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SAN DIEGO DEFENSE LAWYERS

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SAN DIEGO DEFENSE LAWYERS

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Spread of Novel Coronavirus Risks Potential Future Claims for Negligent Exposure

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Although the health and economic effects of the Coronavirus (COVID-19) are still not fully understood, one certainty is that once Court's re-open and life gets back to normal, a barrage of legal claims will follow. One subset of claims will likely seek to impose liability on individuals and businesses for exposing others to the harmful effects of this deadly disease.

As businesses and individuals seek to mitigate future exposure it is important to know there is legal authority potentially supporting these types of claims in California. (See e.g., *John B. v. Superior Court* (2006) 38 Cal.4th 1177.) Much of the authority governing liability flowing from the transmission of infectious diseases arises in the context of the sexually transmitted diseases.

In John B, the California Supreme Court analyzed the issue of whether an ex-wife could sue her ex-husband for bringing HIV into the marriage. The ex-husband argued he should only be liable for disease transmission if his ex-wife could prove he actual knew he was infected contending this had to be "established only by a positive HIV test from an accredited laboratory or a medical diagnosis of HIV or AIDS." (*Id.* at p. 1188.) The Supreme Court disregarded this argument and held ***actual knowledge of infection is not required.***

The Court reasoned "limiting tort defendants to those who have actual knowledge they are infected with HIV would have perverse effects on the spread of the virus. If only those who have been tested are subject to suit, there may be 'an incentive for some persons to avoid diagnosis and treatment in order to avoid knowledge of their own infection.' (Gostin & Hodge, *Piercing the Veil of Secrecy in HIV/AIDS and Other Sexually Transmitted Diseases: Theories of Privacy and Disclosure in Partner Notification* (1998) Duke J. Gender L. & Poly. 9, 40.) Extending liability to those with constructive knowledge of the disease, on the other hand, 'will provide at least a small incentive to others to use proper diagnostic techniques and to alter behavior and procedures so as to limit the likelihood of HIV transmission.' (Hermann, Torts: *Private Lawsuits about AIDS* in AIDS and the Law: A Guide for the Public (Dalton & Yale AIDS Law Project edits., 1987) p. 172 (Hermann).)" (*Id.* at p. 1190.)

Accordingly, the Supreme Court in *John B* concluded "the tort of negligent transmission of HIV does not depend solely on actual knowledge of HIV infection and would extend at least to those situations where the actor, under the totality of the circumstances, has reason to know of the infection. Under the reason-to-know standard, 'the actor has information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such fact exists.' (Rest.2d Torts, § 12, subd. (1).) In other words, 'the actor has knowledge of facts from which a reasonable man of ordinary intelligence or one of the superior intelligence of the actor would either infer the existence of the fact in question or would regard its existence as so highly probable that his conduct would be predicated upon the assumption that the fact did exist.' (Id., § 12, com. a. p. 20.)."

John B makes clear the "constructive knowledge" standard adopted "means knowledge 'that one using reasonable care or diligence should have, and therefore is attributed by law to a given person' (Black's Law Dict. (7th ed.1999) p. 876), encompasses a variety of mental states, ranging from one who is deliberately indifferent in the face of an unjustifiably high risk of harm (see *Farmer v. Brennan* (1994) 511 U.S. 825, 836–840) to one who merely should know of a dangerous condition (see [*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1208–1209])." (*Id.* at pp. 1190-1191.)

While the Court in *John B* somewhat attempted to limit its analysis to the facts of that case, its holding should cause real caution during the current global pandemic as there is arguably no requirement that someone be diagnosed with COVID-19 in order for liability to flow from its transmission.

The CDC says the disease spreads through close contact with persons or surfaces and that it first manifests itself as fever, cough and shortness of breath appearing within 2-14 days of exposure (See https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html). Plaintiff lawyers will argue persons and businesses were on constructive notice of potential infection once the first symptoms appear in an employee or even once the employee learns they encountered someone exposed to the disease. Likewise, businesses could be on constructive notice once they knew or should have known someone exposed to the disease visited their establishment.

There is no question the clear current public policy supporting potential liability mirrors the policy relating to the spread of HIV such that it is designed to "incentive to others to use proper diagnostic techniques and to alter behavior and procedures so as to limit the likelihood of [] transmission." To the extent businesses or individuals do not take immediate action to limit spread upon constructive notice of contact with or contraction of this disease, there is real danger of future claims for negligently exposing others to this deadly disease.

Like the virus itself, we are just learning about the worldwide economic damages that will follow this outbreak. Do what you can now to protect yourself and your business in the future.

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