Admissibility of Evidence of Remedial Conduct

By Craig Gillespie and Bottom Line Research[1]

Introduction

When a plaintiff is injured in an accident, often the defendant responds with remedial conduct to address the hazard which may have led to the plaintiff's injury. Plaintiff's counsel will be interested in the defendant's remedial conduct and wish to gather evidence of such conduct for use at trial. However, defendant's counsel will frequently object to such questioning by plaintiff's counsel at examinations for discovery. Must the defendant answer these questions? Or can the objection stand? And is evidence of the defendant's post-accident remedial conduct admissible in a broader context?

Discussion

A recent case from of the Ontario Court of Appeal discusses the issue of the admissibility of evidence of remedial conduct at trial and holds that, with the proper instruction to the jury, it is admissible: *Sandhu (Litigation Guardian of) v. Wellington Place Apartments*, 2008 ONCA 215, 291 D.L.R. (4th) 220. In this case the Dhillon tenants rented an apartment from the defendant. A window screen on a window in the apartment was broken, and the window did not have a child safety lock. The tenants complained to the property managers, but the window was not repaired. To limit children's access to the room, the tenants installed a lock on the door of the room with the broken window screen. Unfortunately, however, one day the family left the door open and their two year old child fell five stories from the broken window. He suffered serious and debilitating injuries. The defendant fixed the window screens and child safety locks throughout the apartment building immediately after the injury.

The trial judge admitted evidence of the defendant's remedial conduct and gave instructions regarding this evidence to the jury. The defendant argued on appeal that this evidence was not properly admissible, both because it was irrelevant and for reasons of public policy. The evidence was irrelevant because it showed only that the defendant had a belief that the previous

situation (prior to the remedial conduct) was possibly negligent. Further, policy grounds dictated against admitting such remedial conduct evidence because a party would not take remedial steps for fear that those steps would be taken as an admission of liability.

The appellate court, *per curiam*, found that the remedial conduct evidence was relevant and admissible. The evidence was admissible as evidence of the standard of care, not necessarily of liability. Evidence must first be considered for its relevance, then any policy arguments which may apply to exclude the evidence will be considered.

In considering the policy argument the appellate court stated at para. 58:

> The policy argument with respect to evidence of remedial measures is premised on the theory that defendants would be discouraged from taking necessary remedial measures if they knew that these measures would be admitted against them at trial as an admission of liability. **Courts have tended to discount this policy argument.** [Emphasis added.]

The appellate court then found that the law in Ontario did not contain a rule excluding remedial conduct evidence on policy grounds. The trial judge was correct in including the remedial conduct evidence at trial. It is the trial judge that will weigh the probative value of the evidence against its prejudicial effect. The trial judge correctly instructed the jury on the proper use of the evidence. At para. 63:

> In our view, the charge to the jury was correct. As can be seen, the trial judge expressly instructed the jury not to use the evidence as an admission of liability, and we agree with that limitation on the use of the evidence. She then went on to instruct the jury as to the permitted uses of the evidence, namely, as evidence of what was reasonable in the circumstances and whether the appellants took reasonable care.

How have Alberta courts considered this type of evidence? Is the Ontario standard indicative of the approach in Alberta? Do policy arguments have more weight in Alberta? As the following cases will show, Alberta law is very similar to Ontario law on this point. The relevance of the evidence is the primary factor. Then a court will consider if policy reasons apply to exclude the evidence.

The leading case in Alberta regarding whether questions relating to remedial conduct can be asked on discovery is *Canadian Pacific Railway v. Calgary (City)* (1966), 58 W.W.R. 124, 59 D.L.R. (2d) 642 (Alta S.C.(A.D.)). The City of Calgary was building a residential neighbourhood on a portion of its land. This construction included the insertion of a culvert under the railway's tracks while building the storm sewer. However, a large volume of rain and other wastewater blocked the entrance to the culvert with debris, causing the water to back up and the railway's tracks to be washed out. Subsequent to the accident, the city made repairs to the culvert, but refused to answer questions about those repairs at discovery.

The chambers judge ordered the city's officer to answer the questions objected to, and the city appealed. On appeal, the city argued, following case law from England and other provinces, that evidence of the subsequent conduct of a defendant could not be admissible as evidence of the defendant's negligence.

Smith J., writing for the Court of Appeal, disagreed. He stated at paras. 8-10:

> But we have in Alberta the decision of *Toll v. Canadian Pacific R.W. Co.* (1908), 8 C.R.C. 294, 1 A.L.R. 318, 8 W.L.R. 795. In that case, at the trial, evidence was tendered by the plaintiff as to what the defendant had done subsequently to the accident to the post which it was alleged was the cause of the accident. The evidence had been objected to but was admitted. Beck, J., delivering the reasons of the Court en banc of the Supreme Court of Alberta in 1908, referred to and quoted from the reasons of Bramwell, B., and Coleridge, L.C.J., respectively in *Hart v. Lancashire & Yorkshire R. Co.*, *supra*, and *Beever v. Hanson*, *supra*. Beck, J., then said [8 C.R.C. at pp. 307-8]:
>
> > Both the learned Judges quoted were evidently referring to cases in which the evidence was in fact given and was consequently actually before the jury, **I think the correct view is that in an action for negligence, evidence of repairs, improvements, removal, substitution, or the like done after the occurrence of an injury is if it stand entirely alone, no evidence of negligence, but that such evidence is admissible because it is logically relevant**. It may in any case, and does in fact in most cases, become the logical foundation for evidence of other admittedly relevant facts arising out of it, such as declarations made at the time or the consequent disclosure of the more or less latent

> condition of the object which occasioned the accident. In most cases it would be almost impossible in practice to exclude evidence of the fact. I think that though standing alone such evidence would not afford evidence in which a jury could reasonably find negligence, yet it is a circumstance which, in connection with other evidence, they have a right to consider. If there was no other evidence relevant to the question of negligence, it would, of course, be the duty of the trial Judge to withdraw the case from the jury. If there was additional evidence, it would be the duty of the trial Judge to warn the jury that evidence of subsequent repairs, improvements, removal, substitution or the like, taken by itself, is no evidence of negligence. I think, therefore, the evidence objected to was properly admitted.
>
> I have reviewed all of the cases referred to by Mr. Helman and others and have considered the reasons of the Court *en banc* in the *Toll* case and I am in agreement with the reasoning of Beck, J., therein. **I believe it is correct to say that that case has been accepted in Alberta for nearly 60 years as a correct statement of the law.**
>
> On the basis of the reasoning of Beck, J., in the *Toll* case it is clear, in my view, that the evidence as to what was done by the appellant in the culvert in 1960 may be material on the question of whether the appellant was negligent as alleged (*Adams et al. v. Hutchings et al.* (No. 1) (1893), 3 Terr. L.R. 181) and the questions relating to what was done in 1960 must, therefore, be answered as ordered by the Chambers Judge. [Emphasis added.]

Canadian Pacific Railway v. Calgary (City) was applied in *Jetz* v. *Calgary Olympic Development Assn*. (2002), 328 A.R. 265, 2002 ABQB. In this case the plaintiff Jetz was thrown from his bicycle when it struck a speed bump on a road owned by the defendant. Four days before the accident occurred, the defendant had installed the speed bump on a steep curved mountain road through Olympic Park to slow vehicular traffic and protect pedestrians. It was not painted yellow and was difficult to see. Shortly after the cycling accidents of the plaintiff and others, the defendant painted the speed bump yellow with orange stripes at the ends and moved its warning signs, with the result that no further accidents occurred. Moshansky J., relying on *Canadian Pacific Railway v. Calgary (City)* admitted the evidence of the remedial conduct at trial.

Both *Sandhu* and *Canadian Pacific Railway v. Calgary (City)* were followed in the recent decision of *Prosser v. 20 Vic Management*, 2009 ABQB 177, 8 Alta. L.R. (5th) 68, affirmed at

[2010] A.J. No. 153, 2010 ABCA. The Plaintiff was involved in a trip and fall accident at Chinook Centre Mall in Calgary. She tripped and fell on a fence leg as she walked past a construction area. The Defendant decided to sandbag the fence legs after the accident. Fences surrounding other construction sites at the other mall entrances were already sandbagged at the time the incident occurred.

Cairns J. discussed the use of such subsequent conduct evidence as follows at para. 35:

> While remedial action taken by a defendant does not prove that it was accountable for the accident in question, it is "relevant to the issue of the nature of steps that could have been taken to reduce risk": *Sandhu (Litigation Guardian of) v. Wellington Place Apartments*, 2008 ONCA 215, 234 O.A.C. 200 (Ont. C.A.) at para. 61.

Again, the principles in *Prosser* are clear. Evidence of subsequent remedial conduct cannot be used to prove that the defendant was negligent by itself, but it can be used for other purposes as long as the evidence is relevant, such as proving the nature of the steps that could have been taken to reduce the risk.

In *Tolko Industries Ltd. v. Railink Ltd.*, 2003 ABQB 349, 333 A.R. 270, affirmed at 2003 ABCA 332, 346 A.R. 78, Slatter J. considered the permissible scope of questions at examination for discovery. The plaintiff's property had been destroyed in a forest fire, and counsel for the plaintiff sought to ask the officer for the defendant questions regarding its risk assessment policies, such as whether it considered if the log inventory was watered down from time to time. Slatter J. referred to questions at discovery regarding remedial conduct as analogous to questions regarding risk assessment, and held that, provided that the evidence is relevant and material, questions directed at eliciting this evidence should be allowed. With respect to the policy argument, he stated at para. 17:

> It is not uncommon for defendants to take preventative steps after an accident has occurred, in order to avoid a further accident. Plaintiffs will sometimes point to these steps as an admission that before the accident the facility or activity was being negligently maintained or conducted. The defendants will counter that there was nothing negligent about their prior conduct, and they have simply taken the steps to enhance safety out of a sense of common humanity. No responsible

> person wants to see another person injured unnecessarily. Overlying this debate are policy considerations. It will sometimes be suggested that the courts should not have regard to post-accident conduct, as that will merely discourage defendants from taking remedial steps...

Slatter J. discounted the policy argument and stated that such policy considerations were not to be considered by the court at the early stage of the litigation of discoveries. Instead, the questions of public policy and admissibility are to be considered at trial, by the trial judge. The only issues to be considered at the discovery stage are whether the evidence is relevant and material. It is for the trial judge to consider whether the evidence of remedial is inadmissible for public policy reasons. At para. 20:

> I make no comment about the merits of this argument one way or the other. I would simply point out that the issues of contributory negligence and public policy can only be satisfactorily resolved at the trial level. On an interlocutory application like this, the issue is simply whether the questions are relevant and material. The objective at this stage of the proceedings is to ensure that there is a proper and complete record for the eventual trial. Whether the trial judge will find that this evidence is inadmissible for public policy reasons is not something that should be decided at this stage: Cominco Ltd. v. Phillips Cables Ltd., [1987] 3 W.W.R. 562, 54 Sask. R. 134, 18 C.P.C. (2d) 165 (C.A.), Wright v. Schultz (1992), 135 A.R. 58 , 10 C.P.C. (3d) 277 (C.A.).

Conclusion

As the above cases illustrate, evidence of remedial conduct will be admitted if certain tests are met. The first test is broad: is the evidence relevant and material? Then the court will consider the admissibility of the evidence taking into consideration the public policy argument-if such evidence is admitted it will arguably be construed to be an admission of liability so as to prevent the wrongdoer from undertaking the remedial action. Generally, courts in Canada have found that remedial conduct evidence is admissible and have discounted the public policy argument.

With respect to questions regarding remedial conduct at discovery, per Slatter J. in *Tolko Industries Ltd. v. Railink Ltd.*, provided that the evidence is relevant and material, questions directed at eliciting this evidence should be allowed. Policy questions do not come into play at

this stage in the litigation. It is for the trial judge to consider the public policy argument and decide if the evidence is inadmissible.

---

[1] With thanks to Laura Klassen Bullock for her original research and writing of this article.