EVIDENCE

ANDERSON v. MALLOY: THE EIGHTH CIRCUIT EXPANDS THE "FEASIBILITY" EXCEPTION TO FED. R. EVID. 407

INTRODUCTION

Federal Rule of Evidence 407\(^1\) (FRE 407) mandates that evidence of post-accident safety improvements is not admissible as evidence of negligence.\(^2\) However, an exception to the rule permits such evidence of subsequent remedial measures to be used to prove the feasibility of such measures, but only if feasibility is unequivocally\(^3\) controverted by the defendant.\(^4\) The feasibility exception to the exclusionary rule is based on the notion that it would be unfair to allow a defendant to claim that there were no available alternatives, when in fact such alternative safety measures existed and were later employed.\(^5\)

In a decision handed down on March 9, 1983, Anderson v. Malloy,\(^6\) the United States Court of Appeals for the Eighth Circuit relied upon the feasibility exception to FRE 407 in its decision to remand the case for new trial.\(^7\) After finding that the defendants had controverted the feasibility of employing further safety measures at their motel,\(^8\) the court held that the trial court had committed prejudicial error in its ruling to exclude evidence of subsequent repairs.\(^9\)

This note examines the policy considerations underlying FRE

\(^1\) FED. R. EVID. 407:
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 rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as prooving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

\(^2\) Id.
\(^3\) Id.
\(^4\) See note 1 supra.
\(^5\) Note, Chart v. General Motors Corp.: Did it Chart the Way for Admission of Evidence of Subsequent Remedial Measures in Products Liability Actions?, 41 OHIO ST. L.J. 211, 217 (1980) (citing WEINSTEIN & BERGER, supra note 3, ¶ 407[03], at 407-15).
\(^6\) 700 F.2d 1208 (8th Cir. 1983).
\(^7\) Id. at 1213-14.
\(^8\) Id. at 1213.
\(^9\) Id. at 1214.
407 and its exceptions; the conflict over the use of the exclusionary rule; and the feasibility exception as employed by the Eighth Circuit in its analysis in *Anderson*.

**FACTS AND HOLDING**

The defendants, Malloy, Zes, and Gibson, were owners and operators\(^\text{10}\) of a St. Louis area motel in which Linda and Derriel Anderson were guests during January and February of 1979.\(^\text{11}\) On the evening of February 7, 1979, Linda Anderson was alone in the motel room awaiting her husband's arrival from work.\(^\text{12}\) She heard a knock at the door and looked out the picture window, but failed to see anyone in the doorway.\(^\text{13}\) Upon hearing what she thought was her husband's voice, Mrs. Anderson opened the door slightly.\(^\text{14}\) An unknown assailant pushed his way into the room and raped her\(^\text{15}\) at gunpoint.\(^\text{16}\)

The Andersons filed suit in federal district court in St. Louis, Missouri, alleging diversity jurisdiction.\(^\text{17}\) The complaint averred that the defendants negligently failed to provide the Andersons with reasonably safe lodging, that the defendants breached an express warranty to provide reasonably safe lodging, and that the defendants fraudulently misrepresented the extent of security provided to their motel guests.\(^\text{18}\)

During the trial, the district court barred admission of four portions of the plaintiffs' offered evidence.\(^\text{19}\) The court excluded: (1) the testimony of a woman who was raped in her room at defendants' motel five months prior to the rape of Linda Anderson; (2) evidence that a nearby apartment complex was a "breeding ground for crime"; (3) evidence of the security systems employed by other motels in the area; and (4) evidence that the defendants installed chain locks and peep holes in the doors of their motel rooms after Linda Anderson was raped.\(^\text{20}\)

The motel owners asserted contributory negligence on the part

\(^{10}\) *Id.* at 1210.
\(^{11}\) *Id.*
\(^{12}\) Brief for Appellants at 7, *Anderson v. Malloy*, 700 F.2d 1208 (8th Cir. 1983).
\(^{13}\) *Id.* at 8.
\(^{14}\) 700 F.2d at 1210 n.2.
\(^{15}\) *Id.* at 1210.
\(^{16}\) Brief for Appellants at 8, *Anderson*, 700 F.2d 1208 (8th Cir. 1983).
\(^{17}\) 700 F.2d at 1210 (the plaintiffs were residents of Alabama at the time of trial).
\(^{18}\) *Id.* at 1210.
\(^{19}\) *Id.*
\(^{20}\) *Id.*
of Linda Anderson as an affirmative defense. The defendants also argued that they had employed adequate safety measures at their motel. The jury returned a verdict for the defendants, and judgment was entered accordingly.

The Eighth Circuit Court of Appeals found no abuse of discretion by the district court in its rulings to exclude both the testimony of the prior rape victim and evidence that the adjoining apartment complex was a focal point of crime. The court further held that although the trial court had erred in excluding evidence of the security measures of other motels in the area, this error was not prejudicial. Finally, the majority concluded that the trial court committed prejudicial error in its ruling to exclude plaintiffs' offered evidence of subsequent remedial measures. On the basis of that error, the Eighth Circuit vacated the judgment of the district court and remanded the case for a new trial.

BACKGROUND

Federal Rule of Evidence 407 and its Underlying Policies

The Eighth Circuit vacated the lower court's decision in Anderson solely on the issue of admissibility of subsequent remedial evidence. This is the most controversial aspect of Anderson.

Federal Rule of Evidence 407 codified the generally accepted common law rule which excluded remedial measures which were taken after an accident. The use of the phrase "remedial measures" encompasses any post-accident change, repair or precaution. Under the rule, such evidence cannot be offered for the purpose of proving negligence or culpable conduct.

The exclusionary rule rests largely upon an extrinsic policy—one of encouraging persons to take subsequent precautionary

21. Id.
22. Id. In closing argument, defendants' counsel stated that the defendants had taken every safety precaution that anybody recommended that they do. Id. at 1214. See notes 107-13 and accompanying text infra.
23. 700 F.2d at 1211.
24. Id.
25. Id. at 1212.
26. Id. at 1214.
27. Id.
28. Id.
29. Id. at 1214-16 (Gibson, J. dissenting) (Judge Gibson's opinion focuses on the misapplication of the feasibility exception to FRE 407 by the majority).
31. Rimkus, 706 F.2d at 1064.
measures. It is reasoned that such exclusion is necessary because people are loath to take actions which would increase the risk of losing a lawsuit. Another justification for the rule is that such evidence is not relevant to the issue of negligence. The underlying fear is that the jury will view the subsequent changes as an admission of fault, rather than as one piece of evidence bearing on whether the defendant's conduct was reasonable.

Over the years, many commentators have called for abolition of FRE 407 on the basis that it does nothing to further its underlying policies. First, it has been noted that there exists no empirical data showing that the rule has resulted in an increase in repairs, or that its absence would discourage repairs. Secondly, FRE 403 may be used to exclude such evidence in the event that it is found to be prejudicial, confusing, or misleading. However, despite such criticism, FRE 407 remains intact to this day.

In recent years, the major area of dispute concerning FRE 407 has been centered upon its application to strict liability actions. It has been reasoned by a number of courts and commentators...

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35. Note, supra note 5, at 214. See also Weinstein & Berger, supra note 3, ¶ 407(02), at 407-8.
39. Fed. R. Evid. 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Id.
41. Fed. R. Evid. 407. In addition, every state, with the exception of Maine, has enacted the rule in similar forms.
43. See, e.g., Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788, 793
that the rule is inapplicable in such actions due to the fact that strict liability actions, by their very nature, do not include the elements of negligence or culpable conduct. As illustrated in *Ault v. International Harvester Co.*, a fundamental distinction exists between negligence and strict liability since the issue in a negligence action is the reasonableness of the defendant's conduct, while in a strict liability case the issue is whether the product is defective. It was reasoned that strict liability actions focus on the product rather than culpable conduct, and therefore, FRE 407, by its own language, should not apply. However, other courts and commentators favor the continued use of the exclusionary rule in actions for negligence and strict liability alike. As stated in *Werner v. Upjohn Co.*, the reasoning behind such a distinction is "hypertechnical" because the suit is still against the manufacturer, not against the product.

(8th Cir. 1977) (Doctrine of strict liability, by its very nature, does not include these elements); Ault v. International Harvester Co., 13 Cal. 3d 113, —, 528 P.2d 1148, 1150, 117 Cal. Rptr. 812, 814 (1974) (en banc) (The rule is inapplicable when such evidence is offered to prove negligence or culpable conduct); Sutkowski v. Universal Marion Corp., 5 Ill. App. 3d 213, —, 281 N.E.2d 749, 752-53 (1972) (concerns the character of products); Caprara v. Chrysler Corp., 52 N.Y.2d 114, —, 417 N.E.2d 545, 551, 436 N.Y.S.2d 251, 256 (1981) (The blanket exclusionary rule is inapplicable to strict products liability cases).


46. Id. at —, 528 P.2d at 1150, 117 Cal. Rptr. at 814-15.

47. Id. at —, 528 P.2d at 1152, 117 Cal. Rptr. at 816.

48. See, e.g., Grenada Steel Industries v. Alabama Oxygen Co., 695 F.2d 883, 888 (5th Cir. 1983) (administration of the rule would be simplified if held applicable to both negligence and strict liability); Hall v. American Steamship Co., 688 F.2d 1062, 1066 (6th Cir. 1982) (concerning maritime strict liability); Josephs v. Harris Corp., 677 F.2d 985, 991 (3d Cir. 1982) (the rule is applicable to strict products liability cases); Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981) (Rule 407 applies to strict products liability actions); *Werner*, 628 F.2d 857 (the distinction between negligence and strict liability does not make the rule inapplicable). See also Roy v. Star Chopper Co., 584 F.2d 1124, 1134 (1st Cir. 1978) (court applied FRE 407 to product liability case without discussion of the issue).


50. 628 F.2d 848 (4th Cir. 1980).

51. Id. at 857.
Exceptions to Federal Rule of Evidence 407

FRE 407 does not require the exclusion of evidence of subsequent remedial measures when offered for a purpose other than to demonstrate negligence or culpable conduct. The second sentence of FRE 407 specifies the following other purposes for which this type of evidence may be offered: proving ownership, control, or feasibility, if controverted, or impeachment. This list of exceptions is intended to be merely illustrative, rather than exhaustive.

Each of the exceptions listed in FRE 407 deals with situations where the defendant might gain a direct benefit over and above the fact of exclusion. Examples of such situations include instances where the defendant denies ownership or control, contends that repair or improvement was impossible, or makes statements conflicting with the fact of repair. Furthermore, the rule is relaxed in these cases because, under the circumstances, "relevancy is stronger and more specific and thus cogent enough to overcome the countervailing effect of the policy considerations [underlying the exclusionary rule]."

There also exists further justification for each of the listed exceptions. Evidence of subsequent measures is admissible to prove ownership or control because one is not likely to expend time and money to repair property owned or controlled by another. The impeachment exception is supported by the fact that when a defendant claims to have exercised all possible care, and he later employs further safety measures, such testimony is viewed as a prior inconsistent statement. In such instances, the evidence is admissible not only for the limited purpose of impeachment, but also as affirmative proof to rebut the defendant's claims of having exercised all possible care.

The feasibility exception has been justified on the grounds that it would be manifestly unfair to preclude a plaintiff from

52. Oberst v. International Harvester Co., 640 F.2d 863, 866 (7th Cir. 1980).
53. FED. R. EVID. 407.
54. Werner, 628 F.2d at 856.
55. Id. at 857. See also Wolf v. Procter & Gamble Co., 555 F. Supp. 613, 624 (D.N.J. 1982) (discussing the offensive use of the rule by defendants).
56. Werner, 628 F.2d at 857.
showing that safety measures were later taken when the defendant has claimed that there were no available alternatives.\textsuperscript{61} It has been stated that evidence of subsequent remedial measures "has its highest and clearest probative value [when offered to prove feasibility], and there is some virtue in a rule which admits the proof in such circumstances while focusing the attention of the trier of fact upon its most specific utility."\textsuperscript{62}

Evidence of subsequent remedial measures is not admissible to demonstrate feasibility unless it is controverted by the defendant.\textsuperscript{63} The Advisory Committee Notes to FRE 407 explain that "unless a genuine issue" of feasibility is present, the exception is inapplicable.\textsuperscript{64} In addition, for the issue of feasibility to be uncontroverted within the meaning of the rule, the defendant's concession must be unequivocal.\textsuperscript{65} However, in order to determine whether or not feasibility has been controverted, the trier of fact must first decide upon the definition of the term. One view is that "feasible" merely means "capable of being done, executed, or effected."\textsuperscript{66} The opposing view is that "feasible" not only means "possible", but also entails the capability of being dealt with successfully.\textsuperscript{67} These two divergent viewpoints come in direct conflict with one another in the court's analysis in Anderson.\textsuperscript{68}

The use of the feasibility exception is most troublesome because the feasibility of a precaution may bear on whether it was reasonable not to have taken the precaution prior to the accident in question.\textsuperscript{69} Therefore, feasibility and negligence are often indistinct issues.\textsuperscript{70} As a result, the attempt to separate feasibility from negligence often results in an arbitrary decision made without consideration of the underlying policy reasons for the exclusionary rule.\textsuperscript{71}

One commentator has noted that FRE 407 has lost much of its vigor due to the numerous exceptions that have been created

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\item \textsuperscript{61} Patrick v. South Central Bell Telephone Co., 641 F.2d 1192, 1196-97 (6th Cir. 1980) (quoting Weinstein & Berger, supra note 3, \textsuperscript{[407]} \textsuperscript{[04]}, at 407-23 to 24).
\item \textsuperscript{62} Louisell & Mueller, supra note 35, \textsuperscript{[407]} \textsuperscript{[04]}, at 251.
\item \textsuperscript{63} Oberst, 640 F.2d at 866.
\item \textsuperscript{64} Werner, 628 F.2d at 855.
\item \textsuperscript{65} Weinstein & Berger, supra note 3.
\item \textsuperscript{67} Anderson, 700 F.2d at 1213.
\item \textsuperscript{68} \textit{Id.} at 1215 (Gibson, J. dissenting); \textit{See} notes 97-104 and accompanying text \textsuperscript{infra}.
\item \textsuperscript{69} Weinstein & Berger, supra note 3, \textsuperscript{[407]} \textsuperscript{[04]}, at 407-18.
\item \textsuperscript{70} \textit{Id.}
\item \textsuperscript{71} \textit{Id.} at 407-23.
\end{itemize}
which allow the admission of subsequent remedial evidence for collateral purposes. It has been said that the exclusionary rule has actually become a “positive rule of admissibility” limited only when such evidence is offered as an admission of negligence or culpability. The end result is that trial judges are “bedeviled by both a rule of absolute exclusion and a rule of discretionary exclusion to be applied in the process of a single ruling.”

The foregoing discussion of FRE 407 and the exceptions to the exclusionary rule highlights the divergent viewpoints which were considered by the court in Anderson. In order to properly appreciate the dilemma faced by the Anderson court, it will be helpful to keep these viewpoints in mind while reading the following analysis of the court’s opinion.

ANALYSIS

In Anderson, the Eighth Circuit was confronted with the issue concerning admissibility of subsequent remedial evidence under the feasibility exception to FRE 407. The safety measures at issue consisted of the installation of peep holes and chain locks on the doors at the defendants’ motel after the rape of Linda Anderson. The district court excluded the evidence on the basis that the defendants had not controverted the feasibility of such measures, and therefore, the general exclusionary rule applied to the evidence. However, the Eighth Circuit majority concluded that the feasibility of the safety measures had been affirmatively controverted, thereby bringing the evidence under one of the exceptions to FRE 407.

The Anderson court began by studying the record of the court below to determine whether the evidentiary ruling at issue amounted to an abuse of discretion. The specific issue before the court was whether Malloy, one of the defendants, had affirmatively controverted the feasibility of the security measures which were

75. See notes 35-44 and 66-71 and accompanying text supra.
76. Anderson, 700 F.2d at 1213. There were three additional issues resolved by the court in Anderson. See notes 24-26 and accompanying text supra.
77. 700 F.2d at 1212.
78. Id. at 1212-13.
79. Id. at 1213.
80. Id.
later employed.\textsuperscript{81} It appeared from the record that plaintiffs\' counsel did not question Malloy about the absence of peep holes and chain locks on the motel's doors on direct examination.\textsuperscript{82} The court quoted the exchange between Malloy and defense counsel on cross-examination, during which the issue was first addressed.\textsuperscript{83} Malloy testified that he had met with a representative of the local police department to discuss security at the motel.\textsuperscript{84} The police chief recommended the use of solid core doors, Triple A door locks, bar pins in sliding doors, and additional lighting, all of which the defendants installed accordingly.\textsuperscript{85} Malloy's testimony then continued as follows:

Q. We've already talked about the additional lighting that was installed. Did [the village police chief] indicate to you anything about putting these peepholes, as they are called, in the solid core doors?
A. He felt like we had six-foot picture windows right next to the door. If we'd put peepholes in, it would be false security.

Q. Did you follow the officer's recommendation in that regard?
A. Yes. We did not put the peepholes in at that time.

Q. Did he indicate to you anything about these chains you see on doors on occasion?
A. He felt like they were unnecessary, also. False security.\textsuperscript{86}

Plaintiffs' counsel then asked the following question on rebuttal:

Q. Do I understand, [the police chief] indicated to you that it wouldn't be feasible to put in peepholes and chain guards on the front doors?

Mr. Malloy replied:

A. At that time he felt like the picture windows were adequate for—that the peephole would be sort of a false security, because they could look out these picture windows and see the door, the step there.\textsuperscript{87}

After quoting from Malloy's testimony, the majority com-

\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id. The dissent also quoted another portion of the testimony which was omitted in the majority opinion. Id. at 1214-15 (Gibson, J. dissenting).
\textsuperscript{84} Id. at 1214.
\textsuperscript{85} Id. at 1215.
\textsuperscript{86} Id. at 1213.
\textsuperscript{87} Id. The district court stated in reply to plaintiffs' offer of proof, "There is no question of feasibility in this situation. He said he went on the recommendation, whether it's good, bad, right or wrong. He hasn't said anything which says it wasn't feasible or would cost too much." Id. at 1215.
menced its analysis of whether thereby the defendant had contro-
verted the feasibility of peep holes and chain locks.88 The
*Anderson* court stated that feasibility not only relates to the actual
possibility of operation, economy, and convenience of a safety
measure, but also that it encompasses the ultimate utility of the
measure, coupled with its success in its intended performance.89
Turning to the definition of "feasible" as found in Black's Law and
Webster's dictionaries, the majority concluded that it not only
means "possible", but also "capable of being utilized, or dealt with
successfully."90

The court's reliance upon this particular definition of feasibil-
ity was crucial to its analysis of Malloy's testimony. Relying upon
that definition, it was reasoned that Malloy had inferred that peep
holes and chain locks were not feasible because he indicated that
they could not be employed successfully.91 The majority also
viewed the defendant's testimony as inferring that the installa-
tion of such devices would in fact create a reduced level of security at
the motel.92

Judge Gibson, dissenting in *Anderson*, disagreed with the defi-
nition of "feasible" upon which the majority relied.93 He correctly
noted that the definition which was employed by the majority was
the second definition listed for the word in most noteworthy dic-
tionaries, including those cited in the majority opinion.94 The first
definition recognized by those authorities is "capable of being
done, executed, or effected."95 Judge Gibson also relied upon the
Supreme Court's definition of "feasible" as announced in *Ameri-
can Textile Manufacturers Institute v. Donovan*.96 The dissent
quoted from Justice Brennan's opinion in *American Textile*
as follows:

> The plain meaning of the word "feasible" supports respon-

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88. Id. at 1213.
89. Id. There have been other courts which have followed this view of the defi-
nition of feasibility. See, e.g., *Kurz v. Dinklage Feed Yard, Inc.*, 205 Neb. 125, 128, 286
N.W.2d 257, 260 (1979) (feasibility means more than capable of being done, it also
includes effectiveness and practicality); *Sutkowski v. Universal Marion Corp.*, 5 Ill.
App. 3d 313, —, 281 N.E.2d 749, 753 (1972) ("[f]easibility includes not only the ele-
ments of economy, *effectiveness* and practicality, but also the technological pos-
sibilities viewed in the present state of the art.") (emphasis added).
90. *Anderson*, 700 F.2d at 1213 (emphasis added) (citing WEBSTER'S THIRD NEW
INTERNATIONAL DICTIONARY 831 (unabridged ed. 1987)); BLACK'S LAW DICTIONARY
549 (5th ed. 1979).
91. Id. at 1214.
92. Id.
93. Id. at 1215 (Gibson, J. dissenting).
94. Id.
95. Id.
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According to Webster's Third New International Dictionary of the English Language 831 (1976), "feasible" means "capable of being done, executed, or effected." Accord, The Oxford English Dictionary 116 (1933) ("Capable of being done, accomplished or carried out"); Funk & Wagnalls New "Standard" Dictionary of the English Language 903 (1957) ("That may be done, performed or effected").

The dissent in Anderson further noted that, although American Textile dealt with the use of the word with respect to section 6(b)(5) of the Occupational Safety and Health Act, the Court did not limit its definition of "feasible" to those purposes. Judge Gibson further reasoned that the definition with respect to FRE 407 should be identical to that for OSHA regulations because both were presented to Congress and subject to Congressional action.

The dissent not only concluded that the definition of "feasible" employed by the majority was erroneous, but it further questioned the majority's conclusion that Malloy's testimony inferred that feasibility was at issue. Judge Gibson's view was that the majority had stretched the chain of inferences too far and that Malloy's testimony only related to the question of necessity or desirability of the installation of peep holes and chain locks.

The Anderson majority also relied on the defense counsel's closing argument to support its decision to overturn the trial court's evidentiary ruling. It was opined that the defendants' counsel "took advantage of the situation" by saying the defendants "did everything anybody recommended that they do.

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97. Anderson, 700 F.2d at 1215 (Gibson, J. dissenting) (quoting American Textile, 452 U.S. at 508-09).
98. Id. at 1215. See also 29 U.S.C. § 655(b)(5) (1976). That section requires the Secretary of Labor, in promulgating standards dealing with toxic materials or harmful physical agents, to set the standard which most adequately assures, "to the extent feasible," that no employee will suffer material impairment of health or functional capacity. See Anderson, 700 F.2d at 1215 (Gibson, J. dissenting).
99. (Gibson, J. dissenting). However, two cases subsequently referring to the definition of "feasible" as announced in American Textile have seemingly placed limitations on its use. See, e.g., Donovan v. Castle & Cooke Foods, Inc., 692 F.2d 641, 647-49 (9th Cir. 1982) (holding that the definition of "feasibility" in American Textile is inapplicable to 29 C.F.R. § 1910.95(b)(1) since it is a regulation rather than a legislative enactment); Baroid Division of NL Industries, Inc. v. OSHA Review Comm'n, 660 F.2d 439, 447 (10th Cir. 1981) (in which the court stated that the definition of "feasible" was made clear in American Textile "for purposes of OSHA").
100. Anderson, 700 F.2d at 1215 (Gibson, J. dissenting).
101. Id.
102. Id. at 1215-16.
103. Id. at 1214.
can they do?" The majority concluded that such statements entitled the plaintiffs to introduce evidence of further safety measures taken after the rape of Linda Anderson.

The dissent countered, asserting that a closing argument could not be used to justify the introduction of evidence during the course of the trial. Judge Gibson further argued that the statement "what more can they do" was read out of context by the majority. He noted that the closing argument, read in its entirety, stressed the recommendations given by the chief of police and the defendants' compliance with those suggestions. Upon reviewing the entire closing argument, the dissent concluded that its content was fully supported by the evidence.

The majority in Anderson also reasoned that the evidence in question was admissible to impeach the credibility of the defendants. It was stated that the evidence of subsequent remedial measures was the only evidence that could effectively rebut the defendants' inferences that they had done everything necessary for a secure motel. The majority turned to case law at this point to support the use of the evidence in question for impeachment purposes. Although the dissent did not choose to do so, each of the cases relied upon by the majority may be distinguished from Anderson. The majority first relied upon Patrick v. South Central Bell Telephone Co., in which evidence of subsequent remedial measures was held to be admissible to impeach the defendant's testimony concerning the height of telephone lines which had caused the electrocution death of a telephone company lineman. However, in Patrick, the impeached testimony concerned the conditions existing at the time of the accident. In that case, the evidence of subsequent safety measures was necessary in order for the jury to ascertain the true state of conditions at the time of the accident. In Anderson, on the other hand, there was no controversy surrounding the existence, or lack thereof, of peep holes and

104. Id.
105. Id.
106. Id. at 1216.
107. Id.
108. Id.
109. Id.
110. Id. at 1214.
111. Id.
112. Id.
113. 641 F.2d 1192 (6th Cir. 1980).
114. Anderson, 700 F.2d at 1219, Patrick, 641 F.2d at 1197.
115. Patrick, 641 F.2d at 1196.
116. Id.
chain locks at the time Linda Anderson was raped.\textsuperscript{117}

The Eighth Circuit also relied upon \textit{Kenny v. Southeastern Pennsylvania Transportation Authority},\textsuperscript{118} which is similar to \textit{Anderson} in that it involved evidence of safety measures taken after a rape had occurred.\textsuperscript{119} In \textit{Kenny}, the defendant had inferred that the lighting on a railway platform was adequate at the time the plaintiff was raped, although new lighting fixtures were installed soon thereafter.\textsuperscript{120} The evidence was ruled to be admissible for the purpose of rebutting defendant's claim that all reasonable care was being exercised at the time of the assault.\textsuperscript{121} However, the \textit{Kenny} court expressly distinguished the issue before it from that in \textit{Anderson} by stating: "In this case, the evidence did not show that a protective device of a nature not previously utilized was subsequently installed, but rather established the need for replacement of that which had previously been employed."\textsuperscript{122} In \textit{Anderson}, the defendants' installation of peep holes and chain locks constituted previously unutilized protective devices as referred to by the court in \textit{Kenny}.\textsuperscript{123}

The \textit{Anderson} majority also relied upon \textit{American Airlines, Inc. v. United States},\textsuperscript{124} to justify the admission of subsequent remedial evidence.\textsuperscript{125} In that case, the defendant had testified that the airplane altimeter at issue was "entirely feasible and safe and that there was no reason to change it."\textsuperscript{126} The Fifth Circuit Court of Appeals held that the admission of testimony demonstrating the reasons for, and existence of, subsequent changes was proper for impeachment purposes.\textsuperscript{127} However, that case is distinguishable from \textit{Anderson} in that it involved the change in a safety measure already in use, rather than the installation of additional safety measures.\textsuperscript{128} It also involved impeachment on the basis of a statement which was inconsistent with the defendant's actions.\textsuperscript{129} In

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\item \textsuperscript{117} See \textit{Anderson}, 700 F.2d at 1213 (Malloy clearly stated on cross-examination that chain locks and peep holes had not been installed prior to the incident in question).
\item \textsuperscript{118} 581 F.2d 351 (3d Cir. 1978).
\item \textsuperscript{119} \textit{Anderson}, 700 F.2d at 1214; \textit{Kenny}, 581 F.2d at 353.
\item \textsuperscript{120} \textit{Kenny}, 581 F.2d at 356.
\item \textsuperscript{121} Id.
\item \textsuperscript{122} Id.
\item \textsuperscript{123} \textit{Wolf v. Procter & Gamble Co.}, 555 F. Supp. 613, 624 (D.N.J. 1982) (the court differentiated that case from \textit{Kenny} on the same basis).
\item \textsuperscript{124} 418 F.2d 180 (5th Cir. 1969).
\item \textsuperscript{125} \textit{Anderson}, 700 F.2d at 1214.
\item \textsuperscript{126} \textit{American Airlines}, 418 F.2d at 196.
\item \textsuperscript{127} Id.
\item \textsuperscript{128} Id.
\item \textsuperscript{129} Id. See note 62 and accompanying text supra.
\end{itemize}
Anderson, defendant Malloy simply indicated that the safety consultant felt that peep holes and chain locks would be ineffective.\textsuperscript{130} Therefore, it appears that in order to impeach such testimony, it must be shown that either the safety measures were effective or that the safety consultant had actually favored the use of such devices.

The dissenting opinion in Anderson also relied upon case law to justify its conclusion that the evidence in question was properly excluded by the district court.\textsuperscript{131} Judge Gibson first looked to the decision in Werner v. Upjohn Co.,\textsuperscript{132} in which it was held that the defendant had not controverted the feasibility of an additional drug product warning, but merely questioned the necessity of such a warning.\textsuperscript{133} This is analogous to Anderson in that defendant Malloy did not controvert the feasibility of chain locks and peep holes, but rather questioned the necessity of such safety measures.\textsuperscript{134} Additionally, Judge Gibson noted that in Oberst v. International Harvester Co.,\textsuperscript{135} the Seventh Circuit Court of Appeals held that evidence of a subsequent design change was excludable as being cumulative because it was clear that such alternatives were commercially available.\textsuperscript{136} The Anderson dissent was arguably correct in reasoning that peep holes and chain locks were undoubtedly commercially available and that the testimony was merely that they were not recommended and, therefore, not employed.\textsuperscript{137}

CONCLUSION

The majority's unwarranted extension of the feasibility exception to FRE 407 in Anderson effectively writes the exclusionary rule out of existence.\textsuperscript{138} Although the overwhelming sentiment expressed by commentators has been in favor of discarding the rule,\textsuperscript{139} FRE 407 is still in effect.\textsuperscript{140} Furthermore, the policy considerations underlying the rule are still considered by many to be valid.\textsuperscript{141}

\textsuperscript{130} Anderson, 700 F.2d at 1213.
\textsuperscript{131} Id. at 1216 (Gibson, J. dissenting).
\textsuperscript{132} 628 F.2d 848 (4th Cir. 1980).
\textsuperscript{133} Id. at 855.
\textsuperscript{134} Anderson, 700 F.2d at 1213.
\textsuperscript{135} 640 F.2d 863 (7th Cir. 1980).
\textsuperscript{136} Id. at 866.
\textsuperscript{137} Anderson, 700 F.2d at 1216 (Gibson, J. dissenting).
\textsuperscript{138} See S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 63, 65 (3d ed. Supp. 1984) (stating that Anderson shows how a broad view of feasibility can ultimately remove the protection of FRE 407).
\textsuperscript{139} See note 39 and accompanying text supra.
\textsuperscript{140} FED. R. EVID. 407.
\textsuperscript{141} See notes 52-53 supra.
In the wake of the Anderson decision, it will be very difficult for an attorney to effectively counsel clients whether to undertake subsequent remedial measures without fear of increased liability. In addition, by enlarging the definition of "feasibility" to include those measures which are not only capable of being done, but also capable of being employed successfully, the Anderson majority has encompassed those measures which are so commonly known to be available as to be subject to judicial notice. The additional requirement that such measures be capable of being employed successfully negates this possibility, thereby allowing the plaintiff to extract this potentially damaging evidence at trial. Furthermore, the alternative means of proof available to show the absence of such measures, coupled with the danger of misuse of evidence of subsequent repairs by juries, make a solid case for limiting, rather than expanding, the scope of the feasibility exception to FRE 407.

As to the extension of the impeachment exception, it has been reasoned that unless strained limitations upon otherwise permissible impeachment testimony are adopted, the "exception" may swallow the rule. Additionally, it has been noted that the trial judge should guard against the improper admission of such evidence "to prove prior negligence under the guise of impeachment."

The disagreement between the majority and dissenting opinions accurately reflects the state of confusion among the courts as to the use of FRE 407 and its exceptions. However, unless and until the rule is officially discarded, it should be applied evenhandedly to preserve its integrity.

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142. See notes 99-101 and accompanying text supra.
143. See notes 93-98 and accompanying text supra.
144. See Fed. R. Evid. 201. The rule states in part: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Id. at subsection (b).
145. Comment, supra note 53, at 228-29.
147. Id. (quoting 10 J. Moore, Moore's Federal Practice § 407.04, at IV-159 (2d ed. 1982)).