“The Privilege of Self-Critical Analysis”

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I. INTRODUCTION

Corporate defendants throughout America and particularly in West Virginia are facing an increased risk of multi-million dollar lawsuits in products liability cases. Many of these companies choose to partake in self-examination, evaluating their products’ performance, design, benefits, and setbacks both for preparation for litigation and improvement of product quality and safety. However, many companies have become hesitant to partake in this sort of frank self-evaluation for fear that this information will become discoverable and may be used not only to prove liability on the part of the company, but also to award punitive damages.\(^1\) The privilege of self-critical analysis would provide a means for companies to engage in self-analyses of their products without the fear of the information becoming discoverable. This article will discuss the history of the privilege, the privilege as it has been applied in the products liability context and the policy reasons that this privilege should be considered in West Virginia.

II. BACKGROUND

Both the Federal Rules of Evidence and the West Virginia Rules of Evidence recognize the role of privilege as it relates to discovery.\(^2\) Rule 501 of the West Virginia Rules of Evidence states as follows:

> [t]he privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law except as modified by the Constitution of the United States or West Virginia, statute or court rule.\(^3\)

As a result, information can be privileged in West Virginia if recognized as such either by the Supreme Court of Appeals or if codified by the legislature. Examples of privileges recognized

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\(^1\) See Paul B. Taylor, Encouraging Product Safety Testing by Applying the Privilege of Self-Critical Analysis When Punitive Damages are Sought, 16 HARV. J.L. & PUB. POL’Y 769 (Autumn 1993) (discussing the use of these self-examinations to prove the knowledge requirement for punitive damages).


\(^3\) W. VA. R. EVID. 501.
throughout the United States and in West Virginia include the attorney-client privilege and the work product privilege. These particular privileges are defined by the common law and vary from jurisdiction to jurisdiction as to how they are accepted and applied. One lesser known and oft-applied privilege is the privilege of self-critical analysis. This privilege protects from discovery certain self-evaluations and analyses performed by a party prior to litigation. The rationale behind the existence of this privilege is that it allows parties to engage in self-evaluation without fear of litigation.

The privilege of self-critical analysis was first applied in principle in *Bredice v. Doctors Hospital Incorporated*. In *Bredice*, the court held that minutes of hospital meetings regarding improvement of patient care were protected from discovery in a medical malpractice case. The court reasoned:

> [t]he purpose of these staff meetings is the improvement, through self-analysis, of the efficiency of medical procedures and techniques. They [the meetings] are not part of current patient care, but are in the nature of retrospective review of the effectiveness of medical procedures. The value of discussions and reviews in the education of doctors who participate, and the medical students who sit in, is undeniable. This value would be destroyed if the meetings and the names of those who are participating were to be open to the discovery process.

In addition, the *Bredice* court reasoned that the public interest in having hospitals critically evaluate the quality of care provided to patients outweighed the need for the plaintiff to discover this information. Since the *Bredice* decision, the self-critical analysis privilege has been applied in a variety of cases.

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5 Id.
6 50 F.R.D. 249, aff’d, 479 F.2d 920 (D.C. Cir. 1973).
7 See id.
8 Id. at 250.
9 Id. All fifty states plus the District of Columbia have codified the peer review privilege as it was originally recognized in *Bredice*. See Miles J. Zaremski & Louis S. Goldstein, *Medical and Hospital Negligence*, § 44A:07 n.
In the development of the privilege, courts have recognized four factors that must be reviewed before the privilege is applicable:

(i) is the document to be protected a self-critical analysis;
(ii) does the public have a strong interest in protecting the free flow of such self-criticism;
(iii) will the free flow of such information be impaired if discovery were allowed; and
(iv) is the analysis intended to be confidential and maintain such confidentiality.\(^\text{11}\)

The burden of establishing that these criteria have been met rests on the party seeking to assert the self-critical analysis privilege.\(^\text{12}\) Subsequently, should a company wish to utilize such a privilege in a products case, the company must establish that each of these factors has been met with regard to its product analysis.

The first and the fourth factor can be controlled by the company performing the evaluation of its products.\(^\text{13}\) The first factor will hinge on whether the information sought to be protected is factual information or an actual analysis.\(^\text{14}\) Factual information will typically be discoverable under this privilege, where the actual analyses of the facts will not. The fourth factor, confidentiality, may also be controlled by the company. Companies restricting distribution of such analyses on a “need to know” basis would bolster an argument that these analyses should be privileged.\(^\text{15}\)

Evaluation of the second and third factors will vary on a case-by-case basis. One possible concern is the “chilling effect” that disclosure of corporate internal investigations will
have on an industry’s or corporation’s future attempts to monitor and improve safety. This rationale was considered by the case Hickman v. Whirlpool Corporation. The plaintiff in this case brought suit relating to injuries obtained in an industrial accident. The plaintiff wished to discover minutes from Whirlpool corporate officials regarding the accident. The court held that such information is not discoverable because the documents contained self-critical analysis, and that the “public has a strong interest in preserving this type of data collection within industries.” The court based its decision on the grounds that disclosure would cause irreparable harm to Whirlpool’s efforts to improve safety, and to industry as a whole; further, the court reasoned that public policy favored such efforts to improve safety.

III. THE APPLICATION OF THE PRIVILEGE TO PRODUCTS CASES

State courts have had rare occasion to address the application of the self-critical analysis privilege in products liability cases. However, the self-critical analysis privilege has been recognized in the products liability context on the federal level. One such case applying the privilege is Bradley v. Melroe Company. In Bradley, plaintiff was injured while using a product manufactured by the defendant. During discovery, the plaintiff became aware of seven similar accidents involving the same or similar product. Defendant objected to the discoverability of the analysis surrounding these accidents. While the court allowed discovery

18 Id.
19 Id.
21 Whirlpool, 186 F.R.D. 362.
23 Id.
24 Id.
25 Id.
of the factual information surrounding the accidents, the court declined to allow discovery of the remainder of the reports based on the self-analysis privilege.26

[M]anufacturers study reports of accidents involving their products for the purpose of ascertaining if preventative measures can be taken to avoid future accidents. In such cases, courts have recognized the privilege of self-critical analysis precluding the discovery of impressions, opinions and evaluations but allowing the discovery of factual data. The reasoning behind this approach is that the ultimate benefit to others from this critical analysis of the product or event far outweighs the benefits of disclosure. Valuable criticism could not be obtained under the threat of potential or possible public exposure, for it is not realistic to expect candid expressions of opinions or suggested changes in policies, procedures or processes knowing that such statements or suggestions may very well be used against colleagues and employees in subsequent litigation.27

Scholars have argued that the self-critical analysis privilege should be applied to products liability cases, particularly in the context of punitive damages. “Because a plaintiff must prove that the defendant had knowledge of the harmful effects of its product before punitive damages can be granted, such awards may deter firms from conducting safety research in the hopes of eluding this knowledge requirement.”28 Applying the privilege of self-critical analysis to safety testing and design evaluations when punitive damages are at issue would greatly “reduce the threat to firms of punitive damages” and provide corporations with incentive to generate more information through additional research and testing.29

IV. SHOULD WEST VIRGINIA ADOPT THE PRIVILEGE IN PRODUCTS CASES?

The West Virginia Supreme Court of Appeals has not addressed the application of the self-critical analysis privilege in a products liability case. West Virginia has adopted a statutory

26 Id.
27 Id. “Bradley illustrates an important point of the scope of the self-analysis privilege. While it is uncertain in each case to what extent theories, impressions, and recommendations for self-improvement can be protected, it is indisputable that all factual determinations and facts contained in any internal accident reports are properly producible and are not subject to the privilege.” Michael J. Holland, The Self Critical Analysis: Obscuring the Truth But Safeguarding Improvement?, A.B.A. Practice Tips, 25-FALL Brief 52, 54 (1995).
29 Id. at 802-803.
peer review privilege, as first applied in *Bredice*, the pre-cursor to the self-analysis privilege.\(^{30}\)

The Supreme Court of Appeals, when analyzing this statute, stated as follows:

> [T]he purpose of the legislation is … to ensure the effectiveness of professional self-evaluation, by members of the medical profession, in the interest of improving the quality of health care. The Act is premised on the belief that, absent the statutory peer-review privilege, physicians would be reluctant to sit on peer review committees and engage in frank evaluations of their colleagues.\(^{31}\)

In addition, “the enactment of peer review statutes represents the legislative realization that self-policing within the medical community is vital.”\(^{32}\) The Court acknowledged that without peer review statutes, “doctors would be reluctant to engage in strict peer review due to a number of apprehensions: loss of referrals, respect, and friends, possible retaliations, vulnerability to torts, and fear of malpractice actions in which the records of the peer review proceedings might be used.”\(^{33}\)

The same policy analysis can be used as to why West Virginia should consider adopting the privilege of self-critical analysis in the products liability context, either through common law or by statute. Currently, absent such a privilege, companies may be reluctant to engage in frank self-evaluations of their products. In addition, just as self-policing within the medical community is vital, it is also vital that companies attempt to analyze and improve products that they are releasing into the stream of commerce. Without this privilege, companies and their employees may be concerned with possible retaliations, vulnerability to tort action and punitive damages, and injury to a company’s reputation should the results of such evaluations be released.

\(^{30}\) W.Va. Code §§ 30-C-1 to 30-C-3.


\(^{32}\) *Id.*

\(^{33}\) *Id.* at 774.
In addition, West Virginia has also recognized and codified Rule 407 of the Federal Rules of Evidence governing subsequent remedial measures.\textsuperscript{34} Rule 407 provides that when measures are taken after an event which would make the event less likely to occur, evidence of subsequent remedial measures is not admissible to prove negligence of the event.\textsuperscript{35} The public policy behind Rule 407 is analogous to the policy behind the privilege of self-critical analysis, to encourage corporations to take steps toward added safety of the public.\textsuperscript{36} Looking at this analogy, one can conclude that not only is it in the public’s best interest for products to be repaired after they malfunction, it is also in the best interests of the public that corporations perform analyses of their products, to attempt to expeditiously determine if the product is functioning properly, if the product could be defective, and whether the product is performing well in the market. Performing these analyses without the fear of the information being discoverable or made public would enable corporations to better manufacture products that are safe and effective for public use.

V. CONCLUSION

Today’s society is an extremely litigious environment. In addition, based on West Virginia’s judicial environment, companies are increasingly vulnerable to multi-million dollar products liability suits in this state. By adopting the privilege of self-critical analysis, either statutorily or by common law, West Virginia would not only provide benefit to these companies but also to the general public. Allowing companies to engage in forthright evaluation of their products without fear of discovery of this information or threat to reputation will increase the

\textsuperscript{34} W. VA. R. EVID. 407.
\textsuperscript{35} Id.
quality of these companies’ products. In addition, this evaluation will ultimately and most importantly benefit the citizens of West Virginia, who can be assured of an increase in safety and performance of these products.