The Design It Is A-Changin': Avoiding the "Feasibility" Exception of OEC 407 in Product Liability Cases

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Product safety design is an ever-changing field. If you were to look at your grandfather's lawnmower, many of the warnings and other safety features common on modern mowers might be absent. This is because product manufacturers often implement changes to their products, which can be anything from a new warning, safety feature, or packaging, to a fundamental change in the overall design of the product. Having determined that such changes are to be encouraged, the legislature enacted OEC 407, which provides:


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> 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.

Under this rule, evidence of subsequent remedial measures is not admissible to prove liability in connection with an accident. This rule applies to product liability cases.[1]

The second sentence of OEC 407 creates exceptions to the rule:

> This section does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Thus, evidence of subsequent remedial measures is admissible if offered for some purpose *other* than to prove liability, such as proof of ownership, control, or feasibility. However, admissibility depends on whether the defendant controverts ownership, control, or feasibility.[2]

Whether a particular question, answer, or argument controverts "feasibility" is not a simple determination for the court or counsel, since the rule does not define "feasibility"[3] and no Oregon appellate case specifically addresses this issue. In design defect cases, where the risk and utility of a product are at issue, the question is of particular importance. For example, is a defendant permitted to concede the remedial measure was technologically possible but deny that the change would have made the product safer? Similarly, is a defendant permitted to concede the change was technologically possible but also argue that the design change would have rendered the product unmarketable?

Liberal Approach to "Feasibility"

One line of cases applying the federal analogue to OEC 407 suggests a liberal definition of "feasibility."[4] In *Anderson v. Malloy*[5], for example, the plaintiff sued the owner of a motel after an assailant forced his way into her room and assaulted her. At trial, the plaintiff attempted to put on evidence that after the assault the defendant installed peepholes and safety chains on the entrance doors to the rooms. The trial court excluded the evidence, and the jury returned a defense verdict. On appeal, plaintiff argued that the defendant controverted the feasibility of the subsequent remedial measures because its owner testified that peepholes and safety chains were unnecessary and that they would only provide a false sense of security. The Eighth Circuit held that "[w]hether something is feasible relates not only to actual possibility of operation, and its cost and convenience, but also to its ultimate utility and success in its intended performance."[6] That is, "feasible" means not only "possible," but also

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"capable of being ... utilized, or dealt with successfully."[7] Because the defendant denied that the safety measures would have made the room safer, the Eighth Circuit held that it was error to exclude evidence of the subsequent remedial measures and remanded the case for a new trial.[8]

Under this broad approach, the defendant is arguably required to stipulate not only that the remedial measure was technologically and economically feasible, but also that the modification would have made the product safer and would not have affected the product's performance or marketability. This is obviously problematic for defendants in design defect cases, where evidence that the magnitude of the product's risk outweighs its utility, and evidence that a safer design alternative was both practicable and feasible is often permitted to show that the product was defective and/or that the defendant was negligent in manufacturing the product.[9] In other words, requiring the defendant to admit that the change was capable of being implemented without impacting the utility or marketability of the product would come close to requiring the defendant to admit liability in certain design defect cases.

Narrow Approach to "Feasibility"

A second line of cases adopts a narrow definition of "feasibility." For example, in *Gauthier v. AMF, Inc.*[10], the plaintiff injured his hand while operating a snow-thrower designed by defendant. At trial, plaintiff was permitted to admit into evidence various design changes to the snow-thrower made by the defendant and the industry as a whole since the accident.[11] The jury returned a verdict for plaintiff. Defendant appealed, arguing that the evidence was inadmissible under FRE 407. The plaintiff argued that the evidence was admissible because the defendant controverted the feasibility of the design changes. In rejecting plaintiff's argument, the Ninth Circuit held that the defendant's concession that the safety devices "were technologically and economically feasible" was sufficient to avoid controverting feasibility. The Ninth Circuit held that the defendant was permitted to argue that the safety

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problem "was not great enough to warrant the trade-off of consumer frustration, increased complexity of the product, and risk of consumer efforts to disconnect the safety device" without controverting the feasibility of the remedial measures. The case was remanded for a new trial.[12]

Under this narrow approach, a defendant still must concede that the design change was technologically and economically feasible in order to exclude evidence of the subsequent remedial measures. But this is not as problematic as it may appear, because the defendant has already implicitly conceded these two issues by changing the product. However, the defendant need not admit that the change was practicable, or that it could have been implemented without impacting the utility or marketability of the product. Additionally, the defendant may still argue that the change would not have prevented the accident or materially impacted the safety of the product. This narrow approach is consistent with the policy of OEC 407 because it encourages manufacturers to attempt to make their products safer without the fear of the subsequent remedial measures later being used against them to prove liability for an accident.

Still, counsel should consider whether to argue that the changes would be too economically burdensome. A cost-benefit argument treads dangerously close to this line under both the liberal and narrow interpretations of "feasibility," and the court may decide that it opens the door for plaintiff's counsel to bring in the subsequent remedial measures under both lines of cases.

In short, if a defendant intends to exclude evidence of subsequent remedial measures, it should move in limine for an order excluding the evidence, and also ensure that the order incorporates a narrow definition of "feasibility," thus permitting the defendant to argue about the trade-offs of alternative designs and the marketability of such alternatives without inadvertently controverting feasibility for purposes of OEC 407. Additionally, counsel should take care at trial not to "open the door" by making arguments that the court may interpret as controverting feasibility. Until the Oregon appellate courts address this issue, defendants should rely on the general policy of OEC

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407 and analogues in federal case law to argue in support of a narrow definition of feasibility.

Endnotes

1 *Krause v. American Aerolights, Inc.,* 307 Or 52, 61 (1988).

2 OEC 407. *See also* McCormick on Evidence § 267, p. 413 (5th ed 1999) ("If the other purpose is not controverted, the evidence is inadmissible.").

3 The U.S. Supreme Court, in *Am. Textile Mfrs. Inst. v. Donovan,* 452 US 490, 508-09 (1981) cited to Webster's Third New International Dictionary 831 (1976) for the following definition of feasible: "capable of being done, executed, or effected."

4 Oregon courts regularly look to federal case law interpreting federal rules substantially similar to Oregon rules. *See e.g., State v. Carlson,* 311 Or 201, 209 (1991).

5 700 F2d 1208, 1213 (8th Cir 1983).

6 *Id.* at 1213.

7 *Id.* (citing Webster's Third New International Dictionary 831 (unabridged ed. 1967)).

8 *See also American Airlines, Inc. v. U.S.,* 418 F2d 180, 196 (5th Cir 1969) (defendant's witness testified that an airplane altimeter in issue was "feasible and safe and that there was no reason to change it"; plaintiff allowed to show that defendant changed altimeter design after crash); *Rimkus v. Northwest Colorado Ski Corp.,* 706 F2d 1060 (10th Cir 1983) (evidence that defendant ski resort marked an outcropping as a hazard after the accident was admissible based on the defendant's contention that no warning was necessary because the outcropping was obvious); *Knight v. Otis Elevator Co.,* 596 F2d 84, 91 (3d Cir 1979) (additional evidence of feasibility not permitted because defendant had already conceded that the subsequent remedial measures could have been made "simply, easily and inexpensively").

9 *McCathern v. Toyota Motor Corp.,* 332 Or 59, 78 (2001); *Heaton v. Ford Motor Co.,* 248 Or 467, 471 (1967).

10 788 F2d 634 (9th Cir 1986).

11 *Id.* at 636.

12 *Id.* at 637-38. Other cases referencing a narrow definition of "feasibility" include: *Bush v. Michelin Tire Corp.,* 963 F Supp 1436, 1450 (WD Ky 1996) ("If plaintiffs in products liability cases were allowed to introduce subsequent remedial measures whenever a defendant was forced to argue about the trade-offs of alternative designs, the 'feasibility' exception to FRE 407 would swallow the rule"); *Flaminio v. Honda Motor Co.,* 733 F2d 463, 468 (7th Cir 1984) (ruling that the defendant did not place feasibility in issue simply by arguing about the trade-offs involved in taking the precautionary measures at issue); *McPadden v. Armstrong World Indus.,* 995 F2d 343, 345-46 (2d Cir 1993) ("'Feasibility' is not an open sesame whose mere invocation parts Rule 407 and ushers in evidence of subsequent repairs and remedies. To read it that casually will cause the exception to engulf the rule").