GENERAL LIABILITY ARTICLES 2015

THE TRIVIAL DEFECT DEFENSE IS NOT TRIVIAL WHEN IT COMES TO DEFENDING AGAINST TRIP-AND-FALL AND OTHER PREMISES LIABILITY CLAIMS

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Life seems to be going well until – all of a sudden – our feet fly up, and down we fall, unexpectedly during a routine stroll somewhere outside. We might think that someone is clumsy if they trip and fall accidentally over a small sidewalk crack, or if they misstep over two concrete pavers which are not completely level and symmetrical with each other. But California courts have adjudicated numerous lawsuits over the years where someone has been injured seriously due to a walkway condition that is less than perfect. Because their injuries are significant and they arguably did nothing that caused or contributed to the fall, these claimants look for someone to compensate them.

Such cases can be problematic for a defendant, such as a school, retail business, or homeowner, who is legally responsible for maintaining safe walkway conditions. If a defective condition is apparent enough for a claimant to have seen it beforehand, arguably the property owner was on notice of it too. If the defective condition is so trivial that a claimant likely would not have seen it, arguably the property owner should not have had notice of it either. The issue is really what would have been reasonable under the circumstances.

Legally, there is no dispute that "persons who maintain walkways, whether public or private, are not required to maintain them in an absolutely perfect condition."[1] As a matter of law, a condition is not dangerous if the court determines that the risk was minor, trivial, or insignificant.[2] This so-called "trivial defect defense" is available to private, nongovernmental landowners.[3]

It is not as simple as merely measuring the crack in the pavement, although some courts have done so. Courts have ruled that sidewalk defects greater than one-half inch are trivial as a matter of law:[4] ranging from three-quarters of an inch,[5] to one inch,[6] and up to one and a half inches.[7]

California courts have made clear, however, that we need to consider a totality of various factors when determining whether or not a condition is in fact "trivial." In *Barone v. San Jose,* 79 Cal.App.3d 284 (1978), the Court explained that the concept of triviality has two facets:

> (a) The court must first determine whether the defect is too trivial to be dangerous as a matter of law; and

[1] *Caloroso v. Hathaway*, 122 Cal.App.4th 922, 927 (2004), citing *Ursino v. Big Boy Restaurants,* 192 Cal.App.3d 394, 398-399 (1987).

[2] California Government Code § 830.2.

[3] *Caloroso v. Hathaway,* supra 122 Cal.App.4th at 927*,* citing *Ursino v. Big Boy Restaurants,* supra 192 Cal.App.3d at 398-399.

[4] *Barrett v. City of Claremont*, 41 Cal.2d 70, 74 (1953).

[5] *Whiting v. City of National City*, 9 Cal.2d 163, 166 (1937); *Fielder v. Glendale*, 71 Cal.App.3d 719, 734 (1977).

[6] *Dunn v. Wagner*, 22 Cal.App.2d 51, 54 (1937); *Balmer v. City of Beverly Hills*, 22 Cal.App.2d 529, 531 (1937).

[7] *Nicholson v. City of Los Angeles*, 5 Cal.2d 361, 363 (1936).

> (b) "The larger question of whether the nature of the defect, along with other circumstances, is sufficient to raise a jury question concerning notice. This initial inquiry into the question of 'dangerousness' would involve consideration of such matters as the size and location of the defect with respect to the surrounding area and lighting conditions and whether it has been the cause of other accidents; while the question of notice would necessarily involve not only the factors which are primarily related to "dangerousness," but also such matters as the visibility of the condition, the frequency of travel in the area and the probability, if any, that a reasonable inspection by the appropriate [person, landowner, public official, etc.] would have discovered its existence and its dangerous character.[8]

To illustrate this point, a plaintiff fell at 9:30 p.m. after tripping over two adjoining edges of a public sidewalk that measured between one-half and five-eighths an inch in differential. The Court acknowledged that such height differentials have been held as trivial conditions as a matter of law. However, the Court ruled against the defense after considering the other factors present at that specific location, including the facts that the accident happened at night, the sidewalk had a shadow because of overhead trees, Plaintiff was walking slowly, and he did not contribute to accident in any way.[9]

In conclusion, while a condition may be trivial or minor, and can form a defense that allows for a possible Motion for Summary Judgment, it is not always as straightforward a defense as we would like. We must take into account the other conditions and circumstances surrounding the alleged condition, including prior accidents at the site, visibility, lighting, other obstructions, prior repairs, whether or not the area is frequently navigated, and Plaintiff's actions, to name but a few.

[8] *Barone v. San Jose,* 79 Cal.App.3d 284, 291 (1978).
[9] *Johnson v. City of Palo Alto,* 199 Cal.App.2d 148, 150-152 (1962).

PREPARING WITNESSES AGAINST THE REPTILE CROSS-EXAMINATION AT DEPOSITION

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In the May 2015 issue of our newsletter, Erik Laakkonen discussed our firm's victory at trial over a plaintiff's attorney who attempted to utilize the so-called Reptile Theory to prosecute his case. The basis of the Reptile Theory is that the alleged violation of a purported safety rule by the defendant creates a danger to people like those on the jury. Unwitting responses can inflame the jury and cause them to think that the defendant and their witnesses are callous about public safety.

The earliest, and perhaps best, way to defend proactively against this tactic is to prepare your witnesses for deposition so that the plaintiff's attorney cannot obtain the necessary admissions or concessions from the defense that would support the Reptile trial strategy. At deposition, the Reptile attorney will attempt to elicit certain concessions from the defendant and other witnesses regarding "safety" rules. Some of the commons signs of the Reptile questions at deposition include:

- Questions focusing on information that is remotely relevant (e.g., the case is about a specific incident but plaintiff's focus is on broad notions of safety that seem relevant in only a vague and general sense).

- Questions that attempt to get the defendant to agree that the defendant must guarantee absolute safety (e.g., suggesting doctors must guarantee patient safety in that they must always choose the safest course of treatment).

- Questions concentrating on concepts of potential harm as opposed to actual harm.

- Questions relating to general standards concerning policies or procedures in which the plaintiff tries to get the witness to agree that such policies and procedures must be followed for safety purposes.

- Questions seeking agreement that failure to follow policies and procedures can cause injury.

- Questions seeking confirmation that if failure to follow policies and procedures results in injury, then those not following the procedures are responsible for the injury.

- Questions using words like good health, mobility, endanger, safety, policy, procedure, potential harm, community safety, and similar terms.

It is always imperative to recognize a Reptile line of deposition questions and prevent them from escalating. The questions are framed in such a general way that common sense, and the initial knee jerk reaction from a witness, is to agree. Examples of such questions include:

- Medical Malpractice Cases:
  - A doctor must not needlessly expose a patient to an unnecessary danger, correct?
  - A doctor must always choose the safest course of treatment for the patient, correct?

- Automobile/Trucking Cases:
  - There are specific rules of the road that everyone must follow, correct?
  - All drivers are required to pay attention at all times, correct?
  - If someone is not paying attention they can cause an accident, correct?
  - If someone is injured in an accident as a result of the other driver not paying attention, then the inattentive driver is at fault, correct?

- Product Liability Cases:
  - A product manufacturer must make products that are free from defects, correct?
  - If a manufacturer makes a product that has a defect and someone is injured because of that defect, then the manufacturer is responsible for the harm and losses caused, correct?

Who would not agree with the foregoing general safety rules? Safety rules are central to the Reptile process, with the idea to trap witnesses first into agreeing with general safety principles and danger avoidance/risk avoidance principles, then move into more specific safety rules, and finally pinning witnesses down on specific safety rules or danger avoidance concepts that were broken by this particular defendant. When done effectively, the Reptile strategy confuses witnesses and results in those detrimental admissions. Thorough witness preparation is the key to defend against Reptile questioning tactics.

First, identify the general safety rule (e.g., a doctor must never expose a patient to unnecessary danger). The Reptile theory involves plaintiff's counsel creating a safety rule, which counsel will argue the defendant violated, leading to the injury at hand. In order to attack the Reptile effect effectively, it is important to get a handle on what the safety rule is. Anti-Reptile themes should be developed that emphasize the standard of care and the legitimacy and fairness of standards of care in the context involved.

Next, prepare, prepare, prepare your witness! Defense witnesses are often lulled into believing that their best strategy is just to "listen to the question, answer the question, and don't volunteer anything unnecessary." Generally this is a good strategy to follow – unless you are up against the Reptile. Once you hear the buzzwords at deposition (safety, danger, harm – all in the general sense) you need to have your witness ready to go beyond the "yes" or "no" answer, offering explanations and caveats. This is where the extra preparation pays off.

The additional preparation in time spent with the witness helps to get him or her familiar with the general "safety" concepts that may come up at deposition, and prepares the witness with responses and explanations that extend past the "yes" or "no" answer. This may take numerous meetings and practice sessions to ensure that the witness understands what the Reptile tactics are, how to recognize the Reptile buzzwords, and how to answer those seemingly innocent general safety questions. Ensure that the witness is familiar with the defense buzzwords that will be used in the jury instructions at trial and to incorporate them into their response.

Here are some examples of what Reptile questions might be asked, and how your witness can respond effectively to defeat the Reptile plaintiff attorney:

- Q: During the period of time when you were receiving your professional training, were you taught some basic safety principles about caring for others' safety?
- A: During my training I was taught that the standard of care requires professionals to use the level of skill, knowledge, and care in analysis and implementation that other reasonably careful professionals would use in the same or similar circumstances.

- Q: Is a professional ever allowed to needlessly endanger someone else?
- A: Professionals are required by the standard of care to use the level of skill, knowledge, and care in analysis and implementation that other reasonably careful professionals would use in the same or similar circumstances. A professional is not necessarily negligent just because he or she chooses one standard accepted method of analysis and implementation and it turns out that another standard accepted method could have been used instead.

- Q: If a change in the course of action is going to be made that has increased risk, were you taught that there must be increased benefit to offset that risk?
- A: Yes, you want to do things that have more benefit than risk. However, a professional is not necessarily negligent just because he or she chooses one standard accepted method of analysis or implementation and it turns out that another standard accepted method would have been a better choice. A professional is only negligent when he or she was not as skillful, knowledgeable, or careful as other reasonable professionals would have been in similar circumstances.

Witness preparation for deposition is always important. However, it is even more crucial when facing the Reptile plaintiff's attorney. Witness depositions are the first line of defense in attempting to thwart the use of the Reptile Theory at trial.

MAY UNDOCUMENTED ALIENS PURSUE CLAIMS FOR PAST WAGE LOSS IN CALIFORNIA AND NEVADA? MAYBE. MAYBE NOT.

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Immigration reform and the rights of undocumented aliens are hot button topics for many Californians these days. The Department of Homeland Security estimates that there are approximately three million illegal immigrants currently living in the California, or about 7.5 per cent of the state's total population. The figure may be closer to 10 percent in Los Angeles County.[10] The issue is even more contentious in Nevada, which has the largest number of illegal immigrants per capita of any state in the country.[11]

Some proponents of tort reform comment that undocumented aliens should not be permitted to file lawsuits in this country. Granted, the U.S. Constitution does not explicitly grant anyone the right to sue someone else. However, this is not to suggest that the drafters of the Constitution thought litigation is non-essential. Rather, they thought that it was such a fundamental right that no explicit mention was needed.[12] The Fifth and Fourteenth Amendments to the Constitution guarantee equal protection under the law to citizens and non-citizens alike, and they inspired Congress to enact the Civil Rights Act of 1870, which states in pertinent part:

> *All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts,* ***to sue****, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . .*[13]

Federal and state courts have construed this statute as giving undocumented aliens the same rights as U.S. citizens to sue as plaintiffs in both federal and state courts for injuries they receive while living here.[14] But may they claim past wage loss as damages if they never possessed the work documents which are required by the Immigration Reform and Control Act ("IRCA")?[15] And, if so, is their wage loss compensable under U.S. rates or the rates applicable in their home countries? Court decisions are split around the country, and the California and Nevada courts are less than clear.

California Cases

No reported California case has awarded past wage loss as damages to an undocumented worker, but no reported California case has held that an illegal immigrant cannot receive them either. Indeed, a survey of illustrative cases suggests that they might be recoverable.

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[10] Los Angeles Almanac, http://www.laalmanac.com/immigration/im04a.htm, downloaded Feb. 6, 2015.
[11] Steve Sebelius, "No Surprise That AG Laxalt Joined Immigration Lawsuit," Las Vegas Review-Journal (Jan. 28, 2015), http://www.reviewjournal.com/columns-blogs/steve-sebelius/no-surprise-ag-laxalt-joined-immigration-lawsuit, downloaded Feb. 6, 2015.
[12] Peter S. Munoz *The Right of an Illegal Alien to Maintain a Civil Action*, 63 Cal. L. Rev. 762, 766 (1975).
[13] Civil Rights Act of 1870, codified as 42 U.S.C. § 1981.
[14] See, e.g., *Martinez v. Fox Valley Bus Lines*, 17 F. Supp. 576, 577 (N.D. Ill. 1936).
[15] Immigration Reform and Control Act of 1986, codified as 100 Stat.3445, Public Law 99-603.

The first suggestive case was *Alonso v. State* (1975),[16] which was not a personal injury case. An undocumented worker sued the State of California after being denied unemployment benefits because his undocumented status precluded him from claiming that he was available for work. The Court of Appeal upheld the trial court's ruling but noted in dicta that even an undocumented worker has the right to earn a living in the ordinary occupations of the local community. This seems to imply that a claim for both future and past wage loss might be allowable.

In *Clement v. State* (1986),[17] an illegal immigrant who was injured in a hit-and-run accident sued the highway patrol after an officer's allegedly negligent investigation failed to determine the tortfeasor's identity. The plaintiff moved successfully to have evidence of his immigration status excluded at trial on the ground that it was immaterial and unduly prejudicial. The defense appealed, arguing that the evidence was relevant to show whether he was entitled to recover future loss of earnings. No mention was made of any claim for past wage loss. The California Supreme Court affirmed the trial court ruling because the plaintiff had been gainfully employed in California prior to the accident and there was no evidence either that he intended to return home or that he was facing deportation.

In the oft-cited case of *Rodriguez v. Kline* (1986),[18] an illegal immigrant from Mexico suffered injuries during a traffic accident and he sued for future wage loss as part of his damages. Again, there was no discussion of a claim for past wage loss. The trial judge allowed evidence of his earning capacity both in U.S. dollars and Mexican pesos, and then instructed the jury that if they found the plaintiff was subject to deportation, they were to calculate his future wage loss in pesos. The jury returned a general verdict in favor of plaintiff, but they did not specify whether the amount included future wage loss, or whether it was calculated based on dollars or pesos.

On appeal, it was held that the plaintiff's immigration status, and thus his deportation status, should have been determined *in limine* outside the jury's presence. The defendant had the initial burden of proving his likelihood of being deported. If the defendant met its burden, then the burden shifted to the plaintiff to prove that he had taken steps to correct his deportable condition. If the defendant prevailed, then evidence of the plaintiff's future earnings would be calculated according to his country of origin. If the plaintiff prevailed, then all evidence regarding his immigration status must be excluded and his earning capacity would be calculated based solely on U.S. dollars. It was not a question of whether damages may be awarded, but how they should be measured.

In *Murrillo v. Rite Stuff Foods, Inc*. (1998),[19] an illegal immigrant sued her former employer for wrongful discharge and sexual harassment. The trial court granted a defense Motion for Summary Judgment because the plaintiff had obtained employment under false pretenses by proffering forged resident alien and Social Security cards. The Court of Appeal reversed, finding that FEHA protects undocumented workers from sexual harassment which is unrelated to one's immigration status. The Court focused more on the defendant's tortious conduct while plaintiff was employed than on the plaintiff's fraudulent acts in being hired.

The *Murrillo* Court addressed the plaintiff's claims for emotional distress and physical injuries, but did not discuss whether she may recover either past or future wage loss. The decision was superseded by

[16] *Alonso v. State*, 50 Cal.App.3d 242 (1975).
[17] *Clement v. State*, 40 Cal.3d 202 (1986).
[18] *Rodriguez v. Kline*, 186 Cal.App.3d 1145 (1986).
[19] *Murillo v. Rite Stuff Foods, Inc.,* 65 CaL.App.4th 833 (1998).

the subsequent enactment of the IRCA to the extent that the IRCA authorizes lost pay after an employer discovers its employee is not documented to work in the United States.[20]

The United States Supreme Court then weighed into the discussion in *Hoffman Plastic Compounds v. NLRB* (2002).[21] This was a review of a decision from the U.S. Court of Appeals for the District of Columbia Circuit, so it is not based on facts originating in California. The issue was whether an undocumented worker was entitled to receive back pay from the date of his wrongful termination until his employer discovered that he was not authorized to work in the United States. Chief Justice Rehnquist wrote the majority opinion for the 5-4 split Court: federal immigration policy as expressed in IRCA forecloses the National Labor Relations Board from ever awarding back pay to undocumented workers who were never authorized to work here.

Hoffman would seem to have a chilling effect on California state law claims for recovery of past wage loss, but that is not the case. No reported California decision has applied the rule in *Hoffman* to a plaintiff personal injury action, but the California Legislature reacted to *Hoffman* by enacting four identically-worded statutes (Civil Code Section 3339, Labor Code Section 1171.5, Government Code Section 7285, and Health and Safety Code Section 24000), all of which state in pertinent part:

> *(a) All protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state.*
>
> *(b) For purposes of enforcing state labor, employment, civil rights, and employee housing laws, a person's immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that this inquiry is necessary in order to comply with federal immigration law.*

The California Court of Appeal has upheld the Legislature, stating: "These statutes leave no room for doubt about this state's public policy with regard to the irrelevance of immigration status in enforcement of state labor, employment, civil rights, and employee housing laws."[22] California courts still have not commented on whether claims for past wage loss may be recovered, but the courts have protected undocumented workers' right to sue regardless of their citizenship status.

The immigration issue is a hot-button issue in personal injury cases. Most recently, in January 2015, in *Velasquez v. Centrome, Inc.,*[23] a trial court erred when it disclosed a plaintiff's undocumented immigrant status during the jury selection phase of a personal injury case. The disclosure was deemed prejudicial and immaterial because the plaintiff was suing only for personal injuries, and there were no claims for lost earnings or earning capacity. The Court of Appeal stated emphatically:

> *Immigration status has no tendency in reason to prove or disprove any fact material to the issue of liability; it does not demonstrate whether the defendant committed a harm-causing act. Immigration status has no tendency in reason to prove or disprove*

[20] *Salas v. Sierra Chemical Co.*, 59 Cal.4th 407, 422-428 (2014).
[21] *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002).
[22] *Hernandez v. Paicius*, 109 Cal.App.4th 452, 460 (2003).
[23] *Velasquez v. Centrome, Inc.,* 2015 WL 2015 WL 400543 (Cal.App. 2015).

any fact material to the determination of past special damages, i.e., what are the plaintiff's past medical bills up to the date of trial. Nor is evidence of immigration status relevant to general damages, as it does not prove or disprove what is the reasonable amount of money to compensate the plaintiff for his or her past and future pain and suffering. Further, immigration status alone has no tendency in reason to prove or disprove any fact material to the issue of a party's credibility.

* * *

As [Plaintiff] and the amici parties accurately point out, cases both in California and in multiple other jurisdictions have recognized the strong danger of prejudice attendant with the disclosure of a party's status as an undocumented immigrant. [Citations.] In such cases, reviewing courts have found that rulings to exclude evidence of a party's immigration status were not error, or that admitting evidence of a party's immigration status was error because the evidence was irrelevant to any material issue or because it was only marginally relevant to any material issue, and that the error justified reversal. We agree.

We find the trial court abused its discretion in determining the evidence was admissible under Evidence Code section 352. The court overweighed the probative value of the evidence of immigration status on the question of whether Velasquez could feasibly argue he expected to require, and to receive, a lung transplant in the future. The evidence did not show that, because of his immigration status, Velasquez would be foreclosed from receiving a lung transplant, if one was necessary.

In summary, whether examined as an issue of total inadmissibility for want of relevance under Evidence Code section 350, or as a matter of discretionary exclusion under Evidence Code section 352, the trial court erred when it ruled that Velasquez's immigration status could be presented to the jurors. Thus, it erred by informing the jurors of Velasquez's immigration status during voir dire.[24]

Nevada Cases

Nevada has little published caselaw on this subject. *ATC/Vancom of Nevada, Ltd. Partnership v. MacDonald* (2009)[25] is a short opinion which may not be relied upon because its disposition was ordered unpublished. The key issue was whether a trial on damages should be bifurcated between past wage loss and future wage loss when the jury knows that the plaintiff is an undocumented alien. This seems to imply that Nevada might allow a claim for past wage loss, but this case does not explicitly support such a claim.

In *Tarango v. State Industrial Insurance System* (2001),[26] an undocumented worker sustained an industrial injury for which he received workers compensation benefits but was denied vocational rehabilitation benefits. The Nevada Supreme Court held that he was entitled to workers compensation, including partial

[24] *Id.,* *14-15.
[25] *ATC/Vancom of Nevada, Ltd. Partnership v. MacDonald*, 281 P.3d 1151 (2009).
[26] *Tarango v. State Industrial Insurance System*, 177 Nev. 444 (2001).

disability payments, but that formal vocation training must be denied if such training was required solely because of his immigration status. No mention was made of a past wage loss claim.

In *City Plan Development, Inc. v. Office of Labor Commissioner* (2005),[27] which was not a personal injury case, the Supreme Court stated in dicta that a building contractor on a public works project is required to pay undocumented workers the prevailing wage regardless of their immigration status. This likewise suggests that a past wage loss claim might be viable in Nevada, and compensable under U.S. wage scales.

The Nevada Supreme Court have shown that it does not follow California law in other matters, and this small body of caselaw infers that Nevada courts might differ from California on the issue of page wage loss claims. With the establishment of the new Nevada Court of Appeal this year, there will be additional opportunities for published caselaw. Given the current state of high tensions in Nevada over illegal immigration, this may be one of the hot-button issues which the Nevada Court of Appeal will discuss in the very near future. Stay tuned.

[27] *City Plan Development, Inc. v. Office of Labor Commissioner*, 121 Nev. 419 (2005).

PROVING THE VALUE OF MEDICAL EXPENSES WHEN YOU ARE UNINSURED: IT'S AN EXPERT-INTENSIVE QUESTION FOR THE JURY

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It's a well-known industry fact that medical billing can be complicated and capable of multi-tiered calculations depending on the identity of the payer. Two patients might be charged significantly different rates depending on whether they have health insurance which has negotiated a discounted rate structure. This is a significant issue in personal injury cases when trying to evaluate how a jury will determine the worth not only the value of an economic damage claim, but also the value of a plaintiff's non-economic damage claim.

Prior to 2011, the general rule was that plaintiffs may recover as economic damages the lesser of: (1) the amount paid or incurred for medical services, or (2) the reasonable value of those services. Beginning in 2011, the courts have begun to modify this rule in order to address specific fact patterns. In 2011, the California Supreme Court issued its seminal ruling in *Howell v. Hamilton Meats & Provisions, Inc*.,[28] which held that an insured plaintiff may only recover the sums which were actually paid. *Howell* can be extended to non-insured plaintiffs, but the facts of the case are that the plaintiff's insurer negotiated a reduced rate on behalf of its insured. Even though the medical provider billed the plaintiff a higher amount, what was dispositive is that her insurer negotiated an agreed-upon lower sum. The amount of that agreed-upon reduced rate, whether paid by the plaintiff or her insurer, eliminated the need to analyze the reasonableness of the billings.

According to *Howell*, when a medical billing rate is negotiated between a plaintiff's insurer and medical provider, the reduction in the billed amount is not considered a collateral source which the jury is prevented from hearing. Payment of the lower amount is all the evidence that a jury will receive in a post-*Howell* world regarding the value of the plaintiff's economic damage claim. Recovery of economic damages is therefore limited to what was actually paid or incurred. What *Howell* leaves unanswered is the situation where billings are neither discounted nor paid: is evidence of the (presumably higher) billed amount relevant for any purpose?

In 2013, the California Court of Appeal (Second District) issued its ruling in *Corenbaum v. Lampkin*,[29] which further limited the scope of recoverable damages as set forth in *Howell*. *Corenbaum* held that the full (i.e., non-discounted) amount billed for past medical expenses is not admissible as evidence of what the reasonable value of future medical expenses should be. Nor is it relevant to help calculate the value of a plaintiff's non-economic damage claim. Llike *Howell*, *Corenbaum* presumes that someone, whether the plaintiff or her insurer, has paid at least some of the billing.

What the *Howell* and *Corenbaum* courts fail to address is what happens in a situation where the plaintiff is uninsured, there is no negotiated discount by the plaintiff's insurer, and the plaintiff fails to pay the medical bills (presumably because she cannot afford to do so). In that situation, there is no agreed-upon sum

[28] *Howell v. Hamilton Meats & Provisions, Inc*., 52 Cal.4th 541, 566 (2011).
[29] *Corenbaum v. Lampkin*, 215 Cal.App.4th 1308 (2013).

upon which to conclude the reasonable value of either past or future medical expenses. Without that information, it is difficult to evaluate the amount of a plaintiff's non-economic damage claim too.

On June 22, 2015, the California Court of Appeal (Third District) issued its ruling in a personal injury case presenting exactly that factual situation. In *Bermudez v. Ciolek*,[30] two vehicles collided in an intersection as the traffic signal changed colors. One vehicle began a left-hand turn directly into the path of an oncoming vehicle. The inevitable collision pushed the incoming vehicle onto a bicyclist who was then crossing the intersection. The bicyclist suffered a fractured kneecap, a fractured pelvis and chip in his front left hip, severe shoulder injuries, lacerations, and deep bruising to his left leg and groin. Following his initial hospital stay, he underwent two additional back surgeries, one to repair a herniated disc and the second to remove and replace the same disc.

The bicyclist had no medical insurance and no other ability to pay his past incurred medical bills, which approximated $450,000. At trial, the parties stipulated to the admissibility of his bills, but not to their reasonableness. Conflicting expert testimony was introduced regarding the necessity of the various procedures and the reasonableness of the charges based on market values. The jury awarded $3,751,969.00 for both economic and non-economic damages. Defendant appealed, among other things, on the proper measure of his economic damages.

The court acknowledged that the amount of monetary damage recoverable by an uninsured plaintiff may be higher than what is recoverable by an insured plaintiff, based upon amounts which arguably are billed at a higher, non-negotiated rate: "the measure of damages for uninsured plaintiffs who have not paid their medical bills will usually turn on a wide-ranging inquiry into the reasonable value of medical services provided, because uninsured plaintiffs will typically incur standard, non-discounted charges that will be challenged as unreasonable by defendants."[31]

Hence, *Bermudez* holds that the full billed amounts are relevant to the amount the Plaintiff has incurred and therefore responsible to pay. *Bermudez* is not contrary to *Howell* or *Corenbaum*, but reaches its conclusion on facts which they never confronted. The full billings also are relevant and admissible to show the reasonable value of the medical services. However, they are not sufficient by themselves and must be accompanied by competent expert opinion testimony to help explain whether the nature and cost of the services rendered were reasonable and necessary. Like an insured plaintiff, an uninsured plaintiff still must introduce substantial evidence of both the amount incurred and the reasonable value of the services. The amount incurred merely sets a cap on the amount of recoverable medical damages.

Following *Bermudez*, the jury is tasked with determining what are reasonable and necessary medical expenses (both past and future), with the assistance of expert opinion testimony. If no one has paid for the Plaintiff's medical expenses, the jury should be instructed to determine both: (1) the reasonable cost of reasonably necessary medical care that the plaintiff has received, and (2) the reasonable cost of reasonably necessary medical care that the plaintiff is reasonably certain to need in the future. This will require careful preparation of experts and carefully-drafted jury instructions.

[30] *Bermudez v. Ciolek*, 237 Cal.App.4th 1311 (2015).
[31] *Id.,* 237 Cal.App. 4th at 1330-1331.

COPYRIGHT PROTECTION: THE IMPORTANCE OF REGISTERING COPYRIGHTABLE WORK IN LIGHT OF INCREASING COPYRIGHT INFRINGEMENT LITIGATION

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There is no doubt that we are surrounded by smart and creative people. Based upon the Copyright Clause of the United States Constitution,[32] Congress enacted the Copyright Act of 1976 to recognize the great value that exists in scientific progress and the creation of "useful arts," and to reward such efforts with a set of exclusive rights that allows authors and artists to make and sell copies of their works, create derivative rights, and display their works publicly.[33]

But these remarkable advances in literature, music, dramatic works, sculpture, pictorial and graphic art, audio-visual works, derivative works,[34] compilations and architectural works can trigger significant legal issues – and litigation. Recent studies show that copyright infringement is on the rise.[35] How many times has a terrific new product been snatched away – legitimately – because its originator did not take adequate steps to protect it legally? Welcome to the world of copyright litigation.

Generally a copyrightable work needs not be registered in order to be protected by federal copyright law. Indeed, copyright protection begins when a work assumes tangible form, such as when a photographer takes photographs of a particular subject but does not yet publish them.[36] The Copyright Act states specifically that "registration is not a condition of copyright protection."[37] In many instances, copyright protection is presumed and one need not engage in the time, effort and expense of registering his or her intellectual property.

However, there is an exception to the rule when copyright infringement litigation arises. Should someone's intellectual property be infringed without the owner's permission, the owner may sue for copyright infringement only if he or she can prove by a preponderance of the evidence that he or she is the owner of a valid copyright, and that the defendant violated at least one of the exclusive rights granted to the copyright holder.[38] In order to meet that burden of proof, the copyrightable intellectual property must be registered in the copyholder's name. Registration of the copyright is a pre-requisite for bringing.[39]

Another reason to register a copyrightable work is that the aggrieved copyright holder may recover certain damages in the event of an actionable infringement. Plaintiffs have the option of recovering either

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[32] *U.S. Constitution*, Art. 1, Sec. 8, Cl. 8.
[33] *The Copyright Act of 1976*, 90 Stat. 2541, codified as 17 U.S.C. § 101-810.
[34] A derivative work is "an expressive creation that includes major copyright-protected elements of an original previously created work first work," such as a satirical depiction of the *Mona Lisa* with a moustache. "Derivative work," *Wikipedia*, <https://en.wikipedia.org/wiki/Derivative_work> downloaded November 16, 2015.
[35] See, e.g., Christopher A. Cotropia and James Gibson, *Copyright's Topography: An Empirical Study of Copyright Litigation*, 92 Texas L. Rev. 1981 (2014).
[36] *Gener-Villar v. Adcom Group, Inc*., 560 F. Supp. 2d 112 (D. P.R. 2008).
[37] 17 U.S.C.S. 408, et seq.
[38] *Gener-Villar v. Adcom Group, Inc*., 560 F. Supp. 2d at 124-125.
[39] *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1241 (2010); C*osmetic Ideas, Inc. v. IAC/Interactive Corp.*, 606 F.3d 612, 614-615 (9th Cir. 2010).

the amount of their actual damages or a statutory amount that ranges from $750 to $30,000, depending on what the court determines to be a just amount.[40] The actual damages that a copyright holder is entitled to recover are what was "suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages."[41] Because actual damages can be difficult to prove, statutory damages can be a very attractive alternative theory of recovery. In addition, the prevailing party is entitled to recover attorney's fees.[42]

Hence, not every copyrightable work is registered and sometimes copyright infringement litigation is filed concerning a work which was not registered at the time of the alleged infringement. These are important factual issues which every defendant should investigate at the beginning of a claim.

For example, if a copyrightable work is infringed while the registration process is incomplete and still pending, the copyright holder may not recover statutory damages unless registration occurred within three months of the first publication; otherwise, only actual damages are recoverable.[43] When does a copyright protection become effective? The Ninth Circuit, wherein most of our clients are located, follows the so-called Application Approach, which holds that registration is deemed effective for the purposes of infringement litigation when the application is submitted to the U.S. Copyright Office.[44]

With respect to liability insurance for such claims, earlier ISO coverage forms and many non-standard industry forms listed copyright as an enumerated "offense" under the Advertising Industry coverage form. More current ISO coverage forms now combine Advertising Injury and Personal Injury and limit coverage for copyright infringement to the insured's "advertisement." That change, coupled with exclusions for many intellectual property claims, is significant to the liability insurance industry because fewer insurers are accepting copyright infringement claims unless they write a specialty-risk policy that extends coverage to claims other than advertisements.

This is an important area of law, with many traps for the unwary. If we can ever be of assistance, please let us know.

[40] 17 U.S.C. § 504.
[41] 17 U.S.C. § 504(b).
[42] 17 U.S.C. § 505.
[43] 17 U.S.C. § 412.
[44] *Cosmetic Ideas, Inc*., supra 606 F.3d at 619.