Report on Post-Accident Remedial Measures

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British Columbia Law Institute

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The British Columbia Law Institute was created in 1997 by incorporation under the Provincial *Society Act*. Its mission is to:

(a) promote the clarification and simplification of the law and its adaptation to modern social needs,
(b) promote improvement of the administration of justice and respect for the rule of law, and
(c) promote and carry out scholarly legal research.

The Institute is the effective successor to the Law Reform Commission of British Columbia which ceased operations in 1997.

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INTRODUCTORY NOTE

The British Columbia Law Institute has the honour to present:

Report on Post-Accident Remedial Measures

After an accident occurs on or with a person's property, that person will usually take steps to ensure that a similar accident will not occur in the future. It is sound public policy to encourage people to take these post-accident remedial measures. They reduce the possibility that others will be exposed to the risk of future accidents.

However, it is no longer clear that the law in British Columbia provides people with an adequate incentive to take post-accident remedial measures. Indeed, to the extent that the law now permits post-accident remedial measures to be admitted in litigation as evidence of negligence, it may be discouraging people from taking the necessary steps to ensure that future accidents do not occur.

The British Columbia Law Institute recommends that the *Evidence Act* be amended to address this concern. The amendment recommended in this report would provide that evidence of remedial measures taken after the occurrence of an injury or damage, which is alleged to give rise to liability in an action for breach of duty, will not be admissible in a trial of that action, unless it is offered to prove a fact other than liability and that other fact has actually been disputed by the defendant.

Gregory K. Steele, Q.C.
Chair, British Columbia Law Institute

January 2004

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I. Introduction

An issue with the law of evidence in this province has come to light. After an accident occurs on or with a person's property, that person will usually take steps to ensure that a similar accident will not occur in the future. A question has arisen whether that person may leave a dangerous condition unaltered in order to avoid having post-accident remedial or precautionary measures used as evidence against them for the incident which has already occurred. This would create the possibility of future accidents and expose members of the public to unnecessary risk.

The British Columbia Law Institute published a *Consultation Paper on Post-Accident Remedial Measures* in April 2003. The Consultation Paper discussed the leading issues in this area of the law and requested comments on our tentative proposals for reform. The British Columbia Law Institute would like to thank all those who responded to the Consultation Paper. The comments were of great benefit and were fully considered in the pre-paration of this Report.

II. Historical Exclusion of Evidence

Historically, evidence of the defendant's repair or alteration of a site subsequent to an accident was not admissible against the defendant. On this point the following statement by Bramwell B. in *Hart* v. *Lancashire and Yorkshire Ry. Co.* is often quoted:[1]

> . . . people do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it gets older, therefore it was foolish before.

Similarly, in *Beever* v. *Hanson, Dale & Co.*, Lord Coleridge C.J. wrote:[2]

> Now a perfectly humane man naturally makes it physically impossible that a particular accident, which has once happened, can happen again, by fencing or covering, or, at any rate, making safe the particular thing from which it arose. That, however, is no evidence of, and I protest against its being put forward as evidence of, negligence. A place may be left for a hundred years unfenced when at last some one falls down it. The owner, like a sensible and humane man, then puts up a fence, and upon this the argument is that he has been guilty of negligence, and shows that he thought the fence was necessary, because he put it up. This is both unfair and unjust. It is making the good feeling and right principle of a man evidence against him. This is no evidence of negli-gence.

The reason for this policy was a concern that to admit such evidence would discourage a

1. (1869) 21 L.T. 261 at 263 (Eng. Ex. Ct.).

2. (1890) 25 L.J.N.C. 132 at 133 (Eng. Q.B.D.).

potential defendant from taking steps to prevent further accidents. As one of the purposes of the law of negligence is to prevent accidents, it was felt that to allow the evidence in would defeat the purpose that the law was trying to achieve.

Another policy reason for not admitting post-accident remedial evidence at trial was the effect it could have on the jury. Though they ought to be instructed to consider all of the evidence before them, a jury could take the evidence as an admission of liability despite the limiting instructions, with the result that the prejudicial effect of the evidence would out-weigh its probative value.[3] As the issue that the jury is charged with deciding is what a reasonable person in the position of the defendant could have foreseen when safety measures were or were not implemented, this issue is only confused by considering the facts with the benefit of hindsight.

Most Canadian provinces followed this position until midway through the last century, when it began to be questioned.[4] The prevailing view in Canada today has been stated as follows:[5]

> Evidence of post-accident precautions may not, *in itself*, be construed as an *admission of* liability but it may be admitted to establish a *fact* that supports a finding of negligence where the evidence would not be unduly prejudicial to the defendant.

III. The Law in British Columbia

The exclusionary position was initially followed by the British Columbia courts: *Howard*

3. Wigmore on Evidence, (Chadbourn Rev. 1979) v. 2, at 175.

4. Wilkinson J. referred to different positions taken in Canada as to the admissibility of such evidence in *620357 Saskatchewan Ltd.* v. *Georget,* (2000) 202 Sask. R. 131 at 139, [2001] 5 W.W.R. 349 at 356 (Q.B.):

> Some cases hold that such evidence is inadmissible at trial but admissible for discovery purposes. Other cases hold it can be admitted at trial if relevant to an issue other than negligence, or as proof of what might be done without interfering with efficiency. Still others hold that it is admissible and can be resorted to, not alone, but in combination with other evidence in order to support a finding of negligence. Our Court of Appeal held in *Cominco Ltd. v. Phillips Cables Ltd.*, [1987] 3 W.W.R. 562, 54 Sask. R. 134 (C.A.) that the issues of admissibility and weight with respect to such evidence should be left to the trial judge.

5. P.H. Osborne, *The Law of Torts* (Toronto: Irwin Law, 2000) at 37 [emphasis in original]. For an example of the position adopted in most American jurisdictions *see*: United States' Federal Rules of Evidence, Article IV, Rule 407.

v. *B.C. Electric Railway Co. Ltd.*;[6] *Cathcart* v. *Richmond (Township of)*.[7] More recently, in *Cominco Ltd.* v. *Westinghouse Canada Ltd.*,[8] the Court of Appeal said that this rule does not apply in British Columbia. In that case it was alleged that a fire at a zinc plant spread quickly due to the propensity of the insulating sleeve on certain cables to burn. The plaintiff appealed from the ruling of the chambers judge, in part, on the issue of whether questions relating to the period after the accident could be asked at examination for discovery. Seaton J.A., for the court, concluded that the appellant had the right to conduct discovery into issues that occurred after the date of the accident. The Court reviewed the *Howard* and *Cathcart* cases and found that an exclusionary rule had not been proposed in these cases, but rather the courts had disallowed questions that were not relevant. Seaton J.A. made the following statement in this regard:[9]

> No case binding on us supports an exclusionary rule based on policy and I am not inclined to introduce such a rule. In my view a defendant will not expose other persons to injury and himself to further lawsuits in order to avoid the rather tenuous argument that because he has changed something he has admitted fault.

These words were again adopted by the Court of Appeal in *Anderson* v. *Maple Ridge (District)* in 1992.[10] In *Anderson* the plaintiff alleged that the defendant municipality had placed a stop sign too far from the edge of the road to be visible. As a result he drove through the intersection without stopping and was injured in a collision. The Court held that the plaintiff should have been permitted to introduce, as evidence that the sign was too far from the road, the fact that the municipality moved the sign closer to the road following the plaintiff's accident and that this resulted in a reduction in accidents.

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6. [1949] 1 W.W.R. 933, [1949] 3 D.L.R. 304 (B.C.S.C.). In that case the defendant objected to the plaintiff's questions at examination for discovery about repairs that were made following the accident to the wigwag signal at a railway crossing. The court held that such evidence was not receivable as an implied admission of negligence.

7. (1965) 51 W.W.R. 767 (B.C.S.C.). In the *Cathcart* case the plaintiff sought to ask questions at examination for discovery relating to the repair or installation of warning signs at an intersection after the accident. Counsel for the plaintiff stated that the purpose was to use the evidence as an admission of negligence or of a standard of reasonableness. The court held that evidence of subsequent repairs was not admissible for that purpose.

8. (1979) 11 B.C.L.R. 142 (C.A.). The court found that questions about post-fire conduct were relevant as they bore on such matters as the capacity to produce fire retardant cable and on what ought to have been known before the fire.

9. *Ibid.* at 157.

10. (1992) 71 B.C.L.R. (2d) 68, [1993] 1 W.W.R. 172 (C.A.), leave to appeal to SCC refused [1993] 1 S.C.R. vi, 74 B.C.L.R. (2d) xxx (note).

Recent case law has interpreted the *Anderson* case. In *Dahl* v. *Liberty Investments Ltd.*[11] the plaintiff fell and was injured going down a set of stairs that led to a pool deck. The court admitted evidence that the defendant had taken steps to remedy the deficiencies set out in the plaintiff's Statement of Claim with regard to the hazards surrounding the design of the steps. On this issue the court stated:[12]

> Insofar as the defendant promptly addressed the deficiencies set out in the Statement of Claim to the extent of using the Statement of Claim as a checklist, I instruct myself that I cannot on the basis of this evidence alone conclude that the defendants thereby admitted liability. I assume from that passage from *Anderson* v. *Maple Ridge (District), supra*, that use can be made of such evidence in conjunction with other relevant and admissible evidence to arrive at a conclusion about liability.

Further, in *Ryan* v. *Victoria (City of)*[13] the court discussed the law of post-accident evidence. The plaintiff was injured when his motorcycle tire became trapped in railway tracks (flangeways) running down the centre of a city street. The motorcyclist sued the City of Victoria and the railway companies that owned and operated the tracks. The trial judge found the City and the railways liable in negligence. Following *MacKay* v. *City of Saskatoon*,[14] which quoted from *Hart* v. *Lancashire and Yorkshire Ry. Co.*,[15] the court held that evidence of subsequent remedial measures by the City was not admissible to prove negligence, but was admissible for other purposes. In this regard the trial judge stated:[16]

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11. [1997] B.C.J. No. 461, online: QL (BCJ) (S.C.).

12. *Ibid,* at para. 26.

13. At trial the railway was found liable in negligence for maintaining dangerously wide flangeways and the City was found liable in negligence for failing to properly warn of the hazard created by the flangeways: (1994) 4 M.V.R. (3d) 59, [1994] B.C.J. No. 1202, online: QL (BCJ) (S.C.). The Court of Appeal held the City and the railways liable only for failure to warn of the hazard: (1996) 22 M.V.R. (3d) 1, 82 B.C.A.C. 40 (C.A). At the Supreme Court of Canada the respondents did not challenge the finding that they were liable for failing to warn of the hazard. The court found that on the issue of the railway's liability for the width of the flangeways the trial judge's finding of negligence should not have been reversed by the Court of Appeal: [1999] 1 S.C.R. 201, 168 D.L.R. (4th) 513. (Public nuisance and contributory negligence were also at issue in this case.)

14. (1960) 26 D.L.R. (2d) 506 at 509 (Sask. C.A.). In that case evidence that the city placed warning lanterns around a street excavation site after the accident was admitted at trial. The Court of Appeal affirmed the trial decision that the defendant was not liable and stated that it regretted that nearly all of the plaintiff's evidence was coloured by reference to the post accident measures that were taken.

15. *Supra* note 1.

16. (1994) 4 M.V.R. (3d) 59 at 92.

> I agree that such evidence is not admissible to prove negligence. . . . However, this evidence is relevant to more than the issue of the defendant City's alleged negligence. As noted, it goes to issues put forward by the defendants. Thus, the evidence of subsequent remedial measure is admissible for the purpose of considering the validity of the defendants' claims, and the general economic and functional ability to implement improvements related to safety on Store Street. There are no policy reasons to exclude the evidence for those purposes.

It is clear that in British Columbia remedial measures taken after an incident has occurred may be construed as an admission of negligence, and may be relied on to establish facts that may support a finding of liability, as well as whether the defendant had ownership or control over the accident site or whether it was feasible to carry out precautionary measures.

IV. Issue under the Present Law

The move toward admitting evidence of remedial measures is part of a larger trend in Canadian law, a trend which seeks to relax exclusionary rules and to admit as much relevant evidence as possible for consideration.[17] While we affirm the general trend in the law of evidence towards admissibility, in this instance we are of the view that a more restrictive test is preferable.

Admitting evidence of remedial or precautionary measures taken after an incident may place the potential defendant in an undesirable position. A defendant who, with the benefit of hindsight, wants to take steps to prevent another accident, faces the real possibility that those steps may be admitted as part of the evidence against that person in a negligence case. The law may discourage the defendant from carrying out measures that common sense dictates ought to be done. For example, if an accident occurs on a ski slope a potential defendant may be reluctant to adopt additional safety measures for fear that such conduct would be used as evidence against the defendant with regard to the injury that has already occurred. As it is in the interest of society that potential defendants adopt precautionary measures to ensure that similar accidents are avoided in the future, the general trend toward greater admissibility is in this instance counterproductive.

A lawyer advising a client in this situation may be in an equally difficult position. Aside from having to tell someone not to do what ought to be done, the solicitor is forced to weigh the possibility and cost of further accidents and lawsuits against the consequences of having such evidence admitted to prove a fact that supports a finding of liability in the lawsuit for the accident that has already occurred.

17. *Supra* note 10 at 74 (B.C.L.R.).

On the other hand, there are circumstances where evidence of subsequent repairs or improvements is probative of facts other than the defendant's negligence. For example, the fact that the defendant repaired a sidewalk after an accident may prove that the defendant was the owner of, or was responsible for maintaining the sidewalk. In this case, it would be unfair for the defendant to hide behind an exclusionary rule and deny ownership of the sidewalk. Arguably, allowance should be made for the admission of evidence of subsequent remedial measures which goes to proof of collateral issues that are disputed by the defendant.

V. The Consultation Paper

To gauge opinion on the issues raised by the state of the law in British Columbia on post-accident remedial measures, the Law Institute published a Consultation Paper in April 2003.

In the Consultation Paper, we recommended that a new statutory rule be adopted. The rule would state that evidence of remedial measures taken after the occurrence of an injury or damage, which is alleged to give rise to liability in an action for breach of duty,[18] is only admissible at trial if: (i) it is offered to establish a fact other than breach of duty, such as proving ownership, control, or feasibility of precautionary measures; and (ii) the fact is in dispute. This would limit the purpose for which post-accident evidence may be used, while at the same time the defendant would be prevented from taking unfair advantage of the rule. For example, if the defendant denies ownership, control or responsibility for the thing which caused the injury, evidence of the fact of repair or remedial measures could come in to prove control. If the defendant maintained that remedial measures were not feasible or that their cost was prohibitive, evidence to the contrary could be admitted to rebut this assertion.[19]

18. In our recommendations and draft legislation we use the expression "breach of duty" which embraces not only negligence but duties arising under statute or contract and to which the same rules should apply.

19. Rule 407 of the American Federal Rules of Evidence contains a similarly-worded provision. The American courts have diverged over the interpretation of the words "if controverted." Some courts have held that a fact is controverted for the purposes of the Rule if it is not expressly admitted by the defendant: *see Herndon* v. *Seven Bar Flying Service, Inc.*, 716 F. 2d 1322 at 1329 (10th Cir. 1983), *cert. denied* 466 U.S. 958; *Ross* v. *Black & Decker, Inc.*, 977 F. 2d 1178 (7th Cir. 1992). Other courts have interpreted "if controverted" as requiring the defendant to take steps to put the fact in issue: *see Werner* v. *Upjohn Co., Inc.*, 628 F. 2d 848 at 855 (4th Cir. 1980), *cert. denied* 449 U.S. 1080; *Gauthier* v. *AMF, Inc.*, 733 F. 2d 634 at 636-638 (9th Cir. 1986). In the Law Institute's view the latter position is the better one, and it should be adopted in British Columbia.

In practice the rule may seldom require that evidence of post-accident remedial measures be totally excluded, since another purpose may be advanced that does not relate directly to proving breach of duty, but rather goes to a collateral issue relevant to the case.

The Law Institute received a small number of responses to the Consultation Paper. We view the number of responses as being commensurate with the non-controversial nature of our proposal for reform, and as reflecting a general feeling of approval for our proposal. We are grateful for the responses that we did receive. They generally (although not unanimously) supported our proposal, and provided us with assistance in formulating our final re-commendations.[20]

VI. Recommendations for Reform

The Law Institute endorses the proposal for reform made in the Consultation Paper as its final recommendation. The legislative amendments set out in Appendix A to this Report meet with the approval and have the full support of the Law Institute.

VII. Conclusion

We are of the view that the issue raised in this Report is an area of the law that needs to be re-considered in light of social policy concerns. We recommend enactment and implement-ation of the draft legislation set out in Appendix A.

VIII. Acknowledgments

We wish to acknowledge the contribution of the Law Institute's staff lawyers Caroline Carter and Kevin Zakreski in the preparation of this Report and the Consultation Paper that preceded it.

20. The issue of whether the proposed legislation should expressly limit questions that can be asked on examination for discovery was raised in the Consultation Paper. The focus of our final re-commendations is on admissibility at trial and nothing in them is intended to change the law of discovery.

Appendix A

Draft Legislation

EVIDENCE (AMENDMENT) ACT, 2004

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

1. The *Evidence Act*, R.S.B.C. 1996, c. 124, is amended by adding the following section:

   XX (1) Subject to subsection (2) if, after an incident alleged to give rise to liability in an action based on breach of duty, remedial or precautionary measures are taken, evidence of those measures is not admissible to establish the breach of duty.

   (2) Evidence referred to in subsection (1) may be admitted if offered for another purpose, such as proving ownership, control, or feasibility of remedial or precautionary measures, if controverted.

2. This Act comes into force by regulation of the Lieutenant Governor in Council.

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