

Subsequent remedial measures

Getting them into evidence and using them to your advantage

By Loren Schwartz

Presenting evidence of remedial measures taken after an injury-producing event – measures that, if taken earlier, could have prevented the event from occurring in the first place – can appear incredibly powerful and persuasive.

In a premises liability case, for example, such evidence could theoretically be seen as highly probative on the issue of whether the condition of the property on the date in question presented an unreasonable risk of harm.

Logically speaking, the fact that remedial measures are taken following an accident may tend to support a finding that, at the very least, there were measures available to the Defendant by which he/she could have made his/her property safer prior to the accident.

Taken a step further, such measures could very well support an inference that Defendant's failure to take such steps prior to the event in question constitutes negligence.

Of course, as many of us will recall from law school, legally speaking, evidence of subsequent remedial conduct may *not* be offered in civil actions to prove negligence. (See, Cal. Evid. Code, § 1151.)

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Rule of Law

Evidence Code section 1151 was enacted in 1965 and effectively codified existing case law on the subject of subsequent remedial measures. The rule excluding evidence of subsequent remedial conduct to prove negligence has been said to be premised on the public policy which aims to "avoid deterring individuals from making improvements or repairs after an accident has occurred." (*Ault v. International Harvester Co.* (1974) 13 Cal. 113, 119.)

According to the drafters of Section 1151: "The admission of evidence of subsequent repairs to prove negligence would substantially discourage persons from making repairs after the occurrence of an accident." (Law Revision Com. comment to Evid. Code, § 1151.)

Obviously, we, as a society, want to encourage individuals and corporations to promote safety in whatever their lines of business may be. At the same time, one could very well question the extent to which Evidence Code section 1151 properly promotes this objective. A public policy analysis of the rule excluding evidence of subsequent remedial conduct to prove negligence is beyond the scope of this article.

What is important, for present purposes, however, is an analysis of the reach of Section 1151. By its own terms, the evidentiary exclusion encompassed by Section 1151 is actually quite narrow. The statute, in its entirety reads as follows:

> 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.

Per the plain language of the statute, Section 1151 provides a mechanism for excluding evidence of subsequent remedial measures only when such evidence of such measures are offered to prove "negligence or culpable conduct."

"When the reason of a rule ceases, so should the rule itself." (Cal. Civ. Code, § 3510.)

As such, it is well-recognized that evidence of subsequent remedial measures may be admissible for a host of other purposes including the following:

Control – To establish control over the property at issue. (See, *Alpert v. Villa Romano Homeowners Assn.* (2000) 81 Cal.App.4th 1320, 1341.)

• Feasibility – To demonstrate the "possibility or feasibility of eliminating the cause of [an] accident." (See, *Baldwin Contracting Co. v. Winston Steel Works, Inc.* (1965) 236 Cal.App.2d 565, 573.)

Impeachment – To impeach the testimony of a witness e.g., by showing that subsequent remedial conduct taken by a Defendant was inconsistent with his testimony that the original condition of the property was appropriate. (See, *Pierce v. J.C. Penney Co.* (1959) 167 Cal.App.2d 3; *Sanchez v. Bagues and Sons Mortuaries* (1969) 271 Cal.App.2d 188, 191-192; *Dagget v. Atchison, T. & S.F. Ry. Co.* (1957) 48 Cal.2d 655, 661.)

• Acknowledgment of Duty – To show Defendant acknowledged a duty to take certain safety measures. (See, *Morehouse v. Taubman* (1970) 5 Cal.App.3d 548, 555.)

• Measures by Third Parties – To establish subsequent remedial measures taken by a third party. (See, *Magnante v. Pettibone-Wood Mfg. Co.* (1986) 183 C.A.3d 764, 768.)

Strategies for getting subsequent remedial conduct into evidence

In cases involving subsequent remedial measures, it is incumbent upon Plaintiff's counsel to devise a strategy and discovery plan at the case's outset which is calculated to ultimately put counsel in a position where he/she can put such evidence in front of a jury.

As one does so, it is critical to not lose sight of one of the most basic rules of evidence: "No evidence is admissible except relevant evidence." (Cal. Evid. Code, § 350.) "Relevant evidence," in turn, is defined as "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Cal. Evid. Code, § 210.)

Consider the auto case where the Defendant admits liability. As many readers of this article are aware, once the Defendant admits liability, Plaintiff's counsel will generally become limited in terms of the evidence which he/she can put forward that otherwise would have been relevant to establishing this issue. Counterintuitive as it may seem, many Plaintiffs' lawyers, depending on the circumstances, may hold out hope that Defendant will continue, through trial, to *deny* liability as this may allow them then to put on evidence of certain "bad" conduct that otherwise would not be allowed.

In cases involving subsequent remedial measures, if Defendant readily acknowledges, for example, that they controlled the subject property (or area of the subject property at issue), Plaintiff's counsel likely will be prohibited from putting on evidence of subsequent remedial conduct to establish the element of control. Similarly, if Defendant acknowledges that there was nothing preventing them before the injury-producing event from taking the remedial measures which they only took after the event, counsel will likely be prohibited from putting on evidence of subsequent remedial conduct to establish feasibility.

Often, when defendants deny something we think they should admit, our gut instinct is to go on the offensive and try to poke holes in the bases for such denials. However, when dealing with subsequent remedial measures, the better practice may be to embrace such denials, and, where warranted, actively seek them out.

Consider the following scenario:

> Your client is a tenant who lives in a large apartment complex. One day, as

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he is leaving the complex, a large tree branch falls on his head, causing him to sustain a traumatic brain injury. The tree, which has signs of rot visible at a handful of locations, is located on the sidewalk fronting the complex.

As it turns out, two large branches had fallen off of this tree within the prior year – both times narrowly missing other tenants, who subsequently reported these episodes to management. After your client is injured, the owner of the complex hires an arborist who comes out to inspect the tree and subsequently removes additional branches from the tree which are believed to pose a risk of falling.

You sue the owner of the apartment complex for premises liability and allege, amongst other things, that this tree presented an unreasonable risk of harm to passersby and that the complex owner had a duty to take appropriate measures prior to your client's injury to have the tree inspected and to have branches removed which were at risk for falling.

At the outset of this case, you should be thinking of ways to ultimately get into evidence the fact that after your client's injury, the complex owner hired an arborist to remove other at-risk branches from this tree. You know that one of the elements of a cause of action for Premises Liability is that the Defendant owned, leased, occupied, and/or controlled the property or area of property in question and that as such, this is ultimately one of the elements you will need to prove. Nonetheless, you should consider resisting the initial urge which you might have to try to conclusively establish this element through this particular defendant.

Consider noticing a Person Most Qualified Deposition early on in the case, potentially even before written discovery is under way. (You can always re-notice his/her deposition later as an individual if need be – See Cal. Civ. Proc., § 2025.610 (c)(1).) If this deponent, on behalf of Defendant, acknowledges at the outset that the owner, at all relevant times, exercised control over the tree in question, you may never get into evidence the fact that after your client was injured, the company hired an arborist to evaluate the tree and remove other at-risk branches. However, if the witness disclaims control, you now have a disputed issue and have set yourself up to introduce the subsequent remedial measures at trial to establish this point.

To this end, embrace the natural instinct of defendants to want to find a way to disclaim responsibility or otherwise disclaim culpable conduct. Indeed, where appropriate, consider leading them there –

Q: Sir, this tree was located on the sidewalk fronting your company's property, correct?

A: That's true.

Q: Your company did not plant this tree, correct?

A: That's right.

Q: Your company did not own the tree, true?

A: That's also true. It's not even on our property. It's on City property.

Q: I see. In other words, it was something that was beyond your company's control?

A: Exactly.

While this witness has essentially denied control, the subsequent remedial measures taken by the company are directly at odds with this assertion, and indeed represent evidence, that on the contrary, the defendant did in fact have control over the tree. Additionally, you can buttress your argument regarding control with additional witnesses and evidence, as needed, at a later time.

With this line of questioning, you have now set yourself up to ultimately introduce at trial, evidence of the remedial conduct taken by the Defendant after your client's injury.

Conclusion

Evidence of subsequent remedial measures taken by a Defendant can be extremely compelling in the eyes of jurors, particularly when these measures are at odds with other positions taken by the Defendant – whether these positions have to do with control, feasibility, or other related issues. Similarly, where a Defendant contends that the original condition of the property was already safe prior to the incident in question, subsequent remedial conduct ordered by that Defendant can become a powerful impeachment tool.

Setting the stage for admission of such evidence should begin early on in your case. As you develop your strategy in this regard, keep in mind the natural instinct of many defendants to want to disclaim both responsibility and wrongdoing, and embrace it. Where appropriate, lead the defendant to where he/she naturally wants to go. By doing so, you may increase your chances of developing avenues for the admission of subsequent remedial measures and ultimately for obtaining favorable results for your clients.


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