion Of Subsequent Design Change Evidence In Product Liability Cases Makes Sense, Even In California

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THE FOLLOWING is an all too common occurrence in products liability cases alleging a design defect: a plaintiff alleges he or she was injured due to a design defect in a product; the manufacturer of the product, at some point after the accident, alters the very design feature plaintiff alleges was the cause of the accident; plaintiff seeks to introduce evidence of this subsequent design change at trial, realizing the powerful impact such evidence can have with many jurors.

Is such evidence admissible? Unfortunately, the answer may depend only on where the case is venued and which evidence rules apply. Federal Rule of Evidence 407 and most states exclude evidence of "subsequent remedial measures" in strict products liability cases. California, Colorado and several other states, on the other hand, allow this evidence to be admitted. How is it that these jurisdictions admit such evidence when the Federal Rules, the great majority of state courts, and strong public policy grounds exclude it? The fault lies in large part with influential *Ault* case, a hopelessly outdated California Supreme Court opinion putting it in the clear minority of jurisdictions.[1]

For the practitioner, this article addresses the legal and policy theories cited in support of the *Ault* decision, demonstrates why they are flawed and why the rule set forth in the Federal Rules of Evidence is more sound and more practical—carefully balancing the needs of both plaintiff and defendant—and

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[1] *See* Ault v. International Harvester Co., 13 Cal.3d 113 (Cal. 1974).

provides guidance for addressing this issue when it arises in competing jurisdictions.

I. The *Ault* Decision

In *Ault*, the plaintiff was injured in a 1964 crash involving his International "Scout" vehicle (an early SUV) which was caused by a broken gear box he alleged was defective by virtue of the weak aluminum material used in its fabrication. Evidence was introduced at trial, over defendant's objection, that "Scout" gear boxes were changed from aluminum to a much stronger malleable iron in 1967. At the time, California's newly operative Evidence Code section 1151, which codified the common law "subsequent remedial measure" exclusion, provided:

> When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event.[2]

The jury returned a verdict in favor of the plaintiff and the defendant appealed.

The California Supreme Court in *Ault* was left to decide the meaning of section 1151 in the context of a product liability case alleging a design defect. In making its decision, the *Ault* court identified a dual rationale for finding section 1151 inapplicable in strict liability cases, thereby paving the way for the admission of subsequent design change evidence: (1) unlike negligence actions, product liability actions do not involve "culpable conduct," and section 1151 was therefore inapplicable by its own language, and (2) the public policy arguments for the exclusionary rule (to encourage remedial conduct) were inapplicable in the product liability context because no reasonable manufacturer of mass-produced products would refrain from making a design change and thereby risk a multitude of future suits.[3]

Evidence Code section 1151 excludes subsequent remedial measures "to prove negligence or culpable conduct in connection with the event" giving rise to a lawsuit, which *Ault* declined to extend to strict liability actions on the assumption that negligence or culpability are not necessary that cause of action.[4] The Court reasoned that in strict liability product cases plaintiffs are not obligated to show any breach of duty of care, but only that the product was defective.[5] What the Court did, in essence, was to ignore the standard definition of culpable conduct, which is, "[b]lameable; censurable; involving the breach of a legal duty or the commission of a fault. … it implies that the act or conduct spoken of is reprehensible or wrong…"[6]

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[2] CAL. EVID. CODE § 1151 (enacted Stats 1965 ch 299 § 2, operative January 1, 1967).

[3] *Ault*, 13 Cal.3d at 118-120.

[4] *Id.* at 117.

[5] Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 62-63 (Cal. 1963).

[6] BLACK'S LAW DICT. (4th rev. ed 1968.)

The dissent in *Ault* recognized that even in strict liability cases a defendant must breach a legal duty not to put a defective product into the stream of commerce.[7] However**,** defendant International Harvester Company conceded that a manufacturer in a strict liability action is not blameworthy in a legal sense and instead argued that strict liability implied a moral duty. [8]

The *Ault* Court then made a similarly narrow application of the California legislature's intent, concluding that if the Legislature had intended to include strict liability actions within section 1151, then it would have used a phrase without the connotation of "affirmative fault."[9] As part of its analysis, *Ault* correctly concluded that the legislature was attempting to codify well-settled law. [10] However, *Ault* did not apply the policy behind the common law rule; instead, the *Ault* court assumed that the California legislature considered strict products liability actions when it codified section 1151, and it wholly rejected the public policy which was the very basis of the rule.

Ault reasoned that the public policies justifying the evidentiary exclusion in negligence cases are not valid in strict liability cases because a mass producer would continue making improvements to products even where evidence of such improvements might later be used against it. The distinction was not based on any tort theory, but on the fact the product is mass-produced.

This mass-producer argument is not original to *Ault.* To support its theory that a mass-producer has sufficient incentive to continue improving its products regardless of the existence of the exclusionary rule, the *Ault* Court included a footnote quoting at length from a 1972 Duke Law Review Article which called newly operative section 1151 an "obsolete evidentiary rule" and was wholly contrary to public policy in the products liability arena.[11] Both this article, and the court's opinion, contradict the very policies underlying the common law exclusionary rule and legislative intent in codifying the common law rule; namely, the exclusion of subsequent design changes would serve as an incentive to manufacturers for the continued improvement of consumer goods by shielding manufacturers from potential liability based on evidence of the mere existence of a product improvement.

By concluding that the legislative intent behind section 1151 did not apply to strict liability actions, the *Ault* Court assumed that the conduct of a mass-producer is guided by the legal distinction between negligence and strict liability claims, even though both claims are typically asserted in a single product liability action. In reality, it makes no difference what legal theory is advanced to find a product manufacturer liable. As the Fourth Circuit Court of Appeals stated in *Werner v. Upjohn Co.*, the deterrent of taking remedial measures is the same,

[7] *Ault*, 13 Cal.3d at 124.
[8] *Id.* at 118.
[9] *Id.* at 118.
[10] *Id.* at 119 (citing Law Review Com. comment to Cal. Evid. Code § 1151).

[11] Note, *Products Liability and Evidence of Subsequent Repairs*, 1972 DUKE L.J. 837, 845-852 (1972).

namely, the fear that the evidence may be used against defendant.[12]

The negligence/strict liability distinction is "hypertechnical," because the lawsuit is against the *manufacturer* under either theory, not against the manufacturer in a negligence case and against the product in a strict liability case. In the first instance, the question is whether the manufacturer was reasonable in designing the product as used by the plaintiff. In the second, it is whether the design of the product as used by the plaintiff was unreasonably dangerous. In either circumstance, the answer depends on whether or not the product is deemed "dangerous." And in either circumstance, there is a desire to avoid future liability and a rule that makes section 1151 inapplicable in product liability cases discourages the development of safety enhancements; it is naïve to think otherwise.

The *Ault* Court either failed to realize or refused to address the concern that the "mass producer" argument applies equally to negligence and strict liability theories. It failed to explain why a manufacturer would be more inclined to make safety changes to the product when sued under strict liability than it would when the theory is based on negligence. In fact, the *Ault* majority seemed to say that none of the public policies behind the rule excluding evidence of subsequent remedial measures apply to products liability litigation at all.[13]

Worse yet, *Ault's* "mass-producer" argument essentially *assumes* the existence of a product defect, as it ignores the common situation where a manufacturer decides to *improve* a non-defective product (whether they are termed "product enhancements," "product improvements," or "safety enhancements"). In the real world, manufacturers make changes to their products all the time, and the impetus for change often has nothing whatever to do with the notion that the existing product is in some way "defective." Such reasons can include: (1) a desire to *enhance* the safety of the product; (2) cost savings; (3) ease of use; (4) production efficiencies; (5) advances in manufacturing capabilities; (6) uniformity of product lines; (7) market condition changes due to customer demand; (8) market condition changes due to legislation; and (9) market condition changes due to design changes by competitors. Certainly, there are many other reasons as well.

Be that as it may, the same design change that can be argued as a "product enhancement" by the manufacturer can be alternatively labeled a "subsequent safety design change" by the plaintiff. From a practical standpoint, in a product liability trial it matters little what non-safety reasons a manufacturer may proffer in support of a design change, the plaintiff will almost certainly argue—and often with great success—that the design change was prompted by safety concerns. A "where there's smoke, there's fire" mentality can easily carry the day for less sophisticated jurors, particularly in today's post-Enron environment where many people believe corporate America cares only about increased profits. And therein lies the rub; manufacturers know that subsequent design change evidence

[12] Werner v. Upjohn Co., 628 F.2d 848, 856-857 (4th Cir. 1980).
[13] *Ault*, 13 Cal.3d at 120.

can be very damaging and the decision to move forward with such changes can be, and has been, a consideration in light of pending or anticipated suits. For the *Ault* court to assume otherwise failed to acknowledge the reality of manufacturing decisions in today's litigious society where some of the nation's largest jury verdicts have come in product liability cases.

But even in those cases where "product enhancements" have been made, evidence of subsequent changes is *completely irrelevant* when there is no factual basis to suggest the subsequent design change was made because the manufacturer believed the product was in some way defective and the change was required to reduce or eliminate a dangerous design flaw. Indeed, the evidence becomes even less relevant where there is direct evidence of reasons for the subsequent design effort that have nothing to do with an existing defect (though plaintiff's counsel will surely argue such evidence is not credible). In most cases, the reality is that the existence of a design defect is not the plain or most probable inference from evidence of a subsequent design change. Yet, when such evidence is admitted, many jurors are unable to avoid making such an assumption.[14]

Most troubling is the fact that *Ault* effectively changed California substantive law: it changed the determination of the point in time for assessing liability for a defective product from the date of manufacture or distribution to the time of trial, which in many cases might be years later. Any product knowledge acquired or design changes made (with or without the benefit of newly acquired knowledge) after the date of manufacture is—or should be—irrelevant. However, *Ault* holds a defendant to product knowledge obtained or a design made outside the relevant time to the time of trial by allowing evidence of subsequent remedial measures to prove that a product defect existed. This creates a substantial likelihood that a jury's attention will be diverted from the relevant time period and may result in jury confusion. This was precisely the point raised by the Fifth Circuit Court of Appeals when it determined that the rule in that circuit would be to exclude evidence of subsequent design changes in strict liability cases under Federal Rule of Evidence 407.[15]

II. The Response to *Ault*

Ault is now clearly in the minority of jurisdictions. Indeed, in *Schelbauer v.*

[14] Given today's anti-business climate, skilled plaintiffs' counsel are often "preaching to the converted" with arguments about why the manufacturer's stated reasons for design changes do not include improved product safety. Even if true, the manufacturer is often forced to listen to closing arguments in which the reasons for the design change were surely motivated by a desire to improve safety—especially if there was also evidence admitted about prior similar accidents—and that the failure to admit it is further support for the "profits over safety" theme frequently employed by plaintiffs' counsel at trial. Not an enviable position to be in, to be sure, but one which is not at all uncommon.

[15] Grenada Steel Industries, Inc. v. Alabama Oxygen Co., Inc., 695 F.2d 883, 888 (5th Cir. 1983).

Butler Manufacturing Co.,[16] the California Supreme Court reaffirmed its *Ault* holding as applying to post-accident warnings and recalls. In so doing, however, the Court could make reference to only a few federal circuit courts (namely the Seventh Circuit, Eighth Circuit, and Tenth Circuit) that were then following the *Ault* rationale as applied to Federal Rule of Evidence 407. Similarly, the Court could only mention "several other state courts" that followed the same rule.[17] Currently, a few western states that have traditionally taken their jurisprudential lead from California follow *Ault*.[18] Both Hawaii and Connecticut have codified *Ault* in explicitly allowing such evidence.[19] Thus, it is clear that the legal landscape on the issue of subsequent remedial measures has changed considerably since the *Ault* decision in 1974 and the *Schelbauer* decision in 1984. Most significantly, Federal Rule of Evidence 407 was amended in 1997 to specifically *include* product liability actions under the exclusionary rule of that statute.[20] Now, of course, *all* federal courts apply the exclusionary rule to strict liability cases by virtue of Rule 407, as do those numerous states which have adopted wholesale the Federal Rules of Evidence.

Moreover, several state courts, when faced with making the policy determination as between Federal Rule of Evidence 407 and *Ault*, have almost uniformly opted to follow the federal lead and reject *Ault* as poorly reasoned. For example, in *Hyjek v. Anthony Industries*,[21] the Washington Supreme Court followed *Werner*, and interpreted its own exclusionary rule, which was identical to the pre-1997 federal rule, as applicable in products liability cases, finding both the evidence of subsequent design change irrelevant as a matter of law and that the policy rationales for the rule apply equally to products liability cases.

The product at issue in *Hyjek* was a K2 snowboard.[22] At that time, K2 did not pre-drill holes for the board's bindings, allowing the consumer to affix any binding on the market by simply screwing them into the board.[23] Plaintiff was injured when his binding came loose and sued the defendant, the parent company

[16] Schelbauer v. Butler Manufacturing Co., 35 Cal.3d 442 (Cal. 1984).

[17] *Schelbauer*, 35 Cal.3d at 451-452.

[18] *See, e.g.*, Caterpillar Tractor Co. v. Beck 624 P.2d 790, 794 (Alaska 1981); Jeep Corp. v. Murray, 101 Nev. 640, 708 P.2d 297, 302 (Nev. 1985); Forma Scientific, Inc. v. Biosera, Inc. 960 P.2d 108, 115 (Colo. 1998).

[19] HAWAII RULE OF EVIDENCE 407 *(see* American Broad. Cos. v. Kenai Air of Hawaii, Inc., 67 Haw. 219, 686 P.2d 1 (Haw. 1984)); CONN. RULE OF EVID. Sec. 4-7(b).

[20] FED. R. EVID. 407 currently reads: "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 the product's design, or a need for a warning or instruction. 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." (emphasis added).

[21] Hyjek v. Anthony Industries,133 Wn.2d 414, 944 P.2d 1036 (Wash. 1997).

[22] *Hyjek*, 133 Wn.2d at 415.

[23] *Id.* at 416.

of K2, alleging that the board was defectively designed in that it did not have inserts molded into the board to hold the bindings in place.[24] Plaintiff sought to introduce at trial evidence that in the year following his accident, K2 designed a new system which included "through-core inserts," which then allowed the bindings to be screwed onto the board more securely with fine threaded screws. K2, by a motion *in limine*, successfully prevented this evidence from being proffered at trial and the jury rendered a defense verdict.[25]

The *Hyjek* court analyzed the state of the law at that point, including an assessment of *Ault.* It found that a "solid majority" of federal judicial circuits excluded such evidence prior to the amendment of Federal Rule of Evidence 407, and based upon this majority and the amendment of its federal counterpart, declined to reverse the trial court's decision.[26] *Hyjek* declined to follow *Ault,* basing its decision in part on the policy analysis in *Werner*: the notion that a manufacturer may be deterred from taking remedial measures if such measures were later admissible applied equally to strict liability as wells as negligence cases.[27] *Hyjek* also noted *Werner*'s explanation of the "fallacy" that *Ault*'s theory assumes the product is defective and ignored a situation where a manufacturer improves a non-defective product.[28] Finally, *Hyjek* focused on the irrelevance of evidence of a product change *after* the incident; noting that to hold otherwise would change substantive product liability law in Washington. "If the time of product distribution or manufacture is the point selected by the Legislature for determining liability in strict liability cases, then the substantive law makes any product knowledge acquired after the point of distribution irrelevant."[29]

The Pennsylvania Supreme Court, in *Duchess v. Langston Corp*., when faced with lower appellate court authority which followed *Ault*, also chose to overrule prior authority and instead follow the course set forth by Federal Rule of Evidence 407.[30] In *Duchess*, the plaintiff was injured at his workplace when cleaning a machine that fabricated cardboard boxes.[31] He contended that the machine should have been equipped with an interlock device which would have prevented the injury.[32] The defendant conceded that such a device was feasible at the time of manufacture but was impractical for a variety of reasons, despite admitting in answers to interrogatories that such an interlock device was incorporated into machines manufactured approximately one year after the accident.[33] Plaintiff then argued that the defendant had opened the door to the introduction of this "subsequent remedial measure." The trial court disagreed, drawing a distinction between feasibility and practicality, and refused to

[24] *Id.*
[25] *Id.* at 416-417.
[26] *Id.* at 421.
[27] *Id.* at 422-423.
[28] *Id.* at 423-424.
[29] *Id.* at 426-427.
[30] Duchess v. Langston Corp., 564 Pa. 529, 769 A.2d 1131 (Pa. 2001).
[31] *Duchess*, 564 Pa. at 531.
[32] *Id.* at 532.
[33] *Id.* at 534.

admit the evidence.[34] The jury found for the defendant on the specific claim whether the lack of an interlock device was a design defect.[35] The intermediate appellate court granted a new trial, finding that the refusal to introduce evidence of the subsequent design change was reversible error, relying on prior Pennsylvania authority that had followed the *Ault* rule that evidence of subsequent remedial repair was admissible in products liability actions.[36] On appeal to the Pennsylvania Supreme Court, the defendant in *Duchess* raised the issue identified in *Hyjek* that to allow such evidence to be admitted in a design defect case in essence changes the substantive law of strict products liability regarding when the alleged "defectiveness" of a product is assessed and gives undue weight to what is essentially irrelevant evidence.[37]

The *Duchess* court noted that Pennsylvania's rule was, like that of Washington, identical to the pre-1997 federal rule and that it was for the courts to determine how this rule was to be applied in strict products liability actions.[38] In fulfilling its duty, the Court evaluated *Ault* and the criticism leveled against it on the issues of: (1) relevance and juror confusion, (2) public policy, and (3) the artificial distinction between negligence and strict products liability actions. The Court held that since a products liability claim must be evaluated at the time the product was distributed, the relevance of such evidence is limited while the potential for juror confusion is great.[39] It further found that the policy considerations militated in favor of applying the exclusionary rule to products liability cases, flatly "reject[ing] Ault's mass producer logic."[40] Finally, the Court stated that it was ". . . unable to meaningfully distinguish claims asserting negligent design from those asserting a design defect in terms of their effect on the implementation of remedial measures and/or design improvements in the marketplace."[41]

This issue was addressed most recently by the Iowa Supreme Court in 2009 in *Scott v. Dutton-Lainson,*[42] which like *Hyjek* and *Duchess* held evidence of

[34] *Id.* at 535. This distinction is often at the heart of the manufacturer's response to claims that the subsequent design change was made to reduce or eliminate a defect in the earlier version of the product. As is frequently the case, the manufacturer is unable to argue that the subsequent design change was not technologically "feasible" at some earlier date, as the existence of specific manufacturing processes and materials often belie such a claim. Rather, the manufacturer typically argues that there were other non-safety reasons at play, or that even if safety was a consideration, the change was not implemented because the earlier design was defective but instead to simply "enhance" the safety of the product as a whole. A similar argument if often made in response to feasible alternative designs offered by plaintiff experts. Here, the alternative design is not attacked on unfeasibility but instead as "undesirable" for any number of reasons.

[35] *Id.*

[36] *Duchess,* 564 Pa. at 535-536, citing Matsko v. Harley Davidson Motor Co. 325 Pa. Supr. 452, 473 A.2d 155 (Pa. 1984).

[37] *Duchess,* 564 Pa. at 539.

[38] *Id.* at 541.

[39] *Id.* at 548.

[40] *Id.* at 549.

[41] *Id.*

[42] Scott v. Dutton-Lainson Co. 774 N.W.2d 501 (Iowa 2009).

subsequent remedial measures inadmissible in design defect cases. The *Scott* case is unique, however, because Iowa Rule of Evidence 5.407, in contradistinction to Federal Rule of Evidence 407, specifically states that the exclusion of evidence of subsequent remedial measures does not apply "when offered in connection with a claim based on strict liability. . ."[43] *Scott* relied, however, on prior Iowa decisional law which held that design defect cases are best analyzed under negligence principles, *per* Restatement of Torts (Third) § 2(a), and evidence of subsequent remedial repairs in a design defect case is "not admissible to show negligence or culpable conduct."[44]

III. Considerations in Dealing with Evidence of a Subsequent Remedial Measure

For defense counsel in jurisdictions for which this is still an open question, the *Werner/Hyjek/Duchess* analysis provides a powerful template on which to craft an argument that the federal rule should be followed. In the alternative, for those jurisdictions recognizing the Third Restatement, *Scott* provides sound authority that the exclusionary rule should apply to design defect cases.

In those jurisdictions that still follow *Ault*, however, all is not lost. Defense counsel still have strong arguments that subsequent design changes are not admissible as a matter of course. In his dissent in *Schelbauer*, Justice Richardson went out of his way to "emphasize a point implicit in the majority opinion," that simply because the *Ault* rule may make the exclusionary rule in section 1151 inapplicable in strict liability cases, "such evidence is subject to the court's complete discretion to 'exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.'"[45] Justice Richardson's admonition in *Schelbauer* was adopted by the court in *Aguayo v. Crompton & Knowles Corp.*,[46] a product liability case involving a large garnet machine used to make welting for furniture padding. At issue in *Aguayo* was the admissibility of a subsequent design change to the machine which took the form of a protective fence designed to keep workers a safe distance from its moving parts. Plaintiff sought to admit the evidence under *Ault* and defendant moved to have it excluded. The trial court excluded the evidence on relevance grounds and under section 352 due to the remoteness in time between the manufacture of the subject machine (1964) and the subsequent design change (1979 or 1980).[47] The Second District Court of Appeal affirmed this evidentiary ruling, holding that "the *Ault* decision *does not mandate* the admission of evidence of subsequent accidents or subsequent design changes, *but permits introduction of such evidence subject to*

[43] *Scott*, 774 N.W.2d at 504.
[44] *Id.* at 506.
[45] *Schelbauer*, 35 Cal.3d at 459, (Richardson, J. dissenting) (citing CAL. EVID. CODE § 352).
[46] Aguayo v. Crompton & Knowles Corp., 183 Cal.App.3d 1032 (Cal. Ct. App. 1986).
[47] *Aguayo*, 183 Cal.App.3d at 1037-1038.

the rules of admission applicable to generally."[48]

Moreover, a key authority relied on by the *Ault* Court has also been limited so that the reasoning would no longer give any support to the *Ault* decision. *Sutkowski v. Universal Marion Corporation*,[49] an Illinois appellate court decision, was given broad meaning by the *Ault* Court. More recent Illinois appellate court cases, however, have clarified that *Sutkowski* actually stands for the more limited proposition that subsequent design changes can be admissible in product liability cases "*for the limited purpose* of establishing that safer design alternative [sic.] were feasible."[50]

The "feasibility" exception is one explicitly built in to many of the exclusionary rules, including Federal Rule of Evidence 407. The Iowa Supreme Court in *Scott* held that even though it was excluding evidence of a subsequent design, "[p]laintiffs have the opportunity to introduce evidence of subsequent remedial measures of the defendant disputes the feasibility of the a suggested alternative design."[51] However, the "feasibility" exception is not an "open sesame" to plaintiffs to admit evidence through the back door when the front door has been closed, and there must be a genuine issue in controversy before this evidence is admitted.[52] In New York, for example, subsequent remedial measures are admissible to show the feasibility of a design change, but given "the abstruse, subjective judgment involved in the balancing of risks and benefits necessary to determine whether the product as made and sold was reasonably safe . . . , and the substantial risk that such evidence may be over-emphasized by the jury, will not be admitted even for that purpose if the manufacturer concedes feasibility."[53]

When faced with a subsequent design change that may be admissible, defense counsel should avoid taking a position that such a design change is never feasible, thereby taking the issue off the table and rendering the proffered evidence irrelevant and superfluous. For example, in California, the standard jury instruction on design defects, *per* the seminal case of *Barker v. Lull Engineering Co.*,[54] provides that one factor for the jury to consider, and on which the defendant has the burden of proof, is "[t]he feasibility of an alternative safer design at the time of manufacture."[55] Depending on the nature of the design change and the time of change in relation to the accident, a product liability defendant may be better served by not raising the issue of feasibility of an alternative design, focusing instead on the other *Barker*

[48] *Id.* at 1040 (emphasis added).
[49] Sutkowski v. Universal Marion Corp., 5 Ill.App.3d 313 (Ill. App. 1972).
[50] Davis v. International Harvester Co., 167 Ill.App.3d 814, 822-823 (Ill. App. 1988) (emphasis added).
[51] *Scott*, 774 N.W.2d at 507.
[52] *Forma Scientific*, 960 P.2d at 122 [Vollack, C.J., dissenting].
[53] Cover v. Cohen, 61 N.Y.2d 261, 461 N.E.2d 864 (N.Y. 1984). As noted above, this is essentially what the defendant in *Duchess* did by not taking a position on the issue.
[54] Barker v. Lull Engineering Co., 20 Cal.3d 413 (Cal. 1978).
[55] *Id. See also* CACI 1204 [January 2011].

factors. If the feasibility factor is not being contested, plaintiffs will be hard pressed to demonstrate any probative value of evidence of a subsequent remedial measure.

IV. Conclusion

The reasoned analysis in more recent cases and the practical experience obtained in the thirty-six years since the *Ault* decision was rendered both demonstrate how outdated the reasoning in *Ault* is and explain why *Ault* is now clearly in the small minority of jurisdictions allowing the introduction of subsequent design changes in strict liability actions. Its continued viability, however, results in forum shopping by plaintiffs, confusion of law and *de facto* changes in substantive law. Even though it is contrary to the policies justifying the exclusionary rule, *Ault* is still the rule in California and several other jurisdictions. While defense counsel may seek limiting instructions, juries cannot ignore subsequent design change evidence in rendering their verdicts. It is therefore imperative for defense counsel to marshal any or all of the arguments discussed above in an effort to distinguish *Ault* and obtain a ruling excluding such evidence.