

Title: Admissibility of Subsequent Remedial Measures in a Premises or Construction Incident Case

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You are in the middle of trial on a work-site injury case where the plaintiff is severely injured from a 20-foot fall following a collapse of a catwalk at the defendant's aggregate plant. The evidence shows the failed rotted wood support beam that caused the collapse was at least 50 years old, and that no other aggregate plant in the state of California uses wood to support catwalks. You also know that immediately after the incident, the entire catwalk system, wood beams and all, are changed out to steel. How do you get this evidence in front of the jury and avoid the subsequent remedial change prohibition?

When an incident occurs because of (1) a negligently maintained condition of premises or (2) an unsafe condition at a construction site, the defendant often corrects the defective condition after an incident occurs. Evidence Code § 1151 generally precludes allowing the introduction of this evidence to prove the defendant was negligent in failing to make the correction before the incident. However, there are numerous exceptions which allow the evidence to be introduced. This article will discuss various methods¹ to introduce evidence of subsequent remedial repairs in spite of the limitations set out in Evidence Code § 1151, which reads in full:

Subsequent Remedial or Precautionary Measures: 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.

At first blush section 1151 appears to forever bar any evidence of a subsequent repair or measure made to the injury-causing condition of the premises. Fortunately, there are many exceptions to the section 1151 limitations to get subsequent remedial measures into evidence in a premises/construction case.

A. THE MOST COMMON § 1151 EXCEPTION: SUBSEQUENT REPAIRS OFFERED TO PROVE MATTERS OTHER THAN DEFENDANT'S

NEGLIGENCE

A powerful exception allowing the admission of evidence regarding a subsequent remedial and precautionary measure occurs when the evidence is offered to prove an issue other than defendant's negligence. As discussed below, the law and supporting facts must be raised in a motion in limine so the trial judge can rule on the matter ahead of time. Defendant can ask the court to give the jury a limiting instruction as set forth in Evidence Code § 355:

When evidence is admissible ... for one purpose and is inadmissible ... for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly.

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, 655-6.)

1. Impeachment

The best vehicle for the admission of subsequent changes is to simply ask the defendant "Did you believe that the condition was safe before the incident?" How could the condition be safe if it was changed after the incident? This is why subsequent changes are often allowed into evidence for the limited purpose of impeaching a witness. It gives the defendant the choice of testifying that the condition was unsafe and avoid the impeachment evidence, or claim it was safe but face cross-examination on the subsequent change.

In *Daggett v. Atchison, Topeka & S.F. Railroad Co.*, supra, 48 Cal.2d at 661, the court allowed the cross examination of the defendant's employee/expert concerning a subsequent change. The case involved an incident in which a car was hit by a train at a railroad crossing. Plaintiff claimed the signal light existing at the time of the incident was inadequate. 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 665.)

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. (*Sanchyez v. Bagues & Sons Mortuaries* (1969) 271 Cal.App.2d 188, 191.)

2. Feasibility and Ease of Making Condition Safer

The next way to obtain the admission of subsequent change evidence is for the limited purpose of showing the feasibility, ease and lack of expense in eliminating the hazard. In *Baldwin Contracting Co. v. Winston Steel Works* (1965) 236 Cal.App.2d 565, the court examined whether evidence of a subsequent change – installing a protective barricade – could be admitted. The court stated as follows:

The ease with which the hazard could have been obviated is indicated by the fact that a protective barricade was installed after the accident by two of [Defendant] Baldwin's carpenters, working under Phillips' direction, in about an hour's time. While public policy precludes the court from considering the construction of the barricade after the accident on the issue of liability, such evidence is relevant and admissible as indicative of Baldwin's duty on the job [citation] and also on the possibility or feasibility of eliminating the cause of the accident. (*Id.* at 573.)

Of course, you should raise the feasibility question with the judge ahead of time and provide the judge with a brief setting forth your offer of proof and supporting law in accordance with Evidence Code § 354.2

3. Control of Premises

Another method of introducing subsequent changes for a limited purpose is to show that defendant was in control of the injury-causing condition and had the duty to make the condition safe before the incident. In *Morehouse v. Taubman* (1970) 5 Cal.App.3d 548, the court allowed the evidence of the subsequent change stating as follows:

[Defendant] Taubman maintained a crew of carpenters whose functions included installing guardrails at Southland; and in practice, at least, provided guardrails and safety devices.... While evidence that Taubman's carpenters installed handrails at the point where Morehouse fell following his injury was not admissible to prove negligence of Taubman (Evid. Code, § 1151) it was properly limited (Evid. Code, § 355) and received by the court, on the issue of control of the premises, and as to whose duty it was under the contract to take such safety measures. (*Morehouse v. Taubman*, *supra*, at 555.)

Similarly, the California Supreme Court in *Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1166, held that evidence a defendant placed a fence around city-owned

property, thereby treating the property as their own, was "highly relevant." The fence was placed to avoid further exposure to the hazard. The Court added that, "It is obvious that the act of enclosing property with a fence constitutes an exercise of control over that property." The court allowed this evidence even though the fence was placed after the incident and because of the incident. (Id. at 1168, citing *Morehouse v. Taubman*, supra, 5 Cal.App.3d 548, 555.) The court relied on the following rule of law:

"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*, supra 14 Cal.4th 1149, 1168, citing 1 Witkin, *Cal. Evidence* (3d ed. 1986) *Circumstantial Evidence*, § 444, p. 413.)

In each case, the subsequent change came into evidence showing control and duty of the repairing defendant to take the safety precautions before the incident.

B. SUBSEQUENT REPAIRS BY 3RD PARTY

There is no preclusion of subsequent changes taken by an entity other than defendant to correct a dangerous condition. (*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.)

C. SUBSEQUENT REPAIRS TO SHOW DESTRUCTION OF EVIDENCE

After the incident a defendant often changes out dangerous conditions and does not preserve the injury-causing instrumentality or condition making, it impossible for plaintiff's experts to evaluate the condition. In this case it is prejudicial to prevent plaintiff from cross-examination on the issue of the subsequent changes in order to establish that plaintiff did not have access to the instrumentality that caused injury (i.e., that there was no stronger evidence available to plaintiff because defendant destroyed it.) The court should allow plaintiff to cross-examine defendant and prove that: (1) defendant destroyed the injury-causing instrumentality when repairs were made, and (2) plaintiff did not have a chance to view these items.

Although there is no law specifically on this point, the court may use its power to allow the changes into evidence for the limited purpose of explaining that plaintiff did not have an opportunity to evaluate the conditions while they still

existed prior to the repair.

D. ESTABLISH THE EXCEPTION § 1151 IN DISCOVERY

Every premises/construction case should be prepared with the section 1151 exceptions in mind so that discovery can lock in the evidence supporting the exception. One of the best discovery tools is the request for admission because defendants are loath to admit anything. Simply ask the defendant to admit that:

- (1) It was feasible to eliminate the hazard;
- (2) Defendant controlled the injury-producing condition on the premises;
- (3) Defendant was responsible for safety measures involving the condition of premises;
- (4) Defendant thought that the condition was safe before the incident;
- (5) Defendant destroyed the injury causing instrumentality following the incident.

Of course depositions will also lock down the facts supporting the subsequent change exceptions. A checklist of these exceptions should be used during the deposition. Motions in limine coupled with the above discovery will normally trigger the admissibility of subsequent repairs.

E. CONCLUSION

Now how do you get the evidence of the subsequent change into evidence at the trial as mentioned in the opening of this article? First, ask the defendant if they thought the conditions were safe before the incident. If yes, it comes in. Second, ask the defendant if they had control over the injury causing instrumentality. If no, it comes in. Third, ask the defendant if an alternate system was feasible. If no, it comes in.³

Even if the answers to all three questions are such that the subsequent change does not come in, take a look at what you have proven. (1) Defendant knew or should have known the condition was unsafe (i.e. they admit it was unsafe, but claim to not have known about it); (2) defendant had control over the instrumentality; and (3) an alternate system was feasible.

Even without the subsequent change evidence, your case is almost proven by the answers a defendant must give to avoid the subsequent change evidence from

being admitted. This is truly a win-win situation.

At first blush, many trial judges may be reluctant to allow the admission of a subsequent remedial measure in a premises case because of the rather strong limiting language of Evidence Code § 1151. However, when you properly work up the facts and laws supporting the limited admissibility exceptions to § 1151, trial judges virtually always allow subsequent remedial repairs into evidence. It is prejudicial to plaintiff and reversible error not to allow these items into evidence, if the right preparation work is done ahead of time.

1 This article will not address the admission of design or manufacturing changes instituted to a product line after a previous generation product caused injury. Such situation is discussed in the lead case of *Ault v. International Harvester Co.* (1975) 13 Cal.3d 113. Ault reasoned that design or manufacturing changes are admissible because "negligence" is not an element of strict product liability actions. (*Id.* at 118.)

2 Evidence Code § 354 "Erroneous Exclusion of Evidence" reads in full:

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that:

- (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means;
- (b) The rulings of the court made compliance with subdivision (a) futile; or
- (c) The evidence was sought by questions asked during cross-examination or recross-examination.

3 As with all the exceptions, these three questions assume the proper foundation is laid for the judge to rule in advance as to whether this evidence will be allowed. Failure to do so could well result in a mistrial.