



## Don't get tripped up in your next fall case

*Defense verdicts are common and comparative fault is often substantial, but careful analysis of the venue and circumstances can lead to a convincing case for liability*

**BY MICHAEL E. GATTO**  
The Veen Firm, P.C.

Fall cases are often quite difficult. Defense verdicts are common and comparative fault is often substantial. This article, through a case study, provides ideas for evaluation of a fall case, discovery, selection and use of consultants, site inspection, as well as jury trial issues including in limines, jury instructions, presentation of case in chief and addressing comparative fault issues.

### Facts

While moving backwards as she took photographs, Plaintiff tripped over the riser for the first step in the center aisle of an auditorium. Plaintiff had not looked before backing up. She was taking photographs at an event hosted by her employer away from the workplace. Plaintiff had taken photos at the event the year before. Immediately preceding her fall, plaintiff had been taking photos of individual award winners on a dais on the right front of the stage. She then moved to the center of the auditorium to take

photos of team award winners. Plaintiff testified she took one to one-and-a half steps backwards before tripping and falling.

The auditorium side aisles were ramps. Plaintiff believed she was backing up a ramp when she sustained her fall. Photographs of the auditorium confirmed the presence of both ramped side aisles and a center aisle with steps.

### Initial evaluation

Where did the fall take place? What is the venue and why was plaintiff there?



What were circumstances of fall? Was there a report documenting the incident? Were there any eyewitnesses? Were any statements obtained?

In addition, you should determine the common use of the venue. Determine which people would likely encounter the claimed dangerous condition. Determine the worst circumstances under which people are likely to encounter the claimed dangerous condition. Resolving these issues will assist in determination of appropriate experts.

Try to get out to the scene as soon as possible. You can visit the scene if it is open to the public and this is a pre-litigation investigation. Once litigation is pending, consider asking defense counsel for an informal inspection. If allowed, this will assist in determining which professionals you need to attend the formal site inspection.

In this case, photographs of the auditorium suggested the possibility of code violations. The center aisle lacked conspicuity striping and lighting strips. The combination of ramps and steps likewise seemed to conflict with the code's preference for ramps as dictated by the slope.

## Discovery

Obtain information regarding design, construction, maintenance, inspection and any modifications of the venue. Determine when, how and why the claimed dangerous condition came into existence. If the defendant's employees use the venue, consider a "person most qualified" deposition regarding defendant's inspection of its workplace for dangerous conditions. Although plaintiff would not be a member of the class sought to be protected, this is opportunity for defendant to discover the claimed dangerous condition. Determine whether defendant has information about use of the venue under circumstances similar to plaintiff's at the time of the fall. Obtain any claimed supporting evidence and documents.

In this case, discovery resulted in production of a drawing of the auditorium

suggesting the original design called for "continental seating," seats going all the way across with no center aisle. Defendant contended the auditorium did not constitute a workspace, likely because they had no documentation of regular inspection. Defendant could not establish use of the venue in circumstances similar to plaintiff's. Defendant had no evidence about the number of times persons had taken photographs or backed up in the center aisle.

## Site inspection

Preliminary investigation and discovery will dictate which professionals you hire and have attend the site inspection. Once you have assembled your site inspection team, disseminate the background data in advance. Conduct a brief meeting to discuss a plan and division of labor. Collect as much physical evidence as is practical. Take photographs and measurements using landmarks for orientation. Consider taking video footage and conducting an accident reconstruction.

Be certain to keep an open mind for surprises that may be encountered at the site inspection. In this case, we found evidence the auditorium was indeed constructed with "continental seating." The chairs adjacent to the center aisle had hardware which would allow another chair to be affixed. Also, the chairs on the ends of the aisles had "finished" sides, which were absent on center aisle chairs. Because people in the first couple of rows of the auditorium would look up at the stage, they were at the same level. To facilitate viewing for rows farther from stage, the audience began sloping upward. We discovered there was a slight upslope before the first "riser."

The site inspection also revealed the following: people accessed the auditorium by entering the building into a foyer. A single door off the foyer opened to an anteroom with two doors leading to the respective side aisles in the auditorium. Straight in front of the door from the foyer was the door leading to the left side aisle. Thus, most persons entering

the auditorium would have walked down the left side aisle. The steps in the center aisle could not be seen from the side aisles.

## Determination/use of appropriate experts

We determined an architect, human factors, safety engineer and general contractor would be important consultants to evaluate the auditorium. Consider the safety arguments you may wish to utilize at trial. Strategize about how you can best obtain and present these themes through your experts' training and experience. Architects, designers, builders, human factors experts and safety engineers should be able to assist with establishing the following rule: A defendant has to take reasonable steps to create a safe environment for the most vulnerable person under the worst possible circumstances. This is true because such circumstances are foreseeable. Thus, you can argue violation of this rule is negligence. In addition, showing plaintiff's conduct is foreseeable undercuts arguments of comparative fault. Professionals will likely testify the Building Codes or other applicable rules establish a bare minimum and prudence requires more stringent safety requirements for a defendant to discharge their duty to maintain their premises in a safe fashion.

The architect identified multiple code violations, including need for permit for revision. He explained architects draw from human factors' experts to minimize risk of injury from a design through study of expected/predictable human behavior. These principles are the bases for many of the applicable Building Codes which are grounded in safety. The architect also testified the original design called for "continental seating;" explained why the original design was safe and reasonable; why a combination of ramps and steps was not authorized by code; and the host of code violations created by the revision. Finally, the architect testified auditoriums "divide the attention" of attendees and should be designed



to accommodate this phenomenon. In other words, it was foreseeable a person would take a photograph in an auditorium and likely back up to do so.

Our human factors' expert testified human interaction with and receipt of biofeedback from an environment is known as "proprioception." The auditorium's combination of ramped side aisles and a center aisle with steps constituted a "human factors' trap." Plaintiff had a reasonable expectation she was backing up a ramp because of this combination and lack of warnings for the stepped center aisle. In addition, the upslope before the first riser reinforced plaintiff's reasonable belief she was backing up a ramp. He explained how the auditorium, with a combination of ramps and stepped aisles posed risk of "confusion" and was therefore dangerous. People assume continuity in environments. In part, the code requirement of ramps or steps at certain slopes is codification of this fundamental human assumption through resulting uniformity in pathway surfaces.

Our safety engineer testified to the inherent dangers in the auditorium based upon lack of signage or other alerts to the existence of steps in the center aisle. He also reiterated many of the arguments made by the architect and human factors expert.

We also hired a general contractor. The general contractor would have testified that, had the original design been for all ramped aisles, there would have been no increase in construction costs. Had he been contacted about performing the "creation" of the center aisle, he would have insisted upon design professional input and necessary permits. The permit process would have required involvement of a building inspector who never would have approved the "illegal" center aisle. The general contractor also would have testified that he would have recommended a ramp for the center aisle or at least putting down conspicuity striping and lighting strips and fix-

ing the center aisle steps to Code riser and tread variance. Finally, the general contractor would have testified about the nominal expenses to comply with the Code and ramp the center aisle.

### In limines

A few common issues arise in fall cases. Specifically, defendant will likely contend no duty to warn, the condition is not dangerous, defendant had no knowledge and others encountered the claimed condition without incident. As to the latter, consider the following: Determine whether similar incidents had occurred. If so, exploit them to the extent possible. If not, anticipate the defendant will seek to argue many others encountered this claimed dangerous condition without incident and therefore they had no knowledge and or the condition was not dangerous pursuant to *Benson v. Honda*, (1994) 26 Cal.App.4th 1336. Defendant had records suggesting an absence of prior fall claims over an extended period. Although not ruled upon by a judge, evidence was marshaled in support of a motion in limine to preclude this defense argument. Discovery established defendant had no data about the number of people that had taken photographs in the auditorium or that had moved backwards in an aisle way. Plaintiff intended to argue defendant's records did not establish an absence of falls but merely a lack of reporting. Defendant witnesses acknowledged they did not track falls but merely injury incidents.

Also, plaintiff's counsel should point out that, in circumstances where a dangerous condition exists but people are still likely to encounter it, defendant has a duty to remedy the situation and failure to do so constitutes negligence. (*Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 121-122.)

### Presenting plaintiff's case

In a fall case, the propensity to "blame the plaintiff" or have jurors conclude plaintiff is overreaching are great risks. Throughout discovery, plaintiff's

counsel needs to be conscious of opportunities to deal with these biases. Focus groups can provide tremendous insight regarding points to establish liability and refute comparative fault arguments.

Establishing (that) plaintiff's conduct is foreseeable to designers and builders of the venue is crucial. The evidence proves defendant's liability and undercuts comparative fault arguments. Prepare plaintiff to answer questions about her thought process around the time of the incident as well as identify any distractions. Try to find others that may have also encountered the claimed dangerous condition regardless of whether they sustained a fall. One of plaintiff's co-workers testified upon learning of plaintiff's fall, she went back to the auditorium to look at the center aisle. Despite walking up and down the ramped side aisles previously, the co-worker stated she was surprised to learn the center aisle contained steps.

Throughout opening statement, layer in evidence of the dangerous condition. Explain why it is dangerous; how easily defendant could have avoided the incident; and the minimal expense defendant would have incurred to avoid the incident.

In this case, all evidence suggested defendant chose to revamp the auditorium and create a center aisle by ripping out two chairs in each row. The tiers designed for the audience to have flat footing beneath them within rows became exposed and created a "stairway." Rather than argue this point, plaintiff intended to lay out the facts to allow the jurors to engage in the process and draw the conclusion themselves. Thereafter, jurors may feel invested in their deduction and develop indignation for the defendant and its counsel.

When discussing the code violations present at the time of the fall, plaintiff intended to stress the fact defendant created the center aisle illegally. [Note: All pre trial filings referred to the center aisle as "illegal." The code required a permit for the revisions. The center aisle also failed to comply with many rules related



to “stairways.”] Plaintiff also contended the “revision” required a permit. Defendant was unable to produce any evidence regarding how, when or why the center aisle was created. Defendant could not produce a building permit for the revision and investigation at the county and city building departments established none was obtained. Defendant had rules requiring professional consultation for certain projects including acquisition of necessary permits and delivery to defendant upon completion.

Not only did defendant create an illegal center aisle, they created more building code violations. The “stairway” lacked conspicuity striping and lighting strips. The risers and treads height and length exceeded variances authorized by the code.

Plaintiff intended to argue elderly, weak, infirm and even visually impaired people were likely to attend functions at the auditorium. The defendant employer had to admit it did not violate labor laws and employed such persons. As the purpose of an auditorium is for attendees to view the stage, plaintiff intended to argue people might be distracted when moving about the auditorium either trying to find their seat or other circumstance. Also, because lights would be dim in the audience during performances, we intended to argue conspicuity of the center aisle steps was crucial.

By analogy, these arguments can be extended to other locations where falls commonly occur. Grocery stores welcome shoppers of varying height, weight, strength and vitality. Shoppers are distracted by other customers, their shopping lists, store displays and other

marketing efforts within the stores. Deposition of store employees can be the vehicle for this evidence through employer manuals, observation of shoppers or even personal experience. At a parking lot, one can argue patrons are distracted by trying to find their cars, focused on getting to the ultimate destination, perhaps burdened by carrying items and often having to do so under less than optimal lighting conditions. Similar arguments can be made for many other contexts.

### Comparative fault

Defendant bears the burden of proof to show plaintiff engaged in *negligent conduct* which contributed to her injury or damages. Thus, defendant must prove plaintiff acted unreasonably.

While factually specific, plaintiff’s counsel will have to consider whether, when and what extent to acknowledge plaintiff bears some responsibility. When arguing proportionate fault, attack the defendant by discussing who had the opportunity to avoid the incident through compliance with reasonable rules, the social utility of complying with these rules and the obligation to make the premises safe.

Often, the defendant owns or controls the dangerous condition for a long time. In contrast, plaintiff will likely have little exposure to the dangerous condition. A pie chart or other demonstrative exhibit can show the respective opportunity to avoid the incident over time. Plaintiff can argue defendant’s opportunity to correct the dangerous condition was much greater than plaintiff’s opportunity to identify it. The ratio of respective time can then be used to support

apportionment of fault in the same percentage.

Consider using some of the following jury instructions: BAJI 3.51 Forgetfulness of a Known Danger; BAJI 3.12 Amount of Caution Varies; and BAJI 3.13 Right to Assume Others’ Good Conduct. In the right circumstances, each of these singularly or in combination can advance a plaintiff’s position in a fall case. These instructions can provide the force of law to rebut defense arguments.

### Conclusion

Focus on defendant’s disregard for safety and ability to avoid the incident through simple measures. When appropriate, acknowledge comparative fault. You should be standing tall after your next fall case.



Gatto

*Michael Gatto is a trial attorney at The Veen Firm, P.C. San Francisco. He has tried over 100 jury trials and for the past 12 years, has specialized in catastrophic personal injury and medical malpractice matters.*

*He is admitted to practice in both California and Arizona. For more information, please visit [www.veenfirm.com](http://www.veenfirm.com) to view his personal profile.*

*William Veen founded The Veen Firm, P.C. as a sole practitioner in 1975, gradually developing it into a firm of talented attorneys and staff who represent severely injured workers and consumers. He is a member of the American Board of Trial Advocates and honored as the Trial Lawyer of the Year by the San Francisco Trial Lawyers Association in 2003.*