



PAYING
DAMAGES
FOR **EMOTIONAL**
DISTRESS

WHAT'S
THE
RISK
TO YOUR
BUSINESS?

It was a case of the needle, not in the haystack, but in the sofa. And nobody was looking for it. She rented the sofa. The price and the color were right and it didn't look very used. To hear the customer tell the tale, as soon as she sat on her new-to-her sofa, the very day it got delivered, she felt something sharp stick her in the buttocks. When she pried the cushions apart, she found a used hypodermic needle. Her first reaction was one of terror. She feared it was a "shared" needle and had been left in the sofa by drug addicts and the rental store failed to find it before rerenting the sofa to her.

BY
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The facts aren't in yet. Nobody knows, yet, where the needle came from or what it was used for. But the facts so far offer a useful platform for a brief overview of the law of damages as it relates to the torts of Intentional Infliction of Mental Distress (IIMD) and Negligent Infliction of Mental Distress (NIMD). As torts go, these are fairly new. Before the science of medicine fully understood the power of the mind, the law insisted that a plaintiff suffer a physical injury before awarding damages for the plaintiff's pain. The law was unwilling to compensate victims

for purely psychic suffering. Early on and still today, the difficulties with damages for emotional harm are how can it be proven and how much is it worth?

The law is much more comfortable with broken arms and legs because then the law can compensate the victim for the medical expenses and time lost from work. Juries can generally value the pain and suffering surrounding such an injury because they have been there or know someone who has suffered similarly. That is less the case with severe mental suffering all by itself. The culture still tends to look at people who seek psychiatric help as somehow "weaker" or less stable than the norm. How then to compensate someone who claims that the defendant was responsible for his or her mental breakdown?

PROVING SEVERE MENTAL STRESS

A couple of real cases will show the wide gulf that exists in such cases and the uncertain state of the law regarding the assessment of damages for severe mental distress.

A recent case from California involved Macy's department store and a needle in the pocket of a woman's jacket that had been returned and was on the rack. The plaintiff put her hand in the pocket and pricked her finger. Here is what she said:

"I can't sleep at night. I have panic attacks. I cry all of the time. I am very sharp with my family. I worry constantly about putting my family through a terrible ordeal and what they may experience by being related to a victim of HIV. I experience night sweats and nightmares concerning my future and the future of my family. If I dwell on the situation, I throw up. I get very angry about being victimized. I focus on this situation so often that I am unable to give adequate attention to my children. I feel helpless. I went through a period of deep mourning."

In the Macy's case, a California Court of Appeals held that the woman could not sue the department store because she could not prove that the needle stick caused "detrimental physical changes to her body," the threshold

level of harm required in an NIMD case. Nor was the plaintiff able to prove that she was more likely than not to contract the diseases she feared. The woman has never tested positive for HIV or hepatitis A, B or C. Macy's offered expert testimony that even if the needle were contaminated, the odds of contracting HIV from it were 1 in 200,000.

And so, at one end of the spectrum, a plaintiff who clearly had severe mental suffering took nothing because there was no physical injury to accompany the mental pain.

WHEN STRESS MANIFESTS AS PHYSICAL INJURIES

At the other end of the spectrum comes a case from Texas in which the jury gave the plaintiff \$5 million for her severe mental distress due to a company's abusive collection practices (*Greenpoint Credit Corp. v. Perez*, 75 SW3d 40 (TX. Ct. of App. 2002)). A finance company employee called Perez several times and threatened that if she didn't make the payments due on her mobile home, she would be put in jail. The problem was that Perez didn't own a mobile home. Nor did she speak much English.

Perez, 72, had a medical history of anxiety disorders. When the mystifying calls persisted, Perez had her daughter drive her to the sheriff's office so that she could turn herself in. The sheriff called the finance company himself to explain that they were dunning the wrong person, but the calls continued. Two weeks later, a finance company employee went to Perez' house and got a signed affidavit stating that Perez did not own and had never owned a mobile home, nor had she ever consented to anyone using her name or credit to buy a mobile home.

Despite evidence that they had the wrong person, the finance company sued Perez anyway. During discovery, everybody learned that the daughter had forged Perez' signature on the loan documents for the mobile home. The company dropped its collection suit against Perez, but she continued with her counterclaims against the company for violations of the state debt collections statute and "intentionally and knowingly causing mental deficiency, impairment or injury to an elderly person." The jury awarded Perez \$3 million for damages in the past and \$2 million for damages in the future. The jury also awarded her \$10 million in punitive damages. The court of appeals upheld the actual damages award of \$5 million, but threw out the punitive damages award.

In tort law, a fundamental principle is that the defendant takes the plaintiff as it finds him, the "egg-shell skull" doctrine. A plaintiff who suffers more than an ordinary person because of some deficiency or malady is entitled to compensation for the amount of actual injury, not for some stylized injury suffered by some "average" person. In this case, Perez was "handicapped by advancing age, a demonstrable history of anxiety and nervousness, an inability to understand the language and cultural insulation," and she therefore did not have "protective

mechanisms available to counter the unexpected threats." The jury saw and heard evidence of physical injuries: "eruptions of her skin, disfiguring, angry running sores were evidence of the turmoil within."

The legal distinction between these two cases is primarily one of physical injury. The sleeplessness, night sweats, nightmares, etc., suffered by the Macy's shopper are all psychic injuries. Perez got shingles and had other skin ailments. Those physical injuries got her case in front of a jury. In the Macy's case, the judge was aware of what juries can do with exciting facts and applied the law of physical injury quite strictly. As a result, the judge dismissed the case and it never went to trial. No jury ever heard the facts..

EVIDENCE VS. NEGLIGENCE

If a jury gets facts relating to a plaintiff's severe mental distress, there is little legal guidance as to how much to award for such suffering. Here is a typical jury instruction:

If you find that a plaintiff is entitled to a verdict against the defendant, you must then award the plaintiff damages in an amount that will reasonably compensate the plaintiff for all loss or harm, provided that you find that loss and harm was suffered by the plaintiff and was caused by the defendant's conduct. The amount of such award shall include:

Reasonable compensation for any fears, anxiety and other emotional distress suffered by the plaintiff and for similar suffering reasonably certain to be experienced in the future from the same cause. This is non-economic damage.

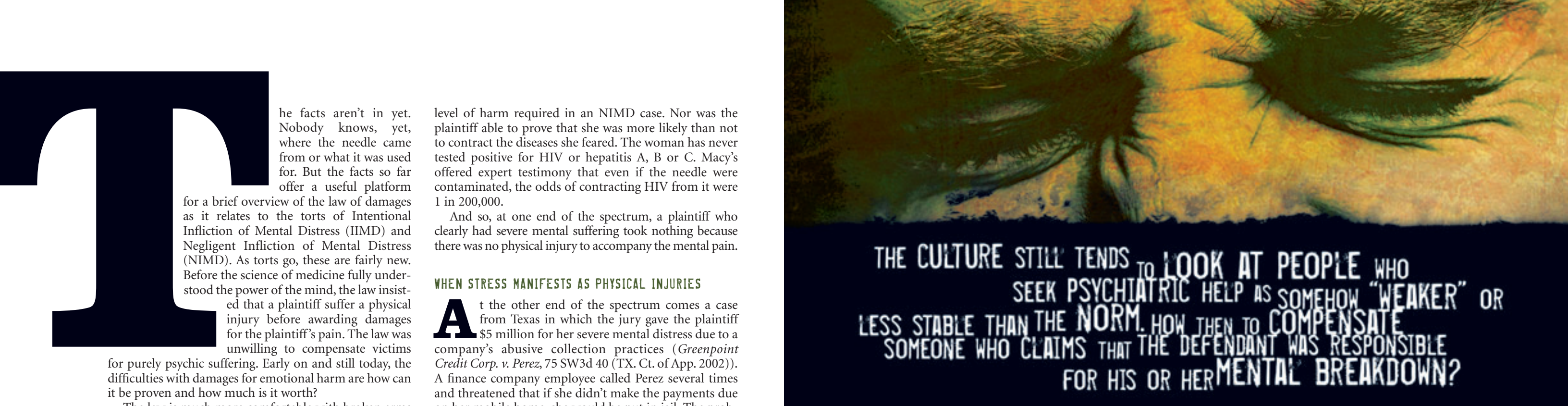
There is no definite standard or method of calcula-

tion as prescribed by law by which to fix reasonable compensation for emotional distress. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for emotional distress, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in light of the evidence.

In the sofa-prick case, all of the evidence is not yet in. The customer may yet contract HIV or hepatitis, in which case she will be able to get to the jury with her request for damages. There is no evidence in, yet, as to any other damages, like those that showed up in the *Perez* case. There may never be any more damages than a prick in the buttocks and a moment of terror.

At worst, the rental store is guilty of negligence by not refurbishing the sofa before re-renting it. In *Perez*, the finance company willfully threatened an old woman with jail and continued with an aggressive pattern of collection efforts against her even after the evidence pointed somewhere else. It should not matter that it was Macy's on the one hand and a consumer finance company on the other, but it might have. If the nature of the business was at play in these cases, then rental dealers should know that their business may be viewed negatively by a jury.

The nature of the threats mattered in *Perez*. The court of appeals noted that "the threat of being put in jail is calculated to put fear and anxiety into every citizen's heart. It is the very tool used by our justice system to control bad behavior in our society. Even a hardened criminal may think twice before doing something that will cause him to be locked away from society. If a criminal may be frightened by jail, how much more mental and physical anguish would be suffered by a woman in the position of Mrs. Perez?"



THE CULTURE STILL TENDS TO LOOK AT PEOPLE WHO SEEK PSYCHIATRIC HELP AS SOMEHOW "WEAKER" OR LESS STABLE THAN THE NORM. HOW THEN TO COMPENSATE SOMEONE WHO CLAIMS THAT THE DEFENDANT WAS RESPONSIBLE FOR HIS OR HER MENTAL BREAKDOWN?

CUSTOMERS SUFFER MENTAL STRESS DIFFERENTLY

Lessons for rental dealers from these cases are first of all that dealers must take customers and possible plaintiffs in a lawsuit against them as they find them. Some customers handle life's blows with aplomb. Others react more strongly to setbacks. Rental dealers, because of the ongoing and intimate nature of their relationship with their customers, must acknowledge those customers who handle the pressures of daily existence poorly and react accordingly. Dealings with such customers need to be above reproach lest a rental company inadvertently abuse a weak sister like Perez.

The good news is that the law has not evolved to where plaintiffs can sue for hurt feelings. That is why the requirement for physical injury persists. In the coarsened culture of today, the law acknowledges that people must be hardened to a certain amount of rough language and to occasional acts that are definitely inconsiderate and unkind.

However, the context will matter and the nature of the business of collecting on expired accounts and repossession

ing TVs will, from time to time, necessarily test where that line is drawn. There are few companies today that could survive a \$5 million judgment against them.

There may always be a needle hidden away somewhere that nobody can find. Rental dealers probably won't have to pay for those kinds of negligent mistakes unless the

RENTAL DEALERS, BECAUSE OF THE ONGOING AND INTIMATE NATURE OF THEIR RELATIONSHIP WITH THEIR CUSTOMERS, MUST ACKNOWLEDGE THOSE CUSTOMERS WHO HANDLE THE PRESSURES OF DAILY EXISTENCE POORLY AND REACT ACCORDINGLY.

customer really gets hurt and more than in the head. But collection abuse that rises to the level of being extreme or outrageous coupled with a delicate customer who "just can't take it" could cost a dealer everything he has worked to gain. ■

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