

4.19. Subsequent Remedial Measures

Evidence of measures taken after an event, that, if taken before the event, would have made injury or damage less likely to result:

(1) in civil proceedings, is not admissible when offered to prove negligence or culpable conduct in connection with the event or to prove negligent or culpable conduct with respect to a product alleged to be defective.

(2) in civil and criminal proceedings, is admissible to prove some other fact relevant to a material issue, such as ownership or control of an object or premises, feasibility of precautionary measures, or in a products liability proceeding to prove a manufacturing defect by a change in design.

Note

This rule governs the admissibility in civil proceedings of evidence of repairs or other measures, such as a modification, change, or precaution, taken by a party after an event, such as an accident, which if taken before the event would have made injury or damage less likely to result.

The exclusionary aspect of the rule does not necessarily apply in a criminal proceeding. As explained in *People v Thomas* (70 NY2d 823, 825 [1987]), where the defendant was prosecuted for a homicide arising out of the operation of a motor vehicle:

“defendant's proof of subsequent design modifications to his automobile offered in support of his defense that the accident was caused, not by his drinking, but by defects in his motor vehicle . . . should have been permitted. . . . Evidence of postaccident design changes is irrelevant in strict liability or negligence cases when offered to prove negligent design. Here, however, the conduct of the manufacturer or seller in designing the vehicle was not at issue. Rather, consistent with his explanation at the scene of the accident, defendant sought only to prove the existence of a ‘defect’ in his automobile, as part of his defense. Moreover, the policy reasons for not allowing evidence of postaccident repairs or improvements in the civil cases do not apply.” (Citations omitted.)

The rule is derived from well settled New York law. (*See e.g. Caprara v Chrysler Corp.*, 52 NY2d 114, 122 [1981]; *Getty v Town of Hamlin*, 127 NY 636, 638 [1891]; *Corcoran v Village of Peekskill*, 108 NY 151, 155 [1888].) The Court of Appeals in *Caprara* stated the rationale for this exclusionary rule:

“Now reaching the broader and more basic question of the role of postaccident change in this case, we start by reiterating the long accepted proposition that, in a negligence suit, proof of a defendant’s postaccident repair or improvement ordinarily is not admissible. The reason for applying this rule of evidence to that kind of case is clear. Since at the heart of such an action is either affirmative conduct in creating a dangerous condition or a failure to perceive a foreseeable risk and take reasonable steps to avert its consequences, proof that goes to hindsight rather than foresight most often is entirely irrelevant and, at best, of low probative value.” (52 NY2d at 122.)

In strict product liability cases, Court of Appeals decisions make the exclusionary rule applicable in actions based on design defects or failure to warn, but inapplicable in actions based on a manufacturing defect. (*See Haran v Union Carbide Corp.*, 68 NY2d 710, 711-712 [1986] [in a failure to warn action, evidence of a subsequent change in warnings is inadmissible]; *Cover v Cohen*, 61 NY2d 261, 274-275 [1984] [in a *design defect* action, evidence of a subsequent change in design is inadmissible]; *Caprara*, 52 NY2d at 123-126 [in a *manufacturing defect* action, evidence of a subsequent design change is admissible as it tended to show a defect and that it was the cause of the accident].) The rationale for the distinction was explained by Justice Simons in *Rainbow v Elia Bldg. Co.* (79 AD2d 287, 292-293 [4th Dept 1981], *affd on op below* 56 NY2d 550 [1982]):

“Perhaps it is sufficient to note that in *Caprara* the court limited its decision to strict product liability cases involving manufacturing flaws, holding that the exclusionary rule did not apply to them because due care is not a defense in such cases. Clearly distinguishable under present New York law is a strict products liability claim of design defect, based as it is on a balancing of risk and utility factors, and involving considerations of reasonable care.” (Citation omitted.)

Finally, Court of Appeals decisions hold that the exclusionary rule is inapplicable where the evidence of subsequent remedial measures is offered for a non-liability purpose relevant in the action. (*See e.g. Scudero v Campbell*, 288 NY 328 [1942] [ownership]; *Caprara*, 52 NY2d at 122 [in dictum, noting impeachment of a witness would be a permissible purpose]; *Cover*, 61 NY2d at 270; *see also Stolowski v 234 E. 178th St. LLC*, 89 AD3d 549 [2011] [“The records of defendant’s post-fire repairs and remedial measures do not fall within any of the recognized exceptions Contrary to plaintiffs’ contentions, ‘general credibility

impeachment' is not an exception. Control is not at issue here since defendant concedes that it owns the premises"].)