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Habitability: How earlier awful conditions created an eggshell plaintiff

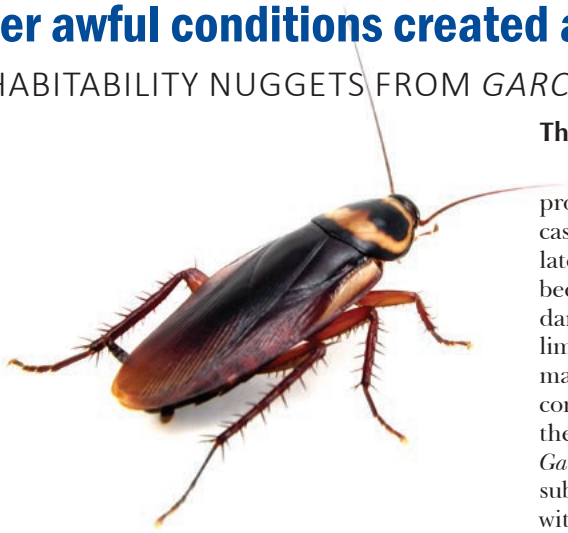
THIS AND OTHER HELPFUL HABITABILITY NUGGETS FROM *GARCIA v. MYLYLLA*

In suits by residential tenants against landlords for breach of the covenant of habitability ("habitability cases"), there is often a scenario where a tenant has suffered through two bad landlords. A related scenario is where the tenant has been suffering through bad conditions for several years that are outside the statute of limitations. Defendants have typically looked at this scenario as a boon for them. They argue that the tenant should be precluded from talking about the landlord's long history of neglecting repairs that occurred outside the statute of limitations. Or they argue that the tenant's complaints really emanate from a prior landlord. Either the real culprit is the prior landlord or they argue that any emotional distress occurred outside the statute of limitations.

The recent case of *Garcia v. Mylylla* (2019) 40 Cal.App.5th 990, has turned this potential negative into a positive. In *Garcia*, plaintiffs' counsel argued that the horrendous conditions the plaintiffs suffered under that were outside the statute of limitations did not reduce the defendants' culpability. Instead, the conditions so wore down the plaintiffs that they created an eggshell plaintiff – a plaintiff who was even more emotionally vulnerable and suffered more precisely because the tenant had been enduring these conditions for many years.

Garcia was an unusually compelling case

Garcia presented one of the more compelling habitability cases. The property in *Garcia* was developed as a duplex. The owner/defendant, however, divided the property into 12 separate living units. The owner added 10 units, but did not add 10 bathrooms. Instead, tenants had to throw human waste into the back yard to dispose of it. The owner also did not add any kitchens, so only two of the units had kitchens.



Beyond the overcrowding and lack of kitchens/toilets, the owner allowed horrendous conditions to develop. The property was overrun with cockroaches, bed bugs, rats and other vermin. One tenant even had to have a live cockroach removed from her ear. There was often a lack of running water. Instead, the owner made the tenants buy water from the owner's daughter. And, of course, the building also often lacked electricity.

Suit was brought against both a prior owner (Mylylla) and a subsequent owner. The subsequent owner settled and the sole defendant was Mylylla. Mylylla had divided the property into the 12 units and owned it as such for 13 years prior to selling it. His long length of ownership meant that much of his ownership period was outside the statute of limitations. The jury was instructed that it could only award damages for the period within the statute of limitations.

At trial, the tenants testified about the horrendous conditions that existed throughout their tenancies – including periods that were beyond the statute of limitations. This testimony was the subject of a motion for new trial which was denied. Thus, the jury was allowed to hear the entire sordid history of the property and what the plaintiffs endured.

The statute of limitations

Garcia presented a fairly typical problem for plaintiffs in habitability cases. Often, tenants seek out lawyers late in their tenancy or after they have been evicted. This results in compensable damages hemmed in by the statute of limitations. In this scenario, the client may have suffered for years, but the compensable time is limited. This was the problem facing plaintiffs' counsel in *Garcia*. How do you get a jury to award substantial damages when the period within the statute of limitations is only six months?

Plaintiffs' counsel in *Garcia*, however, made a "silk purse" out of this "sow's ear." Rather than dodge the issue of the statute of limitations, he firmly grasped it. He argued to the jury that living through these conditions made the plaintiffs even more emotionally vulnerable to the unrelenting waive of cockroaches, lack of water and the absence of toilets that happened within the statute.

On appeal, the defendant argued that this evidence of conditions outside of the statue of limitations should not have been presented to the jury and the judgment had to be reversed. The Court of Appeal disagreed. In their opinion, the conditions that occurred outside the statute made the plaintiffs even *more* vulnerable to emotional distress. In essence, the prior horrendous conditions made the tenants "eggshell plaintiffs." As the court stated:

> Mylylla argues that a number of the plaintiffs testified that they experienced emotional distress from events that occurred *prior* to the period covered by the statute of limitations. However, while Plaintiffs could not recover emotional distress damages directly stemming from events outside

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> the permissible dates, the jury could reasonably consider the *effect* of such events on Plaintiffs' sensitivity to conditions in the Building during the statutory period. For example, as the trial court observed in denying Mylylla's motion for a new trial, the jury could infer that plaintiff Theresa Ramos's traumatic experience in having a cockroach removed from her ear before the statutory period made her more prone to emotional distress from the presence of cockroaches in the Building during the period for which the jury was permitted to award noneconomic damages. (See *Sanchez v. Kern Emergency Medical Transportation Corp.* (2017) 8 Cal.App.5th 146, 168 ["'[A] tortfeasor may be held liable in an action for damages where the effect of his negligence is to aggravate a preexisting condition or disease'"].)

(*Id.*, 40 Cal.App.5th at p. 1000, emphasis in original.)

As noted above, the *Garcia* holding offers an opportunity to plaintiff's lawyers to turn a negative into a positive. Typically, defense attorneys look at the period outside the statute of limitations as "not their problem." The jury will be instructed that no damages can be awarded for this period. In fact, if their motion in limine to preclude this evidence entirely is not granted by the court, it presents an opportunity for defense counsel to allege that all of the emotional distress the plaintiffs suffered was due to events that are not relevant to the award of damages. Most of the problems had resolved by the time the compensable period rolled around.

This argument is particularly compelling when there has been a change in ownership. The prior owner becomes the "empty chair." A strong argument can be made that the present landlord was the solution. He was solving the problems that the prior landlord created. *Garcia* presents plaintiffs with an opportunity to argue that rather than viewing a small period in the abstract, the jury must understand the entirety of what the plaintiffs went through in awarding damages – including their suffering outside the statute of limitations.

Punitive damages without evidence of wealth

The primary issue in *Garcia* was whether the plaintiffs were entitled to punitive damages. There was more than enough evidence of malice, oppression and fraud. The problem was that the plaintiffs had no evidence of the defendant's financial condition. It has long been held that the plaintiff must put on evidence of a defendant's net worth in order to be awarded punitive damages. (*Adams v. Murakami* (1991) 54 Cal.3d 105.) The problem becomes getting this information, since it is not discoverable absent a pre-trial order allowing discovery of a defendant's financial condition. (Civ. Code, § 3295 subd.(c).)

The typical solution to getting evidence of a defendant's net worth is to have a bifurcated trial with punitive damages in the second phase. The plaintiff will then serve a notice to produce, ordering the defendant to produce financial information before the start of the punitive-damages phase. That is the exact route plaintiff's counsel took in *Garcia*. But what happens if the defendant simply ignores the notice to produce?

The legal system in many ways hangs by a thread. We all depend on the honesty of counsel and a modicum of cooperation from the parties themselves. In *Garcia*, however, the defendant simply ignored the notices to produce and the plaintiff wound up in the punitive-damages phase of the trial with no evidence of the defendant's net worth. The trial court allowed him to proceed.

How the matter proceeded was interesting. The defendant not only refused to produce documents of his financial condition, he even refused to appear at all despite being served with a notice to appear pursuant to Code of Civil Procedure section 1987.

In response, plaintiff's counsel proposed to the court that he present the punitive-damages portion of the case solely based on argument. Like the proverbial child who murders his parents and then asks for mercy from the court because he is now an orphan, the defendant argued that plaintiffs were barred from an award of punitive damages because they had no evidence of the defendant's net worth. The trial court rejected this argument. The Court of Appeal agreed that the defendant was estopped from making this argument:

> Finally, Mylylla's argument ignores his own conduct in responding to the notice to appear. Even if Mylylla could have challenged the April 13 notice to appear by simply declining to show up for trial, that is not what he did. He appeared and testified during the first phase of trial, and then, after losing the verdict, unilaterally decided to absent himself rather than provide testimony about his net worth during the punitive damages phase. Had Mylylla been present to testify, Plaintiffs could at least have questioned him about his financial circumstances. He chose to deprive them of that opportunity, and he is therefore estopped from complaining about the lack of evidence of his financial condition.

(*Id.* at p. 998.)

The lesson in this is to make sure you have properly noticed the production of documents and the defendant for the punitive-damages phase of trial. This allows you to assert estoppel if the defendant is a no-show for the punitive damages phase and does not produce financial documents. (Editor's note. If the defendant ignores the notice to produce you served, ask the trial court to order the production. That way, you will have done everything possible to try to obtain the necessary financial information.)

It probably would not hurt to also do some other investigation of the defendant's assets. It is fairly simple to do a real-property search. Indeed, other

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properties owned and managed by the defendant may be relevant to prove his negligence or even malice. Similarly, one can find where the defendant banks for the property and subpoena his bank records. Despite the horrendous conduct of the defendant in *Garcia*, the jury only awarded $95,000 in punitive damages. If the defendant insists on disobeying a notice to produce, it will be helpful to have evidence of his other real property holdings, bank records and if possible, the income that the property (and other businesses) generated.

Sadly, there are bad landlords out there. In the typical habitability case, the tenant is very poor and will have endured the conditions because of a (likely well-founded) fear of eviction if a complaint is made and the inability to afford a better, market-rate apartment. Instead, the tenant endures the bad conditions – often for periods that go beyond the limitations period. *Garcia* allows the tenant to present evidence of the entirety of the tenancy, even if the compensable period is restricted by the statute of limitations.

Peter L. Weinberger brings three decades of experience as a litigator, and more recently, as a mediator. His background includes a wide variety of cases including personal injury, real estate, habitability, insurance coverage, employment, entertainment and all variety of business disputes.