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## *Department store customer stuck by hypodermic needle left in jacket pocket denied recovery*

*by Lessie Gerhold-Lepp*

In *Macy's California, Inc. v. Superior Court of Solano*, 48 Cal. Rptr. 2d 496 (Cal. Ct. App. 1st Dist. 1995), a California Court of Appeals held that a department store customer stuck by a hypodermic needle left in the pocket of a jacket she tried on may not recover emotional distress damages based on her fear of contacting AIDS or other diseases in the absence of any physical harm or detrimental change to her body.

On February 10, 1993, Catherine Tussy-Garber ("Tussy-Garber") tried on a jean jacket in a Fairfield, California, Macy's ("Macy's") department store when a hypodermic needle in the jacket stuck her hand. Apparently, the needle remained in the jacket's pocket after a previous customer purchased and returned the jacket. The pocket also contained a knife and a metal pipe, possibly for cocaine use, as well as an additional hypodermic needle. After the incident, Tussy-Garber underwent tests for HIV and preventative treatment for hepatitis. According to Tussy-Garber, Macy's would not assist in locating the person who returned the jacket "so that she could find out if the person had AIDS." Tussy-Garber further asserted that Macy's refused to help in testing the needle for HIV or to pay for her required treatments.

In February, 1994, Tussy-Garber and her husband brought suit against Macy's for negligence, negligent infliction of emotional distress, and loss of consortium. Macy's moved to bar any recovery for emotional distress. The lower court denied summary adjudication, finding that Tussy-Garber sustained a physical impact which placed her within the area of physical risk. The court held that her recovery could include any proven psychological reactions which reasonably and foreseeably resulted from the incident. Macy's then appealed.

Tussy-Garber did not test positive for HIV and, as of May 1995, had not contracted hepatitis. According to undisputed testimony, she possessed a one in 200,000 chance of HIV infection if the needle was contaminated.

Tussy-Garber listed the following emotional

injuries: insomnia, panic attacks, constant crying, short temper with her family, worry about her family's ordeal of being related to someone with HIV, nightsweats, nightmares, anger, inability to provide adequate attention to her children, feelings of helplessness, and a period of "deep mourning." Additionally, she described the following physical injuries: vomiting, aches and pains, diarrhea, uncontrolled weight fluctuations, tiredness, rapid aging, and tumors on her liver.

### **Court examines *Potter's* "more likely than not" test**

In *Potter v. Firestone Tire & Rubber Co.*, 25 Cal. Rptr. 2d 550 (1993), the court developed a test which "weighed the policy considerations involved in imposing liability for emotional distress damages for fear of cancer and severely restricted the circumstances justifying such damages." In *Potter*, plaintiff landowners lived adjacent to a landfill where the defendant dumped toxic waste. The plaintiffs faced a greater risk of developing cancer in the future due to their exposure to the toxic waste; however, no plaintiff at the time suffered from cancer or exhibited a precancerous condition. The *Potter* court did not find any physical injury, cellular damage, or immune system impairment to the plaintiffs, and, therefore, did not determine whether parasitic damages would be available. The court also did not resolve whether the fear of cancer would be adequate for emotional distress recovery in the absence of physical illness. *Potter* reaffirmed the general principal that there is "no duty to avoid negligently causing emotional distress to another, and that damages for emotional distress are recoverable only if the defendant has breached some other duty to the plaintiff."

The *Potter* test requires:

[I]n the absence of a present physical injury or illness, damages for fear of cancer may be recovered only if the plaintiff pleads and proves that (1) as a result of the defendant's

negligent breach of a duty owed to the plaintiff, the plaintiff is exposed to a toxic substance which threatens cancer; and (2) the plaintiff's fear stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that the plaintiff will develop cancer in the future due to the toxic exposure.

Two courts extended the *Potter* "more likely than not test" to cases involving AIDS/HIV. *Herbert v. Regents of Univ. of California*, 31 Cal. Rptr. 2d 709 (1994), barred a mother from recovery either as a direct victim or as a bystander for injury to her three year old. The child stuck himself with a hypodermic needle while crawling on the floor of a room used as an AIDS clinic the day before. *Kerins v. Hartley*, 33 Cal. Rptr. 2d 172 (1994), denied recovery to a patient in a negligence action against, among others, her HIV positive surgeon. The plaintiff claimed that she underwent surgery without being informed of the surgeon's HIV status.

The appellate court stated that *Macy's* presented an issue left unaddressed by *Potter*, *Herbert* or *Kerins*. The question remained: What is the degree of physical injury required for "parasitic recovery of emotional distress damages for fear of a disease without plaintiff meeting the strict requirements of *Potter*."

### **Court examines the physical impact/injury and duty standards**

In examining Tussy-Garber's claim, the court first looked to the traditional physical impact or injury standards. The court acknowledged that physical injury or impact is no longer required for recovery in negligent infliction of emotional distress cases, as held in *Molien v. Kaiser Found. Hosps.*, 167 Cal. Rptr. 831 (1980). In *Molien*, the defendant misdiagnosed the plaintiff as having a sexually transmitted disease, which caused much "anxiety", "suspicion", and "hostility" between the plaintiff and her husband. The court allowed recovery of emotional distress damages without requiring proof of physical impact or injury. The court also acknowledged the holding in *Pleasant v. Celli*, 22 Cal. Rptr. 2d 663 (1993), which stated that intentional wrongdoing or bad faith is not a prerequisite for recovery in negligent infliction of emotional distress claims.

Next, the court looked to whether *Macy's* owed

a duty to Tussy-Garber. Citing several cases, the court outlined possible considerations regarding the duty of care owed, including the following from *Rowland v. Christensen*, 70 Cal. Rptr. 97 (1968):

[T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

*Macy's* contended that a "mere needle stick" was insufficient for Tussy-Garber to show physical injury. *Macy's* argued that Tussy-Garber must either have tested positive for HIV or shown symptoms of the actual onset of AIDS to avoid the *Potter* "more likely than not" requirement.

Tussy-Garber insisted that neither *Potter*, *Herbert*, nor *Kerins* applied since she sustained a direct physical injury through the needle stick. She argued that negligence law allowed her to recover for the emotional distress and mental suffering accompanying her physical injury. In an attempt to distinguish her case from *Potter*, she compared HIV/AIDS with cancer. Tussy-Garber stated that the public is exposed to carcinogens daily, while AIDS may be avoided. She further argued that cancer is sometimes curable, while AIDS is inevitably fatal.

### **Needle stick determined not to be "harmful"**

For purposes of parasitic damages, the court held that a needle stick does not in itself constitute harm. The court stated that

[I]n a routine needle stick, harm, if it occurs, takes place when a hazardous foreign substance, introduced to the body through the needle, causes detrimental change to the body. Only if the plaintiff proves detrimental change to the body may he or she recover parasitic emotional distress damages. Without such proof, the plaintiff must satisfy *Potter's* more likely than not test.

The court disagreed with Tussy-Garber's contention that AIDS can easily be avoided and called her arguments "overly simplistic." The court noted that infection may occur in utero, through prophylactic failure, through partners who "dissemble" and through tainted blood. The court stated that precedent disfavors recovery of emotional distress damages in connection with actions alleging economic damages. In contrast, precedent favors recovery in cases, such as medical malpractice, which involve personal injury. The court defined the question to be determined: What is "the threshold for a personal injury which, under *Potter*, would sustain parasitic damages for emotional distress."

### **Court creates new standard for recovery**

In conclusion, the court denied summary adjudication, stating that the lower court did not use the correct legal standard when it applied the area of physical risk or physical impact test to Tussy-Garber's situation. The court held that a plaintiff must sustain a detrimental bodily change to recover parasitic damages for emotional distress. Therefore, the court granted Macy's motion barring Tussy-Garber from recovery for emotional distress damages.

## ***Real estate seller wins battle over financing condition***

by Sara E. Neff

Real estate buyers and sellers must now expressly contract the extension of financing conditions in real estate agreements. The Massachusetts Court of Appeals recently rejected the notion that financing conditions in property sales contracts implicitly extend proportionally with renegotiated closing dates in *Churgin v. Hobbie*, 655 N.E.2d 1280 (Mass. App. Ct. 1995). In an action between a buyer and a seller arising from a real estate contract, the appellate court reversed a trial court's judgment in favor of the buyer and concluded that the extension of the closing date under agreement did not extend the deadline for exercising a mortgage financing condition and that the buyer's failure to give the seller timely notice of an inability to obtain financing was not an act of

bad faith or unfair practice.

### **Overconfident buyer failed to exercise option**

On July 8, 1991, the seller, Dr. Churgin, entered into an agreement with a fellow veterinarian, Dr. Hobbie, to sell the commercial property she maintained in Wenham, Massachusetts for \$375,000. The back page of the agreement included two extension forms following the signature blocks: one for an "Extension for Financing" and another for an "Extension for Performance." In the sale agreement, Dr. Hobbie conditioned his performance on obtaining a mortgage loan of \$300,000 "on or before 45 days of closing." The real estate agreement, which made time of the essence, set a closing date of

January 8, 1992. In order to exercise the financing option and reclaim a \$46,875 deposit, Dr. Hobbie was obliged to notify Dr. Churgin on or before 45 days from the closing date that he was unable to obtain the requisite financing. As a result, November 24, 1991, was established as the cutoff date for exercising the financing option.

Dr. Hobbie felt confident that his net worth and "track record" would enable him to secure financing. As a result, he neither applied for mortgage financing by the option deadline of November 24, 1991, nor exercised his right to withdraw from the agreement via the financing option. After receiving a letter dated December 10, 1991, which expressed Dr. Churgin's desire to close on the agreed upon date, Dr. Hobbie began discussions with a potential