

6/8/67

Memorandum 67-39

Subject: Study 63 - Evidence Code

Exhibit I, attached, is a note from the latest issue of the Hastings Law Journal concerning Section 1151 of the Evidence Code (subsequent remedial conduct).

The note is more in the nature of a suggestion as to how the court should apply the exclusionary rule codified in Section 1151 and its exceptions than it is a suggestion for modification of the Evidence Code provision.

As far as the discussion of the hearsay exception for inconsistent statements is concerned, we see nothing in Section 1235 that makes statements regarding subsequent repairs admissible. The hearsay exception would only make such statements admissible as against an objection that they are hearsay; it would not make them admissible as against an objection that they are inadmissible under Section 1151.

The staff believes that Section 352 of the Evidence Code provides the trial judge with sufficient discretion to exclude evidence of subsequent repairs where its probative value as impeachment is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice. Hence, we see no need to recommend any change in Evidence Code Section 1151.

Respectfully submitted,

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Executive Secretary

EXHIBIT I

**EXCEPTIONS TO THE SUBSEQUENT REMEDIAL
CONDUCT RULE**

Section 1151 of the new California Evidence Code renders evidence of remedial or precautionary measures taken after the occurrence of an event inadmissible to prove negligence or culpable conduct in connection with the event.¹ According to the code drafters this section "codifies well-settled law."² Indeed it does.³ The principle embodied in section 1151 is law in every jurisdiction in the United States⁴ except Kansas.⁵ Furthermore, the specific form of the California provision duplicates that found in the Uniform Rules of Evidence.⁶

¹ CAL. EVIDENCE CODE § 1151 provides: "Subsequent remedial conduct. 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."

² CAL. EVIDENCE CODE § 1151, comment.

³ E.g., *Helling v. Schindler*, 145 Cal. 303, 78 Pac. 710 (1904); *Seppensfeld v. Main St., & Agricultural Park R.R.*, 91 Cal. 48, 27 Pac. 509 (1891).

⁴ See, e.g., *Columbia & P.S. R.R. v. Hawthorne*, 144 U.S. 202 (1892); *Annot.*, 179 A.L.R. 7, 19 (1947).

⁵ E.g., *Howard v. Oage City*, 89 Kan. 205, 132 Pac. 157 (1913).

⁶ *UNIFORM RULES OF EVIDENCE* 51.

There is general agreement that this rule serves a most useful social purpose, namely that of allowing persons to take remedial steps after an accident without fear that such precautions may be considered an admission of negligence with respect to the earlier condition.⁷ The comment to the code provision constitutes a reaffirmation of the wisdom of such a policy.⁸

The rule, however, is not without exception.⁹ It has been held that in appropriate cases where important collateral issues are contested, evidence of repairs may be introduced to establish (1) control of the premises in question,¹⁰ (2) the duty of defendant to repair,¹¹ (3) notice of the prior defect,¹² (4) the cause of the accident,¹³ (5) the condition at the time of the accident,¹⁴ and other such issues.¹⁵ The justification for allowing the exceptions enumerated above seems to lie in the fact that when introduced to clarify collateral points, the relevancy of such evidence is strong enough to overcome the countervailing effect of the policy considerations which support the general rule.¹⁶

Impeachment of Witnesses

Another exception, recognized in California¹⁷ as well as other jurisdictions,¹⁸ deserves more careful attention. Evidence of remedial conduct has been held admissible for the purpose of impeaching the veracity of a witness.¹⁹ In many cases the rationalization for permitting the exception is persuasive. If the defendant owner has made repairs after an accident it is at least clear that he believed that the premises or instrumentality could be rendered safer. To allow defendant to strengthen his case by testimony that the condition was as safe as possible before the accident without the ability to contradict such evidence with his own actions would be manifestly unjust.

This same exception, however, has been approved under less compelling cir-

⁷ MCCORMICK, EVIDENCE § 252 (1954); 2 WIGMORE, EVIDENCE § 283 (3d ed. 1940); WITKIN, CALIFORNIA EVIDENCE § 385 (2d ed. 1966).

⁸ CAL. EVIDENCE CODE § 1151, comment: "The admission of evidence of subsequent repairs to prove negligence would substantially discourage persons from making repairs after the occurrence of an accident."

⁹ WIGMORE, *op. cit. supra* note 7, § 283; WITKIN, *op. cit. supra* note 7, § 385.

¹⁰ E.g., *Dobonowski v. Howard Sav. Institution*, 124 N.J.L. 368, 12 A.2d 384 (1940); *Scudero v. Campbell*, 288 N.Y. 328, 43 N.E.2d 66 (1942).

¹¹ E.g., *Boggs v. Cullowhee Mining Co.*, 162 N.C. 393, 78 S.E. 274 (1913); *Carlston v. Rockland, T. & C. St. Ry.*, 110 Me. 397, 86 Atl. 334 (1913).

¹² E.g., *Patton v. Sanborn*, 133 Iowa 650, 110 N.W. 1032 (1907); *Harig v. McCutcheon*, 23 Ohio App. 500, 155 N.E. 701 (1926).

¹³ E.g., *Dow v. Sunset Tel. & Tel. Co.*, 157 Cal. 182, 106 Pac. 587 (1910).

¹⁴ E.g., *Choctaw, O. & G. R.R. v. McDade*, 191 U.S. 64 (1903); *Dyas v. Southern Pac. Co.*, 140 Cal. 296, 73 Pac. 972 (1903).

¹⁵ E.g., MCCORMICK, *op. cit. supra* note 7, § 252 nn. 17 & 18.

¹⁶ Falknor, *Extrinsic Policies Affecting Admissibility*, 10 *RESEARCH L. REV.* 574, 591 (1956).

¹⁷ E.g., *Inyo Chem. Co. v. Los Angeles*, 5 Cal. 2d 525, 55 P.2d 850 (1936); *Wagner v. Atchison T. & S.F. Ry.*, 210 Cal. 526, 292 Pac. 645 (1930).

¹⁸ E.g., *Choctaw, O. & G. R.R. v. McDade*, 191 U.S. 64 (1903); *Chicago & E. R.R. v. Barnes*, 10 Ind. App. 460, 38 N.E. 428 (1894).

¹⁹ E.g., *Inyo Chem. Co. v. Los Angeles*, 5 Cal. 2d 525, 55 P.2d 850 (1936).

circumstances.²⁰ In fact, if section 1151 is simply a codification of prior California law as the comment states,²¹ plaintiffs would seem to control a subterfuge by which they can circumvent the strictures of the rule and present to the jury all the prejudicial facts concerning subsequent repairs.

The mechanics of this artifice are disturbingly simple. Realizing that subsequent repairs may have been made, the liberal California discovery procedure²² invests plaintiff's counsel with broad powers of investigation. Through depositions he may learn about any repairs, the circumstances that gave rise to them, the person who authorized them, and the persons involved in the actual work. Each may be questioned in detail and there are no restrictions in the scope of such depositions which will inhibit counsel's investigatory activities.²³ In fact, the only limitations placed upon depositions in California are relevancy and privilege,²⁴ neither of which form a basis for defendant's objection to questions asked about subsequent precautions.

Once plaintiff's counsel has discovered and compiled all the pertinent data surrounding the repairs, he may proceed, at trial, to call the defendant or defendant's employee who authorized or ordered repairs to be made as an adverse witness.²⁵ During examination he asks a simple question: "In your opinion, sir, were the premises in a safe condition at the time of the accident?" Having received the obvious affirmative answer to this question, plaintiff is free to impeach the veracity of defendant's opinion with evidence of the remedial precautions that have been taken.²⁶

Although the evidence admitted in this manner is subject to a limiting instruction that it may not be considered substantively, but only as bearing upon the veracity of the witness' opinion,²⁷ it is the opinion of this writer that such an instruction is dubious protection in light of the prejudicial nature of evidence of repairs. Moreover, the defendant, may be able to minimize the effect of such evidence by pointing out to the jury that his duty was only to use ordinary care under the circumstances; and that in taking subsequent steps to render the condition safer he was exceeding the duty required of him by the law. However,

²⁰ The dissenting opinion in *Daggett v. Atchison, T. & S.F. Ry.*, 48 Cal. 2d 655, 667-71, 313 P.2d 557, 564-67 (1957), criticized clever cross-examination on the part of attorney Melvin Belli which confused the witness into making the statement which was subsequently impeached with evidence of remedial conduct.

²¹ CAL. EVIDENCE CODE § 1151, comment.

²² See, *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 15 Cal. Rptr. 90 (1961); see CAL. CODE CIV. PROC. §§ 2016, 2031.

²³ CAL. CODE CIV. PROC. § 2016 provides: "[T]he deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . . It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."

²⁴ *Ibid.*

²⁵ CAL. EVIDENCE CODE § 776: "Examination of adverse party or witness. (a) A party to the record of any civil action, or a person identified with such a party, may be called and examined as if under cross-examination by any adverse party at any time during the presentation of evidence by the party calling the witness."

²⁶ *Daggett v. Atchison, T. & S.F. Ry.*, 48 Cal. 2d 655, 313 P.2d 557 (1957).

²⁷ *WIKIN, op. cit. supra* note 7, § 316.

there is a serious question whether defendant should be put to the task of rebutting the inference drawn from evidence of repairs admitted under the dubious circumstances outlined above.

The simplicity by which this long established exclusionary rule may be frustrated by the impeachment exception has not escaped judicial scrutiny. The California courts have examined the problem on several occasions²⁸ and the present law exhibits one limitation by which the courts have attempted to preserve the integrity of the rule. In *Pierce v. J. C. Penney Co.*,²⁹ the District Court of Appeal refused to allow evidence of repairs to be used for the impeachment of a non-expert witness³⁰ who had not actually *authorized such repairs*.³¹ Although the court recognized the dangers inherent in an extension of the impeachment exception,³² Judge Herndon, writing for the majority, still approved the earlier decision of *Daggett v. Atchison, T. & S.F. Ry.*,³³ affirming, albeit by dictum, that in the case of an expert witness, impeachment is possible without proof that he had any connection whatever with the prior condition.³⁴

The Code

California law on the subject crystalized with the *Pierce* decision. The comment to section 1151 of the Code clearly establishes the legislative intention to retain both the exception and the rule as previously applied.³⁵ If the Evidence

²⁸ *Daggett v. Atchison, T. & S.F. Ry.*, 48 Cal. 2d 655, 313 P.2d 557 (1957); *Hatfield v. Levy Bros.*, 18 Cal. 2d 798, 117 P.2d 841 (1941); *Pierce v. J. C. Penney Co.*, 167 Cal. App. 2d 3, 334 P.2d 117 (1959).

²⁹ 167 Cal. App. 2d 3, 334 P.2d 117 (1959).

³⁰ The California Supreme Court had held in *Daggett v. Atchison, T. & S.F. Ry.*, 48 Cal. 2d 655, 313 P.2d 557 (1957) that an expert witness could be impeached without proof that he had any connection with the subsequent precautions taken.

³¹ "But, manifestly, the fact that after the accident some unidentified person other than the witness directed or authorized alterations affords no basis for the utilization of the method of impeachment now under consideration." *Pierce v. J. C. Penney Co.*, 167 Cal. App. 2d 3, 8, 334 P.2d 117, 121 (1959).

³² "If the present ruling were to be sustained, then the clearest dictates of logic would require a holding in the next case that the same impeaching (contradictory) type of evidence here elicited on cross-examination may properly be elicited from witnesses called in rebuttal. Such a holding would mean that whenever a defendant in this type of case calls any witness to testify to any observation tending to prove the safety of, or the lack of danger or defectiveness, in his premises at the time of an accident, the door is automatically opened to plaintiff to prove (by way of impeachment) every subsequent repair made or precaution taken." *Id.* at 11, 334 P.2d at 122.

³³ 48 Cal. 2d 655, 313 P.2d 557 (1957). In this case a signal expert, called by plaintiff as an adverse witness, testified that the wigwag signal in place at the time of the accident was the safest type of automatic warning device. Plaintiff was allowed to impeach the veracity of this opinion by showing that the Public Utilities Commission had required its removal subsequently, and that a flashing red light had replaced it. Similarly, the testimony of a railway employee, who had been called as an adverse witness, that the speed limit on the track was 90 m.p.h. at the time of trial was impeached by evidence showing that it had been reduced at 50 m.p.h. after the accident.

³⁴ *Pierce v. J. C. Penney Co.*, 167 Cal. App. 2d 3, 12, 334 P.2d 117, 123 (1959).

³⁵ CAL. EVIDENCE CODE § 1151, comment: "Section 1151 does not prevent the use of evidence of subsequent remedial conduct for the purpose of impeachment in appropriate cases. This is in accord with *Pierce v. J. C. Penney Co.*, 167 Cal. App. 2d 3, 334 P.2d 117 (1959)."

Code is interpreted without careful judicial delineation, however, the policy of exclusion of evidence of subsequent remedial conduct may be further undermined.

Section 785 of the Code allows any party to impeach the credibility of a witness, including the party calling him.³⁶ This section changes prior law in California which limited impeachment of one's own witness to cases where the latter's testimony surprised and damaged the party calling him.³⁷ Applied to the case of subsequent repairs, this section may produce startling results. As previously stated an expert witness can be impeached with evidence of subsequent remedial precautions without the necessity of showing that he participated in any way in such repairs.³⁸ This section, literally construed, will permit a plaintiff to call his own expert witness, have him testify that the condition was safe at the time of the accident, and then impeach his opinion by introducing the evidence of repairs made after the accident. This, of course, could be done only in cases where the evidence of repairs is sufficiently prejudicial to over-balance and mitigate the danger inherent in impeaching one's own witness. In such cases section 785 may present a second dangerous means by which the exclusionary effect of section 1151 can be avoided.³⁹

A more subtle problem is encountered in the code section relating to the admissibility of prior inconsistent statements.⁴⁰ Before the Code such statements were admitted for the limited purpose of impeachment, and juries were so instructed.⁴¹ The Code, however, has changed the law dramatically on this subject. Prior inconsistent statements are now admitted as substantive evidence and as such qualify as a new exception to the hearsay rule.⁴² It is noteworthy that evidence of subsequent precautions is most frequently found in a verbal context—statements about the prior condition or orders to take steps to remedy the earlier condition.

Also significant is the legal resemblance between the two forms of impeachment. In the case of prior inconsistent statements, the testimony of the witness at the trial is impeached by an earlier statement which demonstrates that he did not always believe to be true the fact to which he testifies or the opinion which he currently holds. Similarly, in the case of impeachment by evidence of subsequent repairs, it is the witness' earlier action or order to make repairs which evinces a belief contrary to the opinion of safety to which he testifies at the trial. In light of these similarities an industrious attorney might well be able to persuade a judge that the conversation of a defendant that resulted in repairs being made constituted prior inconsistent statements which could be used as such to impeach the latter's testimony at trial. However, inasmuch as pre-code law required the court to give limiting instructions both in cases of impeachment by prior inconsistent statements and cases of impeachment by subsequent repairs,⁴³ no advantage would have been gained by such an argument.

³⁶ CAL. EVIDENCE CODE § 785.

³⁷ *People v. Le Beau*, 39 Cal. 2d 146, 245 P.2d 302 (1952).

³⁸ *Daggett v. Atchison, T. & S.F. Ry.*, 48 Cal. 2d 655, 313 P.2d 557 (1957).

³⁹ While it seems inconceivable that a judge would allow such an obvious maneuver to jeopardize the clear intent of § 1151, there seems to be at the present time no case or code section which specifically prevents such a device.

⁴⁰ CAL. EVIDENCE CODE §§ 770, 1235.

⁴¹ *WITKIN, op. cit. supra* note 7, § 537.

⁴² CAL. EVIDENCE CODE § 1235, comment.

⁴³ See notes 27 & 41 *supra* and accompanying text.

With the Code's important change respecting the nature of prior inconsistent statements,⁴⁴ however, the similarities between the two forms of impeachment take on added significance. Now if plaintiff could succeed in qualifying the defendant's order to make repairs as a prior inconsistent statement, it would seem that this evidence would have to be admitted without even the minimal protection of a limiting instruction.

If the only statement plaintiff introduced was defendant's order to make repairs, it is clear that it could not qualify as a prior inconsistent statement within the meaning of the hearsay exception. For, by definition, to so qualify, a statement must be offered to prove the truth of the matter stated;⁴⁵ and an order or a command has neither truth nor falsity, and is offered in our case, not for its truth but rather for the inference drawn from defendant's act of ordering repairs that he was not of the opinion that the condition at the time of the accident was safe.

It seems highly unlikely, however, that this problem will be presented in such a simplified form. It is more probable that any order to make repairs will be the result of some discussion concerning the condition which has occasioned the accident. In this latter case, when there is an attempt to admit into evidence the order to make repairs along with one or more of the collateral statements, the judge's problem is a more difficult one. Suppose the statements offered as evidence are: "I think we can make these stairs safer by placing adhesive strips on them. I want you to get the best price you can on that stripping and put it on the steps as soon as possible." Should the judge allow both comments in evidence as prior inconsistent statements to impeach defendant's testimony at trial that the steps were safe at the time of the accident?⁴⁶ It would seem that the latter one is merely an order and therefore would not qualify as a prior inconsistent statement within the meaning of the hearsay exception.⁴⁷ However, if the judge is unwilling to admit the order as a prior inconsistent statement, must he then dissect the two, admitting the former as substantive evidence and limiting the latter by an instruction that the jury consider it only as bearing upon the veracity of the defendant's opinion?⁴⁸ Furthermore, must not the jury be highly sophisticated to grasp this differentiation?

⁴⁴ See note 42 *supra* and accompanying text.

⁴⁵ CAL. EVIDENCE CODE § 1200 provides: "Hearsay evidence" is evidence of a statement. . . . that is offered to prove the truth of the matter stated."

⁴⁶ The first of the two sentences would apparently constitute a prior inconsistent statement if offered to impeach testimony that the premises were absolutely safe at the time of the accident.

⁴⁷ See note 45 *supra* and accompanying text.

⁴⁸ A careful reading of §§ 1151 and 1235 evinces another argument against the admissibility of prior inconsistent statements regarding subsequent repairs as substantive evidence. Section 1235 states that prior inconsistent statements are *not* rendered inadmissible by the hearsay rule. There is nothing in this section that suggests that as substantive evidence they are free from the restrictions of other code sections. It could be argued that even as prior inconsistent statements they concern subsequent repairs, and that § 1151 requires a limiting instruction when admitted for the purposes of impeachment. However, the plaintiff's answer in such a case might well be that the fact that the evidence concerns subsequent repairs is only collateral to its major function as an inconsistent statement, and should not, as such, necessitate any limitation.

Conclusion

However difficult each of the preceding problems may seem, their resolution will be far more easily realized once the judiciary has given a definitive answer to the basic question upon which all these others are predicated—should evidence of remedial conduct be admitted for the purpose of impeaching a witness whom the plaintiff himself has called?

If the major question is to be answered in the negative, there are at least two means by which such a decision could be implemented. The most effective way to eliminate the dangers inherent in the impeachment exception would be to disallow the admission of evidence of subsequent remedial conduct to impeach a witness called by the plaintiff. Such a limitation would prevent the plaintiff from planning the subterfuge suggested in the earlier part of the note.⁴⁹ Moreover, the plaintiff could not impeach his own expert witness under Section 785.⁵⁰ This limitation, though, would still allow impeachment in cases where justified by the voluntary testimony of defendant or defendant's witness.

To bring about such a change in the present law the court would be required to overrule the decision of *Daggett v. Atchinson, T. & S.F. Ry.*⁵¹ which held that evidence of repairs could be used for the purposes of impeaching an adverse witness called by the plaintiff. With respect to limiting section 785, any such ruling must come as a part of the future evolution of the new code provision.

While it is this writer's opinion that the preceding suggestion provides the most effective solution to the foregoing problems, the code itself contains another supplementary protection against future liberalization of such impeachment. Section 352 grants the trial judge the discretion of refusing evidence where its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice.⁵² It can be persuasively argued that evidence of remedial conduct offered to impeach a witness under the circumstances enumerated above⁵³ would qualify for exclusion under this section. However, since section 352 is a general provision, it offers the judge no guidelines to the solution of the specific questions raised in this note. Consequently, the protection offered by section 352, contingent as it is upon the knowledge and sophistication of the trial judge, would seem effective only to complement a stronger court ruling against admissibility of evidence of repairs.

It is beyond the scope of this note to evaluate the basic policy arguments which originally precipitated the adoption of the exclusionary rule codified in section 1151. For the present discussion, however, it should suffice to note that the California legislature found such arguments persuasive when they chose to incorporate this section into the Code. In light of this clear manifestation of legislative intent, any clever legal subterfuge which circumvents the prohibition of section 1151 and undermines the purpose for which it was adopted, would seem subject to critical judicial scrutiny. It is hoped that the courts will recognize that the rule embodied in section 1151 and the impeachment exception as presently applied in California law can at times be irreconcilable, and will rectify the situation in such a way as to retain the integrity of section 1151 while limiting the exception to those situations wherein it serves a worthwhile judicial function.

Malcolm E. McLorg*

⁴⁹ See notes 22-28 *supra* and accompanying text.

⁵⁰ See note 38 *supra* and accompanying text.

⁵¹ 48 Cal. 2d 655, 313 P.2d 557 (1957).

⁵² CAL. EVIDENCE CODE § 352.

⁵³ See notes 22-26, 38 *supra* and accompanying text.

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