PRACTICAL CONSIDERATIONS FOR DEALING WITH SUBSEQUENT REMEDIAL MEASURES

February 25, 2016

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Disclaimer

The following presentation contains general information and is provided as a courtesy to our clients and friends. It should not be relied upon in any particular fact situation without consulting your legal counsel for specific advice.

OVERVIEW

- This session addresses practical considerations for dealing with subsequent remedial measures under both California and Federal law. This session will include discussion of:
- Inadmissibility of subsequent remedial measures;
- Exceptions to the rule;
- Differences in California and Federal law;
- Best practices for conducting subsequent remedial measures

Subsequent Remedial Measures

- Found in California Evidence Code Section 1151.

- When, after an accident occurs, "remedial or precautionary measures" are taken which, if taken previously, would have made the accident 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; *Ault v. International Harvester Co.* (1974) 13 Cal.3d 113, 116–117.)

Rationale behind the rule

- The rule is based on the public policy consideration that precautionary measures to avoid injuries are to be *encouraged*. A defendant should feel confident that it can repair a dangerous condition without the concern that the remedial measure will be admitted as an admission of liability. (*Westbrooks v. Gordon H. Ball, Inc.* (1967) 248 Cal.App.2d 209, 215-216.)

What Is a Subsequent Remedial Measure?

- The defendant often corrects the defective condition after an incident occurs in order to make the condition more safe and avoid future incidents.
- California Evidence Code section 1151 generally *precludes* allowing the introduction of this evidence to prove the defendant was negligent for not making this change earlier, or that a product sold before a change, was defective as sold.

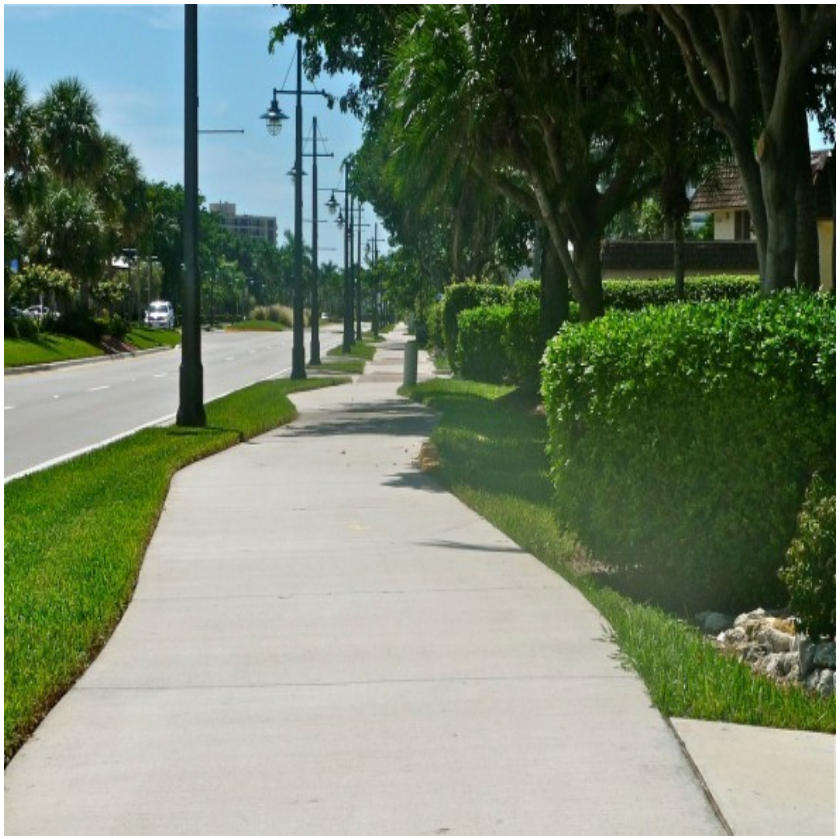
What Is a Subsequent Remedial Measure?

- ***Conduct taken after an incident that would have made the incident less likely to occur.***
  - The changing of a hazardous condition
  - The newer design of a product
  - The use of a warning
  - The institution of a safety program
  - The denial of school benefits
  - The firing of an employee
  - The civil rights context

Changing of hazardous condition

Before

After



Use of a warning

Before

After

Institution of a safety program

Before

After

Conduct must be remedial

- Remedial means corrective, precautionary measures. (*Maddox v. City of Los Angeles* (9th Cir. 1986) 792 F.2d 1408, 1417; *Fox v. Kramer* (2000) 22 Cal.4th 531, 544.))
- If the subsequent measure would *not* have made the event less likely to occur—that is, if the measure was not *remedial*—then it is not barred from evidence.

Conduct must be subsequent

- The rule applies only to changes made *after* the incident that produced the damages giving rise to the action. Evidence of measures taken by the defendant prior to the incident causing injury or harm does not fall within the exclusionary scope of the rule. (*Fox v. Kramer* (2000) 22 Cal.4th 531, 544; *Schelbauer v. Butler Manufacturing Co*. (1984) 35 Cal.3d 442, 450.)

Exceptions: Admissible if offered for other purpose

- Subsequent remedial measures are admissible if offered to prove matters other than defendant's negligence, "such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment." (Evid. Code, § 1151; *McIntyre v. Colonies-Pacific, LLC* (2014) 228 Cal.App.4th 664, 673.)

Exception: Control of premises

- Evidence of repairs, improvements, safety precautions, or like remedial or preventative 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. (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1168; Witkin, Cal. Evidence (3d ed. 1986) Circumstantial Evidence, § 444, p. 413.)
- In the following examples, the subsequent change came into evidence to show control and duty of the repairing defendant to take the safety precautions before the incident.

Exception: Control of premises Example #1

- The California Supreme Court held that evidence that a defendant placed a fence around city-owned property, thereby treating the property as their own, was "highly relevant" when the fence was placed after the plaintiff's fall to avoid further exposure to the hazard. The Court admitted the subsequent remedial measure into evidence, adding that, "It is obvious that the act of enclosing property with a fence constitutes an exercise of control over that property." (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1166.)

Exception: Control of premises Example #2

- In *Morehouse v. Taubman* (1970) 5 Cal.App.3d 548, defendant maintained a crew of carpenters, whose functions included installing guardrails. While defendant's carpenters installed handrails on the guardrails at the point where plaintiff fell *after* plaintiff's injury, the remedial measure was not admissible to prove defendant's negligence. However, the evidence was admissible to prove defendant had control over the premises, and was under a duty to undertake such safety measures. (*Id.* at 555.)

Exception: Feasibility of precautionary measures

- Subsequent change evidence is admissible for the limited purpose of showing feasibility, ease and lack of expense in eliminating the injury-causing condition.
- Feasibility must be at issue in order for plaintiff to use this exception; i.e., defendant must contend that there was “no feasible alternative.”

Exception: Feasibility of precautionary measures Example #1

- Where none of defendants charged with violating safety provisions declared that nothing could have been done to avoid a fire and explosion in tunnel, evidence of remedial measures undertaken after fire and explosion was not admissible to show possibility or feasibility of eliminating the cause of accidents. (*People v. Lockheed Shipbuilding & Constr. Co.* (1975) 50 Cal.App.3d Supp. 15, 36).

Exception: Feasibility of precautionary measures Example #2

- In *Baldwin Contracting Co. v. Winston Steel Works* (1965) 236 Cal.App.2d 565, a protective barricade was installed after the accident by two of defendant's carpenters, working under defendant's direction, in about an hour's time. While evidence of the construction after the accident was precluded on the issue of liability, such evidence was relevant and admissible as indicative of defendant's possibility or feasibility of eliminating the cause of the accident when defendant put feasibility at issue. (*Id*. at 573.)

Exception: Impeachment

- Subsequent changes are admissible for the purpose of weakening the testimony of the defendant by showing that he had subsequently changed his opinion as to the safety of the condition prevailing at the time of the incident. (*Daggett v. Atchison, T. & S. F. Ry. Co.* (1957) 48 Cal.2d 655, 665.)

Impeachment

- The process of calling into question the credibility of an individual who is testifying. (Evid. Code, § 780.)

Exception: Impeachment Example #1

- A key issue is that subsequent change is admissible for impeachment only where the witness who is testifying had something to do with ordering the subsequent change. When there was no evidence that defendant had anything to do with installing or ordering the installation of new abrasive tape for the stairs after plaintiff's fall, defendant's testimony could not be admitted for impeachment purposes as to post-accident repairs to the stairs. (*Sanchyez v. Bagues & Sons Mortuaries* (1969) 271 Cal.App.2d 188, 191-192.)

Exception: Impeachment Example #2

- *Daggett v. Atchison, Topeka & S.F. Railroad Co., supra*, was a case that involved an incident in which a car was hit by a train at a railroad crossing. The defendant employee testified the signal existing at the time was "the safest type of signal." The Court allowed the plaintiff to cross-examine the witness with the fact that he changed out the signal after the incident and installed a different type of signal. The Court allowed this cross examination "for the purpose of weakening the testimony of defendant's expert witness by showing that he had subsequently changed his opinion as to the" safety of the conditions prevailing at the time of the accident. (*Id.* at 661-665.)

Creating Impeachment

- Plaintiff may raise issue to create a situation where a defendant's testimony may be impeached.

Exception: In Strict Liability Cases To Prove "Defective Design"

- ***What is strict liability?*** Strict liability is the legal responsibility for damages, or injury, even if the person found strictly liable was not at fault or negligent. (*Brown v. Superior Court* (1988) 44 Cal.3d 1049, 1056.)
- ***Types of strict liability:***
  - Product
  - Animals, owned or possessed
  - Abnormally dangerous acts

Exception: In Strict Liability Cases To Prove "Defective Design" (Continued)

- California Evidence Code section 1151 does not apply in strict liability cases because "negligence" and "culpability" need not be proved. Plaintiff need only establish the product was "defective." Evidence of subsequent repairs, improvements or design changes to a later model is, therefore, not prejudicial to the defendant in such actions. (*Ault v. International Harvester Co., supra*, at 118.)

Exception: In Strict Liability Cases To Prove "Defective Design" Example #1

- Evidence of plaintiff's employer's post-accident modification to truss boom admissible to prove product defect in strict liability action against truss boom manufacturer. (*Magnante v. Pettibone-Wood Mfg. Co.* (1986) 183 Cal.App.3d 764, 768.)

Discretion of court to exclude evidence

- The court in its discretion may exclude evidence of subsequent remedial measures if its probative value is substantially outweighed by the probability that its admission will:
  - Necessitate undue consumption of time; or
  - Create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352.)

Discretion of court to exclude evidence
(Continued)

- ***What evidence is prejudicial?*** Evidence is prejudicial if its purpose is not to prove the civil wrong but to prove something else that might make a jury tend to believe the civil wrong without relevant evidence.

Limiting Instructions

- Found in California Evidence Code section 355.

- "When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly." (Evid. Code, § 355; Judicial Council Of California Civil Jury Instruction 206.)

Limiting Instructions
(Continued)

- If the defendant does not request a limiting instruction, the court does not have a sua sponte duty to give a limiting instruction. (*Daggett v. Atchison, Topeka & S.F. Railroad Co.* (1957) 48 Cal.2d. 655, 655-656.)

Investigations

- *Scripps Health v. Superior Court* (2003) 109 Cal.App.4th 529 protection is a key tool for public entities to investigate incidences.
- *Scripps* protections apply to investigative materials even when no litigation is yet pending or yet anticipated (*Id*. at 534-536).
- Note: witness statements obtained as a result of attorney-directed interviews are not automatically entitled as a matter of law to absolute work product protection. The applicability of absolute protection must be determined case by case (*Coito v. Superior Court* (2012) 54 Cal.4th 480, 495).
  - Practice tip: Have investigator/questioner write up summaries of statements, which are privileged and need not be produced.

Subsequent Remedial Measures Compare to Federal Rule 407

- When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:
  - Negligence;
  - Culpable conduct;
  - Defect in a product or its design;
  - Need for a warning or instruction.
- But the court may admit this evidence for another purpose, such as impeachment or--if disputed--proving ownership, control, or the feasibility of precautionary measures. (Fed. Rules Evid., rule 407.)

Subsequent Remedial Measures Compare to Federal Rule (Continued)

- **DIFFERENCE: *California rule is broader***

- Federal Rules of Evidence preclude evidence of defective design in a strict liability case and the need for a warning, while California *permits* evidence of subsequent repairs, improvements or design changes to later model ***and*** allows evidence of a warning or instruction.

Best Practices for Conducting a Subsequent Remedial Measure

- Every subsequent remedial measure should be prepared with California Evidence Code section 1151 exceptions in mind so that once litigation commences plaintiff has no evidence supporting any exceptions to the rule. Consider:
  - The feasibility of eliminating the hazard;
  - Your ownership/control of the injury-causing condition;
  - Your responsibility for implementing safety measures involving the injury-causing condition;
  - Your belief as to whether you thought the injury-causing condition was safe prior to the incident.

Model Sample 1

- ***Question 1:*** Plaintiff brings a negligence claim against a restaurant for injuries sustained after tripping over a pipe in the parking lot. Immediately after the accident, a restaurant employee placed yellow rope around the area where the accident occurred. Plaintiff seeks to introduce evidence that the restaurant placed the yellow rope around the area where plaintiff fell to show feasibility – that the restaurant could have placed the yellow rope around the area before the accident rather than waiting for the accident to occur. The defendant argued that the pipe was open and obvious and did *not* dispute the self-evident feasibility of this precautionary measure. What result?

Model Sample 1

Issues to Consider:

1. Control of premises
2. Feasibility of precautionary measures
3. Impeachment
4. Strict liability to prove defective design

Model Sample 2

- ***Question 2:*** Commercial tenant brings action against landlord for negligence and premises liability after an armed robbery occurred at the tenant's store. After the robbery occurred, the landlord hired a security guard. The tenant seeks to introduce this evidence under Evidence Code section 1151 as a subsequent remedial measure, not on the issue of the landlord's negligence, but rather to prove the *causation* element of a negligence cause of action. What result?

Model Sample 2

Issues to Consider:

1. Control of premises
2. Feasibility of precautionary measures
3. Impeachment
4. Strict liability to prove defective design

Model Sample 3

- ***Question 3:*** A powder company brings an action against a sprinkler system company and its employees, for damage resulting from an explosion allegedly due to malfunctioning of a sprinkler system which had been installed and checked by defendant. The defendant company's employee testified that the sprinkler was not explosive. The plaintiff seeks to introduce evidence that the defendant company's employee undertook precautionary measures after the explosion occurred. What result?

Model Sample 3

Issues to Consider:

1. Control of premises
2. Feasibility of precautionary measures
3. Impeachment
4. Strict liability to prove defective design

Model Sample 4

- ***Question 4:*** Pedestrian sued owner of condominium complex for injuries allegedly sustained as result of fall on broken, upturned portion of sidewalk adjacent to complex. Defendant contended that he had no duty to warn the pedestrian or repair the sidewalk, and thus was not liable. Pedestrian thereafter sought to admit condominium complex's board meeting minutes to show that defendant had knowledge and control over the defect. What result?

Model Sample 4

Issues to Consider:

1. Control of premises
2. Feasibility of precautionary measures
3. Impeachment
4. Strict liability to prove defective design

Thank You

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