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Admitting subsequent repairs into evidence

UNDERSTANDING AND COMBATING THE SUBSEQUENT-REMEDIAL-MEASURES-EVIDENCE EXCLUSION IN A PREMISES CASE

"Your Honor, admitting this type of evidence would be bad for society!"

Lawyers sometimes use "public policy" arguments like this to keep damaging evidence away from a jury. Instead of focusing on the case at issue, a lawyer arguing "public policy" tells the court that if a category of evidence were generally admissible, society would suffer. While there is certainly a time and place for public policy arguments, evidence rules based on public policy can give a clever defense attorney a mechanism to keep otherwise admissible evidence away from the jury. One of these public policy evidence rules is the prohibition on evidence of "subsequent remedial measures."

In this article, we look at what the subsequent remedial measures exclusion is supposed to exclude and how you can get helpful evidence admitted over a defense objection or motion in limine.

What are subsequent remedial measures?

A subsequent remedial measure is a repair or other action taken after an injury or harm that had it been taken earlier would have made the harm less likely to occur. The exclusion of evidence of subsequent remedial measures to prove negligence comes from Evidence Code section 1151:

> When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event.

(Evid. Code, § 1151.)

Basically, if a landowner, product developer or other defendant later fixed the problem that caused an injury, evidence that she made these repairs is

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inadmissible to prove her earlier negligence in not having made them. The rationale for the rule is that corrective action after an injury is good for society and therefore should not be used to establish that the defendant should have made the change sooner. This rule makes sense. Imagine someone was hurt by a broken staircase on a premises. A well-meaning landowner may want to fix the staircase so that others would not be hurt the same way. But if that landowner thought that making the repair could be used against him as an admission of wrongdoing, he may be less likely to fix the stairs. And those broken stairs would then put future people in danger.

With that in mind, California courts and the legislature have developed the exclusionary subsequent remedial measures rule. Courts have held that society does not want to deter landowners and shopkeepers from trying to make their property and establishments safer by disincentivizing them from taking corrective measures that make injuries less likely to occur in the future. (*Ault v. International Harvester Co*. (1974) 13 Cal.3d 113, 119 ["courts and legislatures have frequently retained the exclusionary rule in negligence cases as a matter of 'public policy,' reasoning that the exclusion of such evidence may be necessary to avoid deterring individuals from making improvements or repairs after an accident has occurred."])

Based on Evidence Code section 1151 and caselaw, California courts will find evidence of subsequent remedial measures to be inadmissible if offered to prove negligence or other culpable conduct.

Luckily, there are several other ways to get such evidence admitted at trial.

What is the evidence at issue?

Before you can argue that evidence of a subsequent remedial measure should be admitted, you must find out what happened. In a premises case, the easiest way to determine if a subsequent remedial measure was taken is to visit the premises with your expert.

If the premises is open to the public, you can have your expert inspect it without notifying the defendant. (*Pullin v. Superior Court* (2000) 81 Cal.App.4th 1161.) If the premises is private property, you must use formal discovery channels to inspect it. One way to do this is by sending a notice of site inspection. (Code Civ. Proc., § 2031.010.) Although your defendant may challenge your right to do this, a party has a right to inspect the property at issue. (Code Civ. Proc., § 2031.010, subd. (a) [any party may obtain discovery by inspecting land or other property in the possession, custody, or control of any other party to the action].) In most situations, a subsequent remedial measure will be immediately apparent during the site inspection.

Continuing our staircase example: If you and your expert visit the stairs and see that what once was crumbling is now clean and well repaired, you can expect that the defendant will seek to exclude photographs of the current condition of those stairs.

If you are unable to visit the site, another way to find out if there have been repairs is through written discovery. Special interrogatories, requests for admissions, and document requests may be used to gather information.

Often defense counsel will object to this type of discovery request and refuse to respond or provide documents, citing Evidence Code section 1151. When you meet and confer on this issue, point out that the rule against subsequent remedial measures is one of admissibility, not discoverability. (*Bank of the Orient v. Superior Court* (1977) 67 Cal.App.3d 588, 599 ["...section [1151] is a prohibition on the admissibility of evidence at trial. It does not purport to limit the scope of discovery."]) You may need to file a motion to compel further responses to obtain information or any photos of the subsequent remedial measure through special interrogatories, production requests or requests for admissions. In that motion be sure to remind the court that the discovery rules specifically allow discovery of any matter "if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (Code Civ. Proc., § 2017.010.) Evidence of a subsequent remedial measure is discoverable even if it is eventually deemed inadmissible.

The mechanisms for excluding evidence

If you do get evidence of subsequent remedial measures through inspection, discovery, or otherwise, the defense may file a motion in limine to exclude that evidence. Defense counsel will often file motions in limine for any unfavorable evidence that might conceivably fit within Evidence Code section 1151. This could include photographs of a dangerous site taken shortly after a fall that show that something was done to address the dangerous condition. If a defendant files a motion based on Evidence Code section 1151, then the burden is on the plaintiff to show a proper purpose for the evidence. (Evid. Code, § 354, subd. (a).)

If a defendant does not file a motion in limine or if the trial judge decides not to consider the issue until it comes up in trial, then the defense may object during trial. As with a motion in limine, if the defendant raises an objection based on Evidence Code section 1151 during trial, the burden is on the plaintiff to show a proper purpose for the evidence. (Evid. Code, § 354, subd. (a).)

If defense counsel fails to make a proper Evidence Code section 1151 objection, the jury may consider any admitted subsequent remedial evidence for any purpose. If you do get evidence of a subsequent remedial measure admitted, then the Court *upon request* may restrict the evidence to its proper purposes (i.e., impeachment, acknowledgment of duty, control, feasibility, and repairs made by a third party) and instruct the jury to disregard it for any other purpose. (Evid. Code, § 355.) However, the court has no sua sponte duty to give limiting instructions. (*Daggett v. Atchison, T. & S. F. Ry. Co*. (1957) 48 Cal.2d 655, 664.)

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Getting evidence of a subsequent remedial measure admitted

Evidence of a subsequent remedial measure can profoundly impact a jury. This reason, more than any public policy justification, is why the defense often seeks to exclude such evidence. If a jury were to see evidence of a subsequent repair, it may decide that if the repair were done earlier, it could have prevented the injury. But that is not the only value of this evidence. For example, subsequent remedial measures evidence may also show the jury that there were measures available to the defendant that could have made the property or establishment safer prior to the incident. The jury could then infer that the defendant was negligent for not taking these measures.

Evidence Code section 1151 implicitly acknowledges that there are reasons why subsequent remedial measures evidence should be admitted. The language of Evidence Code section 1151 is quite narrow. It only prohibits subsequent remedial measures evidence when "*evidence of such subsequent measures* is inadmissible *to prove negligence or culpable conduct* in connection with the event." (Evid. Code, § 1151 (emphasis added).) If evidence shows remedial measures but is offered for a different purpose, section 1151 does not require that it be excluded. It is well recognized that evidence that includes subsequent remedial measures may be admissible for other purposes. (Evid. Code, § 355; *Wilson v. Gilbert* (1972) 25 Cal.App.3d 607, 615; *Alpert v. Villa Romano Homeowners Assn*. (2000) 81 Cal.App.4th 1320, 1341.) In premise liability cases, these purposes include control, feasibility, acknowledgment of duty, impeachment, and repairs made by a third party. We look at each of these below:

Control

Evidence of a subsequent remedial measure may be admitted to show that defendant had control of the premises. (*Morehouse v. Taubman Co*. (1970) 5 Cal.App.3d 548, 555; *Alpert v. Villa Romano Homeowners Assn.* (2000) 81 Cal.App.4th 1320, 1340.) "Evidence of repairs, improvements, safety precautions, or like remedial or preventive measures taken after an injury may be admitted for the purpose of establishing that at the time of the accident, the defendant owned or controlled the place, thing, or activity which occasioned the injury, at least where ownership or control is controverted, and subject to other appropriate limitations." (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1168.) When a defendant disputes that it had control of the premises, evidence of subsequent remedial measures can be admitted to show that it did. Often, this will happen when the dangerous condition is not technically located on the defendant's property, but the defendant nevertheless maintains the area where the dangerous condition is located. An example of this is when a homeowners' association places a warning sign about an uneven, municipality-owned sidewalk leading up to its building. This would be a subsequent remedial measure but admissible to show control.

Feasibility

Another way to admit evidence of a subsequent remedial measure is to show the feasibility of eliminating the cause of an injury. This is useful if a defendant claims that it would have been too difficult or too costly to do anything to make the premises safe. In *Baldwin Contracting Co. v. Winston Steel Works, Inc.* (1965) 236 Cal.App.2d 565, 573, the court allowed evidence of the defendant's subsequent installation of a protective barricade to show that it took less than an hour to install the barricade and eliminate the hazard. This was evidence that protecting the plaintiff was feasible. One route to help get this evidence admitted over a subsequent remedial measure exclusionary motion is to elicit testimony that it was not feasible to eliminate the hazard. This evidence can come from written discovery or deposition or trial testimony from the defendant's person most knowledgeable or an employee responsible for the safety of the premises.

Acknowledgement of duty

Evidence of a subsequent remedial measure is admissible to prove that a defendant acknowledged a duty to take safety measures. The leading case on this is *Morehouse v. Taubman Co*. (1970) 5 Cal.App.3d 548. In *Morehouse,* a subcontractor's employee was injured when he fell from a trench without a barrier on a construction site. After the accident, the general contractor had carpenters install handrails along the edges of the open trench to eliminate the hazard. The subcontractor's employee brought a personal injury action against the general contractor. The Court allowed plaintiff's counsel to introduce evidence of the handrails to show that the defendant had a duty to take safety measures.

Impeachment

Careful with this one. Evidence of a subsequent remedial measure is admissible for the purpose of impeaching a witness, but there are limitations. In *Daggett v. Atchison, T. & S. F. Ry. Co*. (1957) 48 Cal.2d 655, 664, the defense expert testified that equipment used was the "safest type" possible at the time of the accident. Plaintiff's counsel provided evidence that safer equipment was installed shortly after the accident. The court overruled a subsequent remedial measure objection on the grounds that the evidence would be used to impeach the expert's testimony that the equipment was the "safest type" possible at the time of the accident. (*Ibid*.)

Subsequent cases have limited this impeachment exception to situations where the witness whose credibility is under attack made or ordered the new safety measures. (*Sanchez v. Bagues and Sons Mortuaries* (1969) 271 Cal.App.2d 188, 192 [impeachment was improper where witness was not involved with installing or ordering installation of abrasive tape on allegedly slippery steps]; *Westbrooks v. Gordon H. Ball, Inc*. (1967) 248 Cal.App.2d 209, 216-217 [impeachment was improper because the witness did not order or install the new safety measure].) The specific foundation

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for impeachment that the Court approved in *Westbrooks v. Gordon H. Ball, Inc.* and *Sanchez v. Bagues and Sons Mortuaries* was if a person in charge of installing safety measures testified that such safety measures were proper, but he also ordered additional safety measures, then it is permissible to impeach the witness on why additional safety measures were needed when the previous safety measures were supposedly proper. (*Westbrooks v. Gordon H. Ball, Inc.*, *supra*, 248 Cal.App.2d at p. 216-217; *Sanchez v. Bagues and Sons Mortuaries*, *supra*, 271 Cal.App.2d at p. 192.) The foundation needed for impeachment is rather precise. Make sure you have proper foundation before trying to impeach the witness on a subsequent remedial measure – otherwise you run the risk of having the defendant's objection based on a subsequent remedial measure sustained.

Third-party repairs

There is no exclusion of subsequent remedial measures taken by a non-defendant third-party. (*Magnante v. Pettibone-Wood Mfg. Co*. (1986) 183 Cal.App.3d 764, 768; *Santilli v. Otis Elevator Co*. (1989) 215 Cal.App.3d 210, 214.; *Scott v. C.R. Bard, Inc.* (2014) 231 Cal.App.4th 763, 782.) However, *Magnante v. Pettibone-Wood Mfg. Co*., *Santilli v. Otis Elevator Co*. and *Scott v. C.R. Bard, Inc.* are products-liability cases and the subsequent remedial measure exclusion rule does not apply in a strict-liability case such as products liability. (*Ault v. International Harvester Co.* (1974) 13 Cal.3d 113, 117; *Scott v. C.R. Bard, Inc*. (2014) 231 Cal.App.4th 763, 781.) In a strict liability action, the plaintiff need only establish the product was "defective" and as a result any evidence of subsequent repairs are not prejudicial to the defendant in such actions. (*Ault v. International Harvester Co.* (1974) 13 Cal.3d 113, 117.)

In a premises case with no strict liability claim, a trial judge may instinctively want to bar evidence of a subsequent remedial measure taken by a third party. If that happens, point out to the Judge that the plaintiff in *Scott v. C.R. Bard, Inc.* (2014) 231 Cal.App.4th 763, 782 brought a claim for strict liability and negligence and when examining the plaintiff's negligence claim, the Court distinguished the policy considerations of a subsequent remedial repair made by a third party from a typical negligence case. "Since imposition of liability is not sought against the person taking the remedial action, the policy consideration of not wanting to discourage persons from taking remedial action that might prevent further injury is absent." (*Scott v. C.R. Bard, Inc.* (2014) 231 Cal.App.4th 763, 782.)

Evidence Code 352 and creativity in trial

Finally, looming over every evidentiary battle is Evidence Code 352. Section 352 states:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

This comes up in the subsequent remedial measures context because the defense may argue that certain evidence of repairs is more prejudicial than probative. This can be argued even if evidence of a subsequent remedial measure is not made inadmissible by Evidence Code section 1151. To oppose a motion in limine or an objection at trial on this basis, you will need to be ready to argue why the probative value of the evidence outweighs any prejudice.

To do this you may also have to get creative. We once had a premises-liability case where the best photograph of the broken staircase at issue was taken an hour after our client fell. By the time plaintiff was able to take the photograph, the defendant had put big yellow caution tape up around the site. We sought to introduce the photograph into evidence. The defendant sought to exclude it, arguing both subsequent remedial measures under Evidence Code section 1151 and that the evidence should be excluded as unduly prejudicial under Evidence Code section 352.

The trial judge seemed inclined to deny the motion on the grounds of Evidence Code section 1151. She acknowledged that Plaintiff was not seeking to admit the photograph of caution tape to prove liability. But the judge remained concerned about the prejudice to the jury of seeing yellow caution tape all over the site. As in many cases, the defense argued that public policy weighed against showing the jury this important evidence. The defense effectively said, "Should we have just allowed the stairs to remain exposed and put others at risk? What will that say to future defendants?" To address this concern, we asked our expert to prepare a version of the photograph with the caution tape digitally removed. This allowed us to prove our case while eliminating any disincentive for defendants to repair future problems. Society endured.

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