Subsequent Remedial Measures

by Ian Fusselman, Column Editor

There was a recent discussion on CASD's group email list server about the issue of subsequent remedial measures that inspired me to look further into the admissibility rules relating to this issue. The question on the list server was whether it made sense to abandon a negligence cause of action and solely pursue a strict liability claim in order to make subsequent remedial measures admissible. I voiced my concern that the evidence might still be excluded, but there were several other responses suggesting that it would be admissible under *Ault v. International Harvester Co.* (1974) 13 Cal.3d 113. This article will discuss the background of Evidence Code §1151 and its counterpart in the Federal Rules, the *Ault* rule, and the interplay of Evidence Code §352 in determining the admissibility of subsequent remedial measures.

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Exclusionary Rules

Evidence Code §1151 states in no uncertain terms:

> ***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.***

Federal Rules of Evidence, Rule 407 is more expansive and includes product defects:

> ***When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.***

In both state and federal court, parties are prevented from presenting subsequent remedial measures to raise an inference of negligence or "culpable conduct." As noted by the *Ault* Court,

> ***. . . 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. Section 1151 rests explicitly on this "public policy" rationale.***

Ault, supra, at 119.

This rationale seems to make sense. You don't want a party to feel compelled to leave an allegedly dangerous condition in place in order to avoid likelihood that the act itself would act as some form of an admission of fault. Further, just because someone undertakes some effort to make a condition safer doesn't necessarily mean that it was unreasonably dangerous to begin with.

On the other hand, as the Federal Rule explicitly states, and as our State Courts have applied Evidence Code §1151, subsequent remedial measures are admissible for the purpose of establishing ownership, control and feasibility of repairs. The rationale behind these exceptions likewise makes sense. If the defense is arguing that a particular repair alternative was not feasible or that

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the defendant was not in a position to make the repair, then evidence showing that they actually did make the repair should be admissible.

The *Ault* Rule

In *Ault, supra*, plaintiff alleged that the failure of an aluminum gear box was the cause of a motor vehicle accident. Plaintiff introduced evidence that the manufacturer substituted malleable iron for the aluminum three years after the incident. The defendant objected, citing Evidence Code §1151 and claiming that the Legislature's use of the term "culpable conduct" encompassed strict liability allegations. The Court responded to the defense position by explaining that it was "unpersuaded by this tenuous construction" and noting that if the Legislature had intended include strict liability claims within Section 1151, it would have done so. *Ault, supra,* at 118. Then, after discussing the public policy reasoning behind Section 1151, the Court set forth its holding:

> **While the provisions of section 1151 may fulfill [an] anti-deterrent function in the typical negligence action, the provision plays no comparable role in the products liability field… [I]t is manifestly unrealistic to suggest that such a producer will forego making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse effect upon its public image, simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the improvement… In short, the purpose of section 1151 is not applicable to a strict liability case and hence its exclusionary rule should not be gratuitously extended to that field.**

Strictly speaking, the *Ault* case stands for the proposition that Evidence Code §1151 does not prevent the admission of subsequent remedial measures in strict liability cases. However, as will be discussed later, *Ault* did not stand for the proposition that subsequent remedial measures are always admissible in product cases.

Rejection of *Ault* by the Federal Courts

In contrast to the *Ault* decision, federal courts, including the 9th Circuit, continued to exclude evidence of subsequent remedial measures in product liability actions. In fact, in *Gauthier v. AMF, Inc*. (1984) 788 F.2d 634, the 9th Circuit specifically addressed *Ault* and refused to depart from the long held federal practice of excluding subsequent remedial measures. After discussing the grounds supporting the *Ault* decision, the Court explained the federal position:

> **On the other hand, most Circuits have come to the opposite conclusion and held that there is no practical difference between strict liability and negligence in defective design cases and the public policy rationale to encourage remedial measures remains the same. [*Flaminio v. Honda Motor Co., Ltd.* (1984) 733 F.2d 463, 467] ("the test for an 'unreasonably dangerous' condition is equivalent to a negligence standard of reasonableness …").**

Id. at 637.

Several years after *Ault*, Rule 407 was amended to include the portion applying the rule to product actions, thereby codifying the Federal Courts' rejection of the *Ault* rule.

Application of Evidence Code §352 to *Ault*

As noted above, while Evidence Code §1151 may not be applicable in strict liability actions, this does not mean that evidence of subsequent remedial measures is automatically admissible. To the contrary, it is still necessary to establish the probative value of the evidence and to overcome Evidence Code §352 objections. (See, *e.g., Sanchez v. Bagues and Sons Mortuaries* (1969) 271 Cal.App.2d 188, 192). This requirement was

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noted in a concurring opinion in a post-*Ault* Supreme Court decision:

> ***...I wish to emphasize a point implicit in the majority opinion that merely because section 1151 may not bar introduction of evidence regarding postaccident warnings, such evidence is subject to the court's complete discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will ... (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Evid.Code, §352 [subsequent citations and quote omitted].***

Schelbauer v. Butler Manufacturing Co. (1984) 35 Cal.3d 442, 459 (Justice Richardson concurring).

In short, while Evidence Code §1151 may not necessarily apply in strict liability claims, you still need to establish that evidence of subsequent remedial measures is probative of an issue important enough to overcome the attendant prejudice associated with the evidence.

PRACTICE POINTERS

To be sure, when there is a possibility that your product case might end up in federal court, it is important to remember that Rule 407 will prevent you from using subsequent remedial measures to establish fault even in a strict liability case. In state court, you can be sure to see an Evidence Code §352 objection to any evidence of subsequent remedial measures. Because Section 352 is effectively a balancing test, you will need to establish that the evidence is more probative than prejudicial and, given the knee-jerk reaction that many juries may have after learning of subsequent remedial measures, this bar may be set high. Consequently, it is important to show that the evidence can be used for many purposes rather than just as a means of showing that it was done.

One method of getting this evidence in is to focus on the feasibility of the remedial measure in both discovery and with defense witnesses during their depositions. If there is a dispute over the feasibility, then evidence that it was actually done should be admissible.

Take care, however, in adopting a strategy that relies solely on the "impeachment" exception to Evidence Code §1151. This strategy was attempted and rejected by the Court in *Sanchez v. Bagues and Sons Mortuaries* (1964) 271 Cal.App.2d 188, in which plaintiff's attorney asked a defense witness if he believed a condition was dangerous at the time of the incident. The attorney admitted that "[t]he only reason I asked the defendant whether or not in his opinion the condition was safe at the time of the accident is that now I can bring in the pictures to impeach his testimony." The court affirmed the trial court's exclusion of the subsequent remedial measures, explaining:

> ***We are in accord with the trial court's ruling that this is not a sufficient basis on which to predicate the introduction of the proffered evidence. It is obvious that to the extent such evidence is admitted for any purpose, its admission is likely to defeat the policy of encouraging remedial measures. Therefore, the admission of such evidence should be limited to cases where the need for its admission outweighs the advantages to be gained from its exclusion.***

Id. at 191.

The lesson to be taken from *Schelbauer* and *Sanchez* is that it is imperative that the evidence of subsequent remedial measures is being proffered for more than just establishing that the defendant took remedial steps after the incident, for this evidence is highly prejudicial and may not actually be probative of any issue in the case. **TBN**