San Francisco Examiner

SUNDAY, JUNE 27, 2021 | SFEXAMINER.COM SINCE 1865 | TOMORROW LIES WEST

Senate Bill 447: Expanding Non-Economic Damages In A Survivor Action For Decendent's Pain And Suffering

By Christopher B. Dolan and Allison Stone

This week's question comes from Kate R. from Oakland: I read that Senate Bill 447 was important to many people who may have a personal injury case. Why is Bill 447 significant and why does it matter?

Thank you for reaching out and for your question, Kate.

WHAT IS SENATE BILL 447?

Senate Bill 447 ("S.B. 447") was just recently signed by Governor Gavin Newsom on October 1, 2021.

S.B. 447 changed California law to allow for recovery of a decedent's non-economic damages for pain, suffering and disfigurement by a decedent's personal representative or successor in interest after a decedent's death.

Under California law, a personal injury action brought by someone who suffers a bodily injury can recover, among other damages, non-economic damages for their pain and suffering. By contrast, under the prior law in California, in an action brought by a decedent's survivors for someone's death from an injury, non-economic damages for their pain, suffering and disfigurement suffered before death was not recoverable. (California Code of Civil Procedure Section 377.34)

More specifically, California Code of Civil Procedure ("C.C.P.") Section 377.34 previously limited recoverable damages to economic damages only if a plaintiff died before a judgment was entered. In other words, when a person dies from an injury, the decedent's successors or heirs can file a survival lawsuit to recover damages that the decedent would have been entitled to from the time of the injury up until the time of their death. However, the damages recoverable in these cases was limited to economic monetary losses the person suffered after the injury but before their death. These economic damages that could be recovered included medical bills, lost wages and punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived. However, recoverable damages in such cases did not include damages for pre-death pain, suffering, or disfigurement.

However, S.B. 447 alters C.C.P. Section 377.34 and changes this rule. Now, it will no longer exclude non-economic damages and allows a decedent's personal representative to recover damages for a decedent's pain, suffering or disfigurement if the cause of action or proceeding was granted a preferential trial date before 2022, or if it was filed between January 1, 2022, and January 1, 2026.

Now that S.B. 447 has passed, C.C.P Section 377.34 includes language stating that: "in an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable may include damages for pain, suffering, or disfigurement if the action or proceeding was granted a preference pursuant to [C.C.P.] Section 36 before January 1, 2022, or was filed on or after January 1, 2022, and before January 1, 2026."

WHY DOES S.B. 447 MATTER?

The effect of this change of law is that it adds an important category of damages that can be recovered thereby potentially increasing the amount of damages that can be rightfully awarded in survival actions.

For some background, S.B. 447 was introduced by California State Senator John Laird. Proponents of S.B. 447 supported it for multiple reasons. California was in the clear minority, as most other states in the country have allowed for recovery of non-economic damages for pain and suffering even after a plaintiff dies. In fact, California was only one of 5 states that precluded a decedent's personal representative or successor in interest from recuperating non-economic damages. This prior legislation in California gave Defendants in lawsuits a reason and incentive to delay trials because they would not have to pay pain and suffering damages if a plaintiff in a lawsuit died before a verdict at trial could be reached. In other words, defendants would often take every opportunity to delay trials hoping that a plaintiff would die before trial. Further, supporters of S.B. 447 argued that limiting the damages was arbitrary and manifestly unjust and unfair. As such, S.B. 447 represents an important change in the California law.

HOW DOES S.B. 447 APPLY?

The new provisions of S.B. 447 will apply if: 1) the action is granted preference pursuant to C.C.P. Section 36 before January 1, 2022; or 2) the action is filed on or after January 1, 2022, and before January 1, 2026.

S.B. 447 applies to medical malpractice actions, but the MICRA cap still applies to non-economic damages for pain and suffering damages in a medical malpractice claim.

S.B. 447 does not impact elder abuse (EADACPA) cases (which permit for pre-death pain and suffering damages up to $250,000 in enhanced remedies actions). On the other hand, it does apply to other types of elder abuse claims including but not limited to Health and Safety violations.

S.B. 447 applies to all other personal injury and employment cases.

HOW MIGHT S.B. 447 AFFECT ME?

If you have a case involving a plaintiff that is eligible for C.C.P. Section 36 preference, you and/or your attorney should consider applying for the preference as soon as possible including on an ex parte basis if possible, so that it is granted before January 1, 2022.

If you have a case that can wait to be filed until after January 1, 2022, you and/or your attorney should consider that option.

AN IMPORTANT NOTE ABOUT S.B. 447:

A plaintiff who recovers damages for pain, suffering, or disfigurement between these new specified dates must provide the Judicial Council with a copy of the judgment, consent judgment, or court-approved settlement agreement entitling the plaintiff to the damages and a cover sheet detailing the date the action was filed, the date of the final disposition of the action, and the amount and type of damages awarded, including economic damages and damages for pain, suffering, or disfigurement. The reason for this requirement is that on or before January 1, 2025, the Judicial Council must submit a report to the legislature detailing the information received for all judgments, consent judgments, or court-approved settlement agreements obtained from January 1, 2022, to July 31, 2024.

You can find S.B. 447 here: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB447

Christopher B. Dolan is the owner of Dolan Law Firm, P

C. Allison Stone is a Senior Associate Attorney in our Los Angeles Office. We serve clients throughout the San Francisco Bay Area and California from our offices in San Francisco, Oakland and Los Angeles. Email questions and topics for future articles to: help@dolanlawfirm.com. Each situation is different, and this column does not constitute legal advice. We recommend that you consult with an experienced trial attorney to fully understand your rights

Can I Order Alcohol to Go?

By Christopher B. Dolan and Megan Irish

This week's question comes from Ramon P. from East Bay who asks:
I have a favorite Mexican food place, and during the pandemic I was able to get their margaritas to go. It was a great treat amidst all the chaos that was the pandemic. Is that going to continue, and if so, now that so many people are back to work and, on the road, is it safe for us to do so?

Dear Ramon,

Thank for your question. Yes, people will still be able to order alcohol to go now and for the near future. Last month Governor Newsom extended the ability of restaurants to sell 'to go' alcohol, with food orders, through December 31, 2026, by signing State Bill 389. The bill was introduced by Napa representative, Bill Dodd and is ultimately stated in section 23401.5 of the Business and Professions Code. There are several safety mechanisms built into the law as well as an automatic deadline for the law to expire.

We all recognize that restaurants were hit hard when the pandemic shutdowns took effect. Countless small businesses were forced to figure out how to go from a thriving restaurant to a 'to-go' spot virtually overnight. Modifications to the rules, helped restaurants who were struggling to stay open. This ability to sell 'to go' drinks came from the emergency orders of the Alcoholic Beverage Control ("ABC"), which is the governing body that oversees restaurant and bar's liquor licenses. The rule change came at the end of March, 2020, just as the pandemic was settling in on Californians. As alcohol sales can make up a quarter to a third of a restaurant's revenue, the ability to make these sales was crucial for restaurants to make it through the pandemic.

While State Bill 389 requires a food purchase in order to sell "to go" alcohol to the customer, it allows patrons to continue to take home their favorite adult beverage with their takeout meal. Here are some important points to keep in mind: Alcohol cannot be purchased alone. The law also requires the order to be picked up by the actual customer, and not a driver from a delivery service. As well, the restaurant selling the 'to go' beverages is required to have a liquor license, and the beverage must be sold in a container that is sealed. A customer must store the sealed containers in the trunk of the car, or otherwise away from the passenger compartment for the drive home. There are also size limitations on the drinks that can be sold. The cocktails cannot exceed four- and one-half ounces of liquor and wine is limited to three hundred and fifty-five milliliters. As well there is a two-beverage maximum per meal purchased.

The requirement that sales are coupled with meals means smaller establishments, think your favorite dive bar, cannot sell to go beverages if they don't have an in-house food menu. The law has restrictions, requiring a "bona-fide" meal be purchased such that prepackaged products will not meet the requirements, and the food cannot be catered in, like with a food truck. Unfortunately, the small alcohol only spots will not be able to take advantage of this law to serve its cocktails to go. The local bars will remain limited to on premises consumption only.

While all of this is under the guise of keeping restaurants going, it also brings home a lot of safety concerns just like mentioned in your question. DUIs is the first thing that comes to mind. Distracted driving is also a concern. Will people abide by the rules to leave the alcohol in the trunk until they are safely home? If the container is sealed and transported home in the trunk, there is little concern the driver of the vehicle would become intoxicated or distracted by the beverages, but what if they do not follow the rules?

California hasn't given up all its regulations, by any means. These containers are considered "open containers" which are regulated by the Business and Professions Code, which make it an infraction to possess or consume alcohol in public. So, it is imperative that the 'to go' drinks stay in the trunk until the customer is safely home. That protects everyone on the road from risks associated with drinking while driving, or distractions. Additionally, the twenty-one year minimum age requirement is still in full effect, and the purchaser must be able to show ID when they pick up their order. The 2:00 am last call is also still in effect, and no one is selling drinks between the hours of 2:00 am and 6:00 am. This law, permitting the sale of 'to go' drinks will automatically expire on December 31, 2026. This will give Californians plenty of time to evaluate if these rule changes are helping the restaurant industry, but also importantly, to confirm if alcohol 'to go' is safe for Californians.

Christopher B. Dolan is the owner of Dolan Law Firm, PC. Megan Irsh is a Senior Associate Attorney in our Oakland Office. We serve clients throughout the San Francisco Bay Area and California from our offices in San Francisco, Oakland and Los Angeles. Email questions and topics for future articles to: help@dolanlawfirm.com. Each situation is different, and this column does not constitute legal advice. We recommend that you consult with an experienced trial attorney to fully understand your rights.

Who Is Responsible For Discarded Needles In The Street?

By Christopher B. Dolan and Aimee Kirby

This week's question comes from Nancy G. from San Francisco

Recently, I moved to San Francisco for a job opportunity. Like many people here, I sold my car and now get around by either walking, biking or taking Bart to work. While walking to and from work, I noticed many used needles on the ground. I know the City of San Francisco tries their best to provide services to those in need, I am worried about the increased number of uncapped and used needles on the ground. Although my shoes are protecting my feet, in the chance that I do not see a needle and it goes through my shoe, what are my rights or the rights of other people if we get pricked by a needle on the ground?

Thank you, Nancy, for reaching out and for your question. This issue is one that San Francisco residents and the community at large have been dealing with for a while now. San Francisco is known for our amazing people, culture, food, arts, cable cars, and bridges. But San Francisco is a major city in the world, and we have many city issues to deal with. In 2018 NBC did a report and looked at 153 blocks in San Francisco. They found discarded needles in 41 blocks and human feces on 96 of the city blocks. It appears that the problem has increased due to COVID. The concern with uncapped needles, as you are aware, is that they can be contaminated and can be a health hazard. The city of San Francisco and city leaders are in a constant struggle to maintain clean streets and free of discarded needles. The reality is that this is a very difficult job.

Our office has handled actions against hospitals for improper storage of needles, but your question about needles on the ground in public areas, is a very good question. The cause of action for having an unsafe premise would generally be one that would arise in Negligence. Negligence as a cause of action requires that the person sued: (1) had a duty to do something, (2) breached that duty by acting unreasonably, (3) the Plaintiff who sued the person was injured, and (4) the damages are casually related to the injury. Generally, business owners must keep the regress and ingress (exit and entrance) safe to their businesses. Therefore, if the needle is close to any of these areas, and they were aware of this situation, you would arguably establish the first two prongs of Negligence. In much of San Francisco there are also local ordinances that make the business owners responsible for maintaining the sidewalk outside their property, which help you argue what is called negligence per se.

If your inquiry is how to hold the City of San Francisco responsible, that is a little more difficult. For a case against the City of San Francisco, the standard is different. You would have to allege that the needles make the walkway a Dangerous Condition of Public Property. For this cause of action, you have to prove the walkway was dangerous when used in a reasonable manner, that the City of San Francisco had knowledge of it, had the time and money to fix the condition, and you were harmed by the condition. Assuming you prove the needles constitute a Dangerous Condition, the City of San Francisco has a strong argument that they are doing everything possible to try to combat this problem.

A problem you have with both a cause of action against the property owners adjacent to the sidewalk and the City of San Francisco, is also what harm was suffered by you stepping on the needle. This may seem strange, because of course the emotional and physical response to stepping on a uncapped needle, not knowing what is in it, is extreme. Often times when a person is pricked accidently, the needle is tested, the person is put on antiviral prophylactics and told to wait for the results of testing. The pain and worry someone has in this situation goes way beyond the momentary prick you feel. However, the law states that you may not recover damages, unless there was a physical harm caused by the needle. In the Macy's California, Inc. vs. Superior Court case, a Plaintiff sought emotional distress damages for the fear she suffered after being pricked by an uncapped needle hidden in a returned jacket she bought. In finding that her case could not go forward, the court said:

The question before us is whether a routine needle stick constitutes harm for purposes of parasitic damages. We conclude it does not. In 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. Macy's California, Inc. vs. Superior Court, (1995) 41.Cal.App.4th 744.

Therefore, the courts are not ready to recognize the emotional response to this case, without an actual exposure to material within the needle that causes a detrimental change to the body. Thank you for your question. I am sure many people have thought about this when they see needles on the ground. Please continue to be safe and stay alert as you explore this wonderful City.

Christopher B. Dolan is the owner of Dolan Law Firm, PC. Aimee Kirby is Managing Attorney, Torts Practice in our Redondo Beach Office. We serve clients throughout the San Francisco Bay Area and California from our offices in San Francisco, Oakland and Los Angeles. Email questions and topics for future articles to: help@dolanlawfirm.com. Each situation is different, and this column does not constitute legal advice. We recommend that you consult with an experienced trial attorney to fully understand your rights