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Post-Accident Repairs and Offers of Compromise: Shaping Exclusionary Rules to Public Policy

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INTRODUCTION

It is generally believed that the trier of fact should be provided with as much evidence as possible to ensure that it is aware of all the facts necessary to make a proper determination of the issues it must decide. Certain forms of evidence, however, are excluded from the trier of fact either because they are immaterial or irrelevant, or because admitting the evidence is considered contrary to certain policy objectives. At one time, evidence of post-accident repairs and offers of compromise was excluded on relevancy grounds. It is

1. See, e.g., R. LEMPERT & S. SALTZBERG, A MODERN APPROACH TO EVIDENCE 140 (1977); J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 264 (1898).
2. Evidence which does not address an issue which is in dispute is excluded as being immaterial. See, e.g., First Nat'l Bank v. Miller, 235 Ill. 135, 85 N.E. 312 (1908); Batavia Mfg. Co. v. Newton Wagon Co., 91 Ill. 230 (1878); Ferdinand v. Yellow Cab Co., 42 Ill. App. 3d 91, 355 N.E.2d 547 (1976); Lemaster v. Burns, 130 Ill. App. 2d 918, 266 N.E.2d 114 (1971).
3. Evidence which does not logically tend to prove or disprove a disputed issue is excluded as being irrelevant. See, e.g., Marut v. Costello, 34 Ill. 2d 125, 214 N.E.2d 768 (1966); People v. Scott, 29 Ill.2d 97, 193 N.E.2d 814 (1963); Maltby v. Chicago G. W. Ry., 347 Ill. App. 441, 106 N.E.2d 879 (1952).
4. Consider, for example, the attorney-client privilege, the doctor-patient privilege, and the interspousal privilege, all of which were developed to serve policy objectives. For a complete discussion of these exclusions see Note, Privileges for Confidential Communication, 10 Loy. Chi. L.J. ___ (1979) (attorney-client and interspousal); Note, The Psychiatrist-Patient Privilege in Illinois, 10 Loy. Chi. L.J. ___ (1979).
5. The justification for excluding evidence of post-accident repairs is rarely discussed. In Hodges v. Percival, 132 Ill. 53, 23 N.E. 423 (1890), however, the exclusion was justified on policy and relevancy grounds. The court stated that repair evidence is irrelevant to the issue of negligence, since the implementation of repairs would not "necessarily imply" that prior measures had been unreasonable. Id. at 56, 23 N.E. at 424. The court's analysis was based on the theory of legal relevancy, under which circumstantial evidence was considered irrelevant unless it had more than a logical connection to the issue for which it was offered. See generally Slough, Relevancy Unravelled, 5 U. KAN. L. REV. 1, 10-11 (1956). This theory of relevancy has been rejected by Illinois courts. See, e.g., Marut v. Costello, 34 Ill. 2d 125, 128, 214 N.E.2d 768, 769 (1966); People v. Newsome, 291 Ill. 11, 20, 125 N.E. 735, 739 (1919). Evidence is now considered relevant if it has any tendency to make the proposition for which it is offered more or less likely to be true. Id. The implementation of repairs may often indicate that the repairing party has recognized the insufficiency of prior measures, especially when repairs are effected shortly after an accident. Consequently, it has been widely recognized that the exclusion is no longer justified under the modern concept of relevancy. See, e.g., E. CLEARY et. al., MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 275 at 663 (2d ed. 1972) [hereinafter cited as MCCORMICK (2d ed.)]; 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 417[021, 407-9 [hereinafter cited as WEINSTEIN].
6. As in the case of post-accident repairs, the early decisions dealing with offers of compromise excluded the evidence as being legally irrelevant to the issue of liability: the offer was viewed merely as an attempt to buy peace. See, e.g., Paulin v. Hower, 63 Ill. 312 (1872);
now generally believed, however, that the exclusion of such evidence is attributable to policy considerations.\(^7\)

This article will examine the Illinois rules excluding evidence of post-accident repairs and offers of compromise. It will evaluate the rules in light of the policy considerations they purportedly promote. Finally, it will identify the shortcomings of each rule and suggest alternative methods of dealing with the evidence.

**POST-ACCIDENT REPAIRS**

**Current Law**

Illinois, like the majority of jurisdictions,\(^8\) excludes evidence of post-accident repairs\(^9\) when it is offered as circumstantial proof of

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\(^7\) The repair rule is usually attributed to the policy of encouraging repairs. See notes 11 and 12, infra. See also McCORMICK (2d ed.), supra note 5, § 275, at 668; 2 WEINSTEIN, supra note 5, § 407(02) at 407-9. The compromise rule is attributed to the policy of encouraging out-of-court settlements. See notes 50-52, infra. See also Bell, supra note 6, at 251-52; McCORMICK (2d ed.), supra note 5, § 274 at 663; FED. R. EVID. 408, Advisory Comm. Notes. Indeed, because of the policy bases of the rules, McCormick believes they should be characterized as privileges. McCORMICK (2d ed.), supra note 5, § 74 at 153-54.


\(^9\) The term "repairs" has been broadly defined to encompass a variety of remedial measures, including changes in instructions, Dittmar v. Ahern, 37 Ill. App. 2d 167, 185 N.E.2d 146 (1962), and operations, Parnham v. Carl W. Linder Co., 36 Ill. App. 2d 224, 183 N.E.2d 744 (1962), as well as the addition of warnings, American State Bank v. County of Woodford, 55 Ill. App. 3d 123, 371 N.E.2d 232 (1978); Herrington v. Illinois Power Co., 79 Ill. App. 2d 431, 223 N.E.2d 729 (1967), or safety devices, Spurr v. LaSalle Constr. Co., 385 F.2d 322 (7th Cir. 1967); Marder, Luce & Co. v. Leary, 137 Ill. 319, 26 N.E. 423 (1891); Hodges v. Percival, 132 Ill. 53, 23 N.E. 423 (1890). It also has been interpreted as including precautionary measures such as placing a watchman at a railroad crossing following an accident. Village of Mount Morris v. Kanode, 98 Ill. App. 373 (1901); Cleveland, C. & St. L. R.R. v. Doerr, 41 Ill. App. 530 (1891). Other jurisdictions have recently dealt with the question of whether a manufacturer's recall letter could come within the ambit of the rule. It generally is held that they do, but such letters are admitted so long as there is other evidence which indicates that the accident was related to the defect addressed in the letter. See Annot., 84 A.L.R.3d 1220 (1978).
negligence. The exclusionary rule is based on the policy of encouraging individuals to make repairs which might prevent future injuries. It is believed that admitting such evidence would frustrate this policy because the implementation of repairs could be interpreted as an admission of prior negligence. Consequently, repair evidence is excluded when offered to prove fault, provided the repairs were made to the defendant's own property.

Despite this salutary purpose, evidence of repairs may reach the trier of fact in a variety of ways. When repairs are made by someone other than the defendant, the policy considerations favoring exclusion are considered inapplicable and the repairs may be used to prove that the defendant was negligent in failing to make the repairs himself. Admission is allowed in this situation even if the repairing party is joined as a co-defendant. Repairs may also be used to rebut other evidence or to explain conditions which existed at the time the plaintiff was injured. For example, in Chicago, P. & St. L. Ry. v. Lewis, the plaintiff was permitted to show that the defendant railroad had removed and replaced rotten ties following the derailment which caused the plaintiff's injuries. The court indi-


11. See notes 5 and 7, supra, and note 12, infra.

12. In establishing the exclusionary rule, the Illinois Supreme Court, in Hodges v. Percival, 132 Ill. 53, 23 N.E. 423 (1890), pointed out that:

Evidence of precautions taken after an accident is apt to be interpreted by a jury as an admission of negligence. . . . It would seem unjust that [defendant] could not take additional precautions after the accident without having his acts construed into an admission of prior negligence. Persons, to whose negligence accidents may be attributed, will hesitate about adopting such changes as will prevent the recurrence of similar accidents. . . .

Id. at 56, 23 N.E. at 424.

13. The exclusionary rule has been held inapplicable where repairs were made to another person's property. Plaza Express Co. v. Middle States Motor Freight, Inc., 40 Ill. App. 2d 117, 189 N.E.2d 382 (1963).


17. Chicago, P. & St. L. Ry. v. Lewis, 145 Ill. 67, 33 N.E. 960 (1893); City of Chicago v. Dalle, 115 Ill. 386 (1885).

18. 145 Ill. 67, 33 N.E. 960 (1893).
cated that such evidence was competent to establish the condition of the track at the time of the accident, and to rebut any inference that the tracks had not been changed prior to the trial.\textsuperscript{19}

Although evidence of repairs is generally excluded when offered to prove negligence, it may be used to establish certain elements of a negligence action. The defendant's duty to exercise reasonable care may be proven through repairs indicating his control or ownership\textsuperscript{20} of the property which caused the plaintiff's injuries. If this duty has already been established, a breach of the duty may be shown by comparing the cost of the repairs to the risk created by the prior condition of the property.\textsuperscript{21} In addition, evidence of repairs may be used to establish causation-in-fact.\textsuperscript{22} For example, where a plaintiff alleged that certain damage to his property had been caused by emissions from a neighboring roundhouse, he was permitted to show that damages ceased after the smokestacks on the roundhouse were raised.\textsuperscript{23}

Evidence of post-accident design changes is admissible in strict products liability actions to prove that the defendant's product was defectively designed because of his failure to incorporate feasible safety devices.\textsuperscript{24} Illinois courts initially refused to admit such evidence because the feasibility of alternative designs was not considered relevant in determining a manufacturer's liability.\textsuperscript{25} Following the adoption and expansion of strict liability theory,\textsuperscript{26} the feasibility

\textsuperscript{19} Id. at 78, 33 N.E. at 963.
\textsuperscript{20} Wallner v. Kitchens of Sara Lee, Inc., 419 F.2d 1028 (7th Cir. 1969); Larson v. Commonwealth Edison Co., 33 Ill. 2d 316, 211 N.E.2d 247 (1965); Murphy v. Illinois State Trust Co., 375 Ill. 310, 31 N.E.2d 305 (1940).
\textsuperscript{22} Dallas v. Granite City Steel Co., 64 Ill. App. 2d 409, 211 N.E.2d 907 (1965).
\textsuperscript{23} Kuhn v. Illinois C. R.R., 111 Ill. App. 323 (1903).
\textsuperscript{24} Id.
of alternative designs became recognized as a relevant consideration,\textsuperscript{28} and post-accident design changes were admitted when addressed to this issue.\textsuperscript{29} There is even some indication that design changes may be admissible to prove feasibility in products liability actions based solely on negligence.\textsuperscript{30} Nevertheless, because a jury might confuse the issues of feasibility and negligence, post-accident changes are excluded when offered to prove feasibility in actions lying outside the area of products liability.\textsuperscript{31}

Illinois courts have failed to explain why there should be so many permissible uses of repair evidence. Apparently, when the evidence is admitted its probative value is thought to be sufficient to outweigh any threat to the policy of encouraging repairs. However, some of the “exceptions” present no threat to that policy. Admitting post-accident design changes in products liability actions does not discourage repairs, since a variety of factors compel a manufacturer to improve a defective product, regardless of the admissibility of repair evidence.\textsuperscript{32} Admitting repairs made by someone other than the defendant may actually promote repairs by encouraging a po-

\textsuperscript{28} Sutkowski v. Universal Marion Corp., 5 Ill. App. 3d 313, 281 N.E.2d 749 (1972).


\textsuperscript{30} In Sutkowski v. Universal Marion Corp., 5 Ill. App. 3d 313, 281 N.E.2d 749 (1972), the court noted that:

\textit{In the development of product's liability principles design alternatives are appropriately considered whether reasonable care is the basis of liability or where liability is predicated upon strict tort liability. . . . In both cases it appears that policy considerations are involved which shift the emphasis from the defendant manufacturer's conduct to the character of the product. Such change in emphasis furnishes additional reasons for permitting evidence of alternative designs in a strict tort liability case. . . . If the feasibility of designs may be shown by the opinions of experts or by the existence safety devices on other products . . . we conclude that evidence of a post occurrence change is equally relevant and material in determining that a design alternative is feasible.}

\textit{Id. at 319, 281 N.E.2d at 753. The feasibility of alternative designs has been recognized as relevant in determining whether a defendant was negligent, Moren v. Samuel M. Langston Co., 96 Ill. App. 2d 133, 237 N.E.2d 759 (1968), and evidence of post-accident design changes has been admitted in one case pleading counts of negligence and strict liability. Moore v. Jewel Tea Co., 116 Ill. App. 2d 109, 253 N.E.2d 636 (1969), aff'd, 46 Ill. 2d 288, 263 N.E.2d 103 (1970).}


\textsuperscript{32} If the manufacturer does not effect repairs, he subjects himself to the possibility of extensive litigation, unfavorable publicity, and actions for non-compliance with various administrative regulations, all of which could amount to substantial economic losses. See Carmichael, \textit{Strict Liability in Tort—An Explosion in Products Liability Law}, 20 Drake L. Rev. 528 (1971).
tential defendant to promptly repair his property so as to qualify for the exclusionary rule's protection. 33

Nevertheless, the other "exceptions" to the exclusionary rule present a danger that the evidence will be interpreted as an admission of prior negligence. Because of this danger, repair evidence is admitted only when the plaintiff has no other means of addressing a disputed issue. 34 If the evidence is received, the defendant is entitled to a limiting instruction informing the jury to consider the repairs only on the issue to which they are properly addressed. 35 Moreover, the defendant may protect himself in some situations by admitting the issue the repairs are offered to prove. Admission takes the issue out of dispute and renders the evidence inadmissible. 36

Admitting evidence of post-accident repairs still presents a danger of jury misuse despite the protective measures which are available to the defendant. Whenever the evidence is admitted, a jury might ignore the limiting instruction and construe the repairs as an admission of prior negligence. By recognizing many permissible uses of repair evidence, Illinois courts have weakened the rule and prevented effective implementation of the policy which engendered it. It is therefore advisable to examine alternative ways of dealing with evidence of post-accident repairs.

Alternatives

There are two alternative methods of dealing with repair evidence. First, the exclusionary rule could be expanded so that repairs would rarely reach the trier of fact. If the exclusionary rule actually promotes repairs, expansion would be desirable. However, it would deprive the trier of fact of evidence which, in many situations, is relevant to the determination of a disputed issue. This directly contravenes the basic evidentiary policy of placing all relevant information before the trier of fact. Instead of using a broad rule of exclu-

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33. Note, Products Liability and Evidence of Subsequent Repairs, 1972 DUKE L.J. 837, 843 (1972). The admission of third party repairs may erode the protection afforded to the repairing party. Id.


35. Evidence which is admissible on one ground but inadmissible on another is always received subject to a limiting instruction. Mighell v. Stone, 175 Ill. 261, 51 N.E. 906 (1898); Chicago, R. I. & P. Ry. v. Clark, 108 Ill. 113 (1883); Eizerman v. Behn, 9 Ill. App. 2d 263, 132 N.E.2d 788 (1956).

36. Evidence which does not address an issue in dispute is excluded as being immaterial. See note 2, supra. Consequently, if the plaintiff offers evidence of repairs to establish the defendant's ownership of the property which caused the plaintiff's injuries, the defendant might admit his ownership and preclude introduction of the repairs. This tactic is discussed in Kennelly, Post-Accident Remedial Measures (Federal Rule of Evidence 407)—Suggested Discovery and Methods to Establish Admissibility, 21 TR. L. GUIDE 61 (1977).
Repairs—Offers of Compromise

sion, courts should be permitted to balance the probative value of repair evidence against the potential harm which would result from its admission. They appear to have done this already in formulating the many “exceptions” which are recognized under current law. Consequently, an expansion of the rule would not be desirable.

A second alternative would be to completely eliminate the exclusionary rule. The rule is based on the assumption that remedial measures would not be taken if repair evidence were admitted at trial. This assumption ignores a number of reasons why repairs might be made despite the admissibility of repair evidence. For example, the defendant may wish to make the property safe for his own use. Repairs might also be made in recognition of the fact that a failure to implement remedial measures could be used to prove negligence if a second person were injured at a later time. In addition, the existence of liability insurance suggests that repairs would continue to be made in the absence of the exclusionary rule. The rule protects a defendant from liability by excluding repair evidence. Insurance serves the same function by shifting the risk of liability from the defendant to the insurer. Consequently, the insured defendant need not hesitate to repair even if this could be used against him at trial. In fact, most insurance carriers require repairs to be made as a condition of continued coverage. In light of these considerations, and the fact that most persons are unaware of the protection afforded by the exclusionary rule, it would appear that the assumption underlying the rule is unfounded and the rule itself is unnecessary to insure that individuals will make post-accident repairs. The rule should be eliminated.

If the rule were eliminated, as it has been in Maine, the admissi-
bility of repair evidence would be governed by the standard evidentiary procedure of balancing its probative value against its potential prejudicial effect. Courts could still protect a defendant from prejudicial uses of repair evidence, but they would be free to admit the evidence if its probative value outweighed any harm which the defendant might experience. Admitting repair evidence would not harm a non-negligent defendant, since he would be able to show that his property was reasonably maintained at the time of the accident and that his post-accident repairs simply made the property safer. This would dispel any negative inference which might be drawn from the fact that repairs had been made. On the other hand, if the defendant had failed to reasonably maintain his property, the plaintiff could show this through repairs made after the accident. This would further the basic tort policy of awarding damages to persons injured as a result of another's negligent acts.

As presently administered, the exclusionary rule thwarts this policy by keeping relevant information from the trier of fact and providing an artificial barrier to recovery from negligent parties.

Notification of Defect:
(b) Notification of defect. A written notification by a manufacturer of any defect in a product produced by such manufacturer to purchasers thereof is admissible against the manufacturer on the issue of existence of the defect to the extent that it is relevant.

A minority of the committee which produced the proposed Illinois Rules of Evidence advocated the elimination of the exclusionary rule because of 1) the many exceptions to the rule; 2) the extensive use of liability insurance; and, 3) the fact that most defendants are unaware of the rule. PROPOSED ILL. R. EVID. 407, Minority Discussion (Final Draft). Nevertheless, the majority adopted PROPOSED ILL. R. EVID. 407 (Final Draft) which closely parallels FED. R. EVID. 407 and makes no substantive changes to Illinois common law. PROPOSED ILL. R. EVID. 407 states:

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 proving ownership, control, or feasibility of precautionary measures or impeachment.

The majority's decision to retain the rule was based upon the belief that the "exclusion of repair evidence serves the social purpose of encouraging people to take, or at least not discourage them from taking, steps in furtherance of added safety." PROPOSED ILL. R. EVID. 407, Majority Discussion (Final Draft).

43. The admissibility of evidence which is not subject to an exclusionary rule is determined through this balancing process. See, e.g., People v. Taylor, 410 Ill. 469, 102 N.E.2d 529 (1951); Hulsebus v. Russian, 118 Ill. 2d 174, 254 N.E.2d 184 (1969).
44. Note, The Repair Rule: Maine Rule of Evidence 407(a) and the Admissibility of Subsequent Remedial Measures in Proving Negligence, 27 Me. L. Rev. 225, 244 (1975).
46. Illinois courts continue to recognize the defenses of assumption of risk and contribu-
The exclusionary rule serves no valid purpose. It should be eliminated and courts should be allowed to determine the admissibility of repair evidence on a case by case basis by balancing its probative value against its potential prejudicial effect.

**OFFERS OF COMPROMISE**

**Current Law**

Compromise evidence, like evidence of repairs, is generally excluded when offered to establish the existence or extent of a party's liability. The exclusion is based on the policy of encouraging out-of-court settlements. By settling out of court, individuals avoid the trouble and expense of litigation and the judicial system is relieved of the burden of trying unnecessary lawsuits. It has been recognized that a trier of fact might interpret an offer of compromise as an admission of liability or weakness of position. Since this possibility might discourage individuals from settling, a broad exclusion is applied to offers of compromise.

The exclusion applies to compromise evidence offered by or to


47. See, e.g., Barker v. Bushnell, 75 Ill. 220 (1874); Paulin v. Howser, 63 Ill. 312 (1872); City of Peru v. French, 55 Ill. 317 (1870); People v. Kilbride, 16 Ill. App. 3d 820, 306 N.E.2d 879 (1974).


50. Ross v. Danter Assoc., 102 Ill. App. 2d 354, 242 N.E.2d 330 (1968); Adkins v. Blue Bird Coach Lines, Inc., 27 Ill. App. 2d 34, 169 N.E.2d 368 (1960); Gehm v. People, 87 Ill. App. 158 (1899). This policy also serves as the primary basis for Federal Rule of Evidence 408. FED. R. EVID. 408, Advisory Comm. Notes. For a discussion of the various other justifications which have been used in other jurisdictions see Bell, supra note 6, at 251-52.

51. Bell, supra note 6, at 252.

52. In Gehm v. People, 87 Ill. App. 158 (1899), it was noted that:

A mere unaccepted offer to pay a sum in compromise of a suit or claim is not admissible in evidence against a party, on grounds of public policy. An innocent party has a right to buy his peace and thus avoid suit. If such an offer could afterward be given in evidence against the party making it, and used as a tacit admission of liability, no attempt to compromise a suit would ever be made.

Id. at 159-60.

against another party who made the settlement attempt. It prohibits the introduction of evidence relating to third party negotiations as well as those conducted between the parties themselves. It may also exclude evidence of accepted but unperformed offers of compromise. Several early cases implied that such evidence might be admissible, apparently because the non-performing party could be sued for his breach. It has been noted, however, that the determination of admissibility should not be affected by the acceptance of an offer and, as of this date, no court has admitted evidence of an accepted but unperformed offer of compromise. Many forms of compromise negotiations are excluded under current law, including loan agreements, consent judgments, and covenants-not-to-sue. At one time, offers to pay or actual payments of an injured party's medical expenses were admitted as admissions against interest. By admitting such evidence while continuing to exclude offers of compromise, Illinois courts often produced inconsistent results since the admissibility of evidence depended upon whether it was characterized as an attempt to settle or an offer to pay medical expenses. Recent legislation has eliminated this problem by declaring inadmissible offers to pay or actual payments of a party's medical expenses. This legislation is particu-

54. See notes 47-49, supra.
56. See notes 47 and 48, supra.
57. See, e.g., Paulin v. Howser, 63 Ill. 312 (1872); City of Peru v. French, 55 Ill. 317 (1870).
58. Bell, supra note 6, at 258-59.
59. But see Chicago E. & L. S. R.R. v. Catholic Bishop of Chicago, 119 Ill. 525, 10 N.E. 372 (1887). The facts are unclear but it appears that following the acceptance of a compromise offer one party reneged. Nevertheless, evidence regarding the offer was excluded.
66. ILL. REV. STAT. ch. 51, § 61 (1967) provides:
§ 61. Payment or offer to provide or pay for medical, etc., services—
  Effect—Admissibility of evidence
  The providing of, or payment for, medical, surgical, hospital, or rehabilitation services, facilities, or equipment by, or on behalf of any person, or the offer to provide, or pay for any one or more of the foregoing, shall not be construed as an
larly important in light of the advance payment programs adopted by many insurance companies. Nevertheless, payments which exceed an amount necessary to cover medical expenses are still admissible as an admission against interest.

To preserve the integrity of the exclusionary rule, Illinois courts consistently exclude compromise evidence when it is offered to establish an issue other than liability. Compromise offers are excluded when offered to prove an agency relationship between the defendant and the individual who caused the plaintiff's injuries. They are also excluded when offered to show the amount of a party's damages, even when it is alleged that a party failed to mitigate damages by refusing to accept a reasonable offer or that the amount of admission of any liability by such person or persons. Testimony, writings, records, reports or information with respect to the foregoing shall not be admissible in evidence as an admission of any liability in any action of any kind in any court or before any commission, administrative agency, or other tribunal in this State, except at the instance of the person or persons so making any such provision, payment or offer.


Federal rule 409 states that evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury. Under that rule, however, any statement or conduct made in conjunction with an offer or payment of medical expenses may be admitted because communication is considered unnecessary "in cases of payments or offers or promises to pay medical expenses." Fed. R. Evid. 409, Advisory Comm. Notes. The Illinois statute appears to provide the paying party more protection than the federal rule since "[t]estimony, writings, records, reports or [other] information" relating to an offer or payment of medical expenses is excluded unless offered by him. Ill. Rev. Stat. ch. 51, § 61 (1977). Proposed Illinois Rule of Evidence 409 might have eliminated this additional protection, since it adopted the language of the federal rule.

67. Recognizing the hardship faced by injured plaintiffs during the period between injury and recovery, insurance companies have instituted advance payment programs through which plaintiffs are advanced funds to be credited against any sum later recovered against the insured defendant. For a discussion of such programs, see Carpenter, The Legal Aspects of Partial Payments Made on Liability Claims in Advance of Final Settlement, 1967 ABA SECTION OF INSURANCE, NEGLIGENCE, AND COMPENSATION LAW PROCEEDINGS 499. See also Annot., 25 A.L.R.3d 1091 (1969).


69. It has been noted that exceptions to the exclusionary rule should not be permitted since "it is a practical impossibility to eradicate from the jury's minds the considerations that where there has been a payment there must have been liability." Fenberg v. Rosenthal, 348 Ill. App. 510, 518, 109 N.E.2d 402, 405 (1952).


72. Smiley v. Manchester Ins. & Indem. Co., 49 Ill. App. 3d 675, 364 N.E.2d 683 (1977). In Smiley, an insurance company was sued for an alleged bad faith refusal to settle within
damages is insufficient to invoke the court's jurisdiction. Unlike the majority of jurisdictions, Illinois excludes compromise offers even when they are used to impeach a witness, except in unusual circumstances where testimony has been procured through fraud or other questionable means.

Despite the courts' adherence to the general rule of exclusion, compromise evidence has been received in a handful of situations. As in the case of repair evidence, there has been no adequate explanation for the "exceptions" to the exclusionary rule. Again, one must assume that where the evidence has been admitted its probative value was considered more substantial than its threat to the policy of encouraging settlements. Thus, letters containing the terms of a contract upon which a suit was brought have been admitted even though the letters also contained offers of compromise. Compromise evidence has also been admitted when used to prove the waiver of a contract term or to show that an employee was injured while acting within the scope of his employment. Finally, when the defendant has invoked the statute of limitations as a defense, the plaintiff has been permitted to use compromise evidence to explain the limits of an insured's policy. The company filed a third-party claim against its attorney who had allegedly failed to settle, despite the company's order to do so. When the attorney attempted to show that the company failed to mitigate its damages by refusing to accept a compromise offer made by the plaintiff, the evidence was excluded on the grounds that "the rule allowing the admissibility of evidence of failure to mitigate damages must yield to the public policy inherent in the rule that the offers of compromise may not be shown except in unusual circumstances." Id. at 681. 364 N.E.2d at 688. The court indicated, however, that the evidence would be admissible in a second trial limited to the issue of damages once the company's liability had been established. Id. This bifurcated approach is also used to credit a defendant for any payments which may have been received by the plaintiff. Ross v. Danter Assoc., 102 Ill. App. 2d 354, 242 N.E.2d 330 (1968).

76. This limited exception was suggested in Fenberg v. Rosenthal, 348 Ill. App. 510, 518, 109 N.E.2d 402, 405 (1952), and it has been applied in two cases involving loan agreements made between a plaintiff and one of several defendants who agreed to testify on behalf of the plaintiff. Reese v. Chicago, B. & Q. R.R., 55 Ill. 2d 356, 303 N.E.2d 382 (1973); American State Bank v. County of Woodford, 55 Ill. App. 3d 123, 371 N.E.2d 232 (1978).
his delay in bringing suit. To protect the defendant in this situation, a preliminary trial is held to determine whether the defendant used compromise negotiations to induce the plaintiff to forsake filing his claim. If it is found that this occurred, a new jury is impaneled and a second trial is held to determine the defendant's liability. Through this arrangement, offers of compromise are kept from the jury which determines the defendant's liability. Of course, whenever compromise offers are admitted, the defendant is entitled to a limiting instruction.

The courts' broad application of the exclusionary rule and their reluctance to recognize permissible uses of compromise evidence indicate a clear intent to protect the policy of encouraging out of court settlements. Courts, however, do not protect independent statements of fact which are made without recourse during compromise negotiations. In other words, if a party expressly or implicitly admits a fact during negotiations, the admission may be used at trial to prove liability, unless he qualifies the admission as being made in confidence or without prejudice. Under this rule, repayment negotiations may be used by a creditor to establish a debtor's liability, even where the parties have never established the amount actually owed. Similarly, payments made before a demand may be used to show liability unless the paying party had reasonable

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82. See note 35, supra.
85. Ross v. Danter Assoc., 102 Ill. App. 2d 354, 242 N.E.2d 330 (1968). In Ross the defendant was sued for his failure to perform a construction contract. A check which had been sent by the defendant to the plaintiff was admitted as an admission of liability because in sending the letter the defendant had failed to indicate that it was intended to be a settlement for his failure to perform.
89. Morgan v. Norfolk & W. Ry., 473 F.2d 1278 (7th Cir. 1973); Maulding v. Louisville & Nashville R.R., 168 F.2d 880 (7th Cir. 1948).
grounds to believe that a claim would be made against him.\textsuperscript{90}

Illinois admits independent statements of fact made during negotiations, reasoning that no protection should be afforded to matters which are not in dispute.\textsuperscript{91} Admitting such statements, however, produces several undesirable results. It hinders communication between the parties because they must be extremely cautious to avoid making an admission which could later be used against them.\textsuperscript{92} Litigation is prolonged as attorneys sift through compromise negotiations in the hope of finding an admission which could be used against the opposing party.\textsuperscript{93} Moreover, admitting such evidence serves as a trap for persons who are unaware that their statements are unprotected unless made "without recourse."\textsuperscript{94} It also decreases the predictability of outcome since it is difficult to predict whether a court will characterize a statement as an independent admission or as an integral part of a compromise offer.\textsuperscript{95} Consequently, the admission of independent statements of fact is a major problem under current law.

\textit{Alternatives}

The rule excluding offers of compromise has a valid basis. Although persons particularly adverse to litigation might continue settlement attempts in its absence, nothing indicates that this would generally occur.\textsuperscript{96} Moreover, by broadly applying the rule and recognizing few "exceptions" to it, Illinois courts have preserved its integrity.

\begin{itemize}
\item \textsuperscript{90} Hill v. Hiles, 309 Ill. App. 321, 32 N.E.2d 933 (1942).
\item \textsuperscript{91} Smothers v. Cosgrove-Meehan Coal Co., 264 Ill. App. 488 (1932).
\item \textsuperscript{92} Tracy, \textit{Admissibility of Statements of Fact Made During Negotiation for Compromise}, 34 Mich. L. Rev. 524, 529 (1936) [hereinafter cited as Tracy]. The only way an offering party can effectively protect himself is to limit his remarks to the offer itself. If he so much as indicates that he is sorry for what had happened, his statements will be admissible against him. See Dertz v. Pasquina, 59 Ill. 2d 68, 319 N.E.2d 12 (1974) (offering party's statement that she was sorry for what happened and would pay for damages to co-defendant's car was no more than an "expression of regret" which could be introduced against her).
\item \textsuperscript{93} Bell notes that "It is a common court room scene to find the attorneys busily engaged in dissecting any settlement efforts of the parties in an attempt to locate a morsel of evidence." Bell, \textit{supra} note 6, at 239.
\item \textsuperscript{94} Bell, \textit{supra} note 6, at 256. \textit{See also} Tracy, \textit{supra} note 92, at 528-30.
\item \textsuperscript{95} \textit{Weinstein}, \textit{supra} note 5, § 408(03), at 21-22.
\item \textsuperscript{96} It might be expected that most people would avoid making an offer if it could be used against them as an admission of liability, unless a very small amount were involved. Furthermore, unlike the situation under the repair rule, there do not appear to be any significant pressures which would compel an individual to attempt a settlement in the absence of the exclusionary rule. Therefore, it is reasonable to conclude that the protection afforded by the exclusion actually encourages individuals to settle out of court.
\end{itemize}
The basic problem under current law lies in the fact that independent statements of fact made during negotiations may be used at trial. Admitting such evidence frustrates the policy of encouraging out of court settlements because it hinders communication and decreases the predictability of outcome. Expanding the exclusion to cover independent statements of fact might deprive the trier of fact of relevant information in some situations, but it would also remove a substantial deterrent to candid negotiation and thereby promote the policy of encouraging settlements. Consequently, the rule should probably be expanded to cover such statements. The federal rules of evidence have already accomplished this expansion. The expansion, however, should be broader than that of the federal rules, for it should extend not only to statements made in conjunction with an offer of compromise but also to those made with reference to an offer to pay medical expenses. To differentiate between the two situations creates a danger of inconsistent results, since courts could characterize similar conduct in different ways.

CONCLUSION

Evidence of post-accident repairs and offers of compromise are generally excluded to promote the policies of encouraging repairs and out-of-court settlements. The compromise rule, which is broadly applied and subject to few exceptions, represents a valid means of promoting public policy. Nevertheless, the effectiveness of...
the rule would be enhanced if the rule were expanded to cover independent statements of fact made during compromise negotiations.

The repair rule is a striking contrast to the rule excluding offers of compromise. Whatever protection the repair rule provided in the past has been substantially eroded by a series of increasingly broader exceptions. Moreover, a variety of factors indicate that the rule is unnecessary to encourage individuals to make repairs. It is time to acknowledge that the rule no longer serves a valid purpose by completely eliminating the rule itself.

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