

A PRIMER ON LITIGATION ISSUES INVOLVING FOODBORNE ILLNESS AND ENVIRONMENTAL TOXINS IN THE HOSPITALITY INDUSTRY

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In the last issue of the TLQ we published an article which focussed on an individual food poisoning case, Sarti v Salt Creek Ltd. (Bam! Pow! Slam! California Court Criticises and Distinguishes Long-Standing Precedent in Food Borne Illness Cases, [2009] TLQ 93, Issue Two, June 2009.) In this article the two authors take a more strategic view of food poisoning litigation.

1. Introduction

Claims within the hospitality industry for illnesses related to the exposure to toxins or bacteria are on the rise. One need only watch the evening news or read newspapers to find evidence of the nature and extent of this increasing tide of claims. Whether the claim arises from illness caused by e-coli bacteria found in lettuce, meat or peanut butter or upon the norovirus which sickens vacationers upon cruise ships or in hotels, virtually no entity within the hospitality industry is immune.

Given the relative wealth of published decisions related to foodborne illness claims and a dearth of such decisions regarding environmental toxin claims, authorities addressing issues commonly raised in foodborne illness claims will be discussed at the outset to provide a framework for issues we anticipate will be raised in claims arising from alleged exposure to environmental toxins and bacteria. This article is not intended to constitute an exhaustive treatise, but rather a brief introduction to the legal issues frequently raised in such claims in the hope that the reader

can take appropriate steps to protect or defend themselves against such claims.

**Foodborne illness claims
are not new to the
hospitality industry**

2. Sources of foodborne illness

Commonly referred to by the misnomer 'food poisoning', foodborne illness claims are

not new to the hospitality industry. In order to properly address those claims, it is important to first discuss some of the most common sources of foodborne illness. An understanding of the source of potential contamination is critical to detection and prevention of illness and resultant claims. Typically, foodborne illness is caused by the presence of unhealthy levels of harmful bacteria found in or on certain foods or beverages, most commonly e. coli, salmonella or shigella.

E. Coli

Currently there are four recognised classes of Enterovirulent Escherichia Coli (collectively referred to as the 'EEC Group' or e. coli) that cause gastroenteritis in humans. These include the enteropathogenic, enterotoxigenic, enterohe-

morrhagic and enterinvasive strains. See the 'Bad Bug Book' produced by the Food & Drug Administration which can be found at www.cfsan.fda.gov [hereinafter 'Bad Bug Book']. The symptomatology and treatment differ depending upon the strain to which one is exposed. Further, the symptoms and treatment may also differ depending upon the age or health of the individual infected. Exposure can be fatal depending on the strain one is exposed to, the availability and quality of treatment, and the patient's immune system.

Salmonella

Salmonella, a motile bacterium, has widespread occurrence in animals, especially in poultry and swine. However, salmonella can also be found in or on water, soil, insects, factory surfaces, kitchen surfaces, animal faeces, raw meats, raw poultry, and raw seafood. The bacteria can also be found in sauces and salad dressings as well as peanut butter, cocoa and chocolate. Its symptoms include nausea, vomiting, abdominal cramps, diarrhoea, fever and headaches. Typically, symptoms are experienced within 6-48 hours of exposure. (See Bad Bug Book.)

Shigella

Shigella is a bacteria that accounts for less than 10% of the reported outbreaks of foodborne illnesses in the United States. Contamination of foods and beverages most frequently occurs as a result of improper hygiene by food handlers, preparers and servers. The symptoms include abdominal pain, cramps, diarrhoea, fever, vomiting, and blood or mucous in the stool. The onset of symptoms is typically within 12 to 50 hours from exposure. It is most commonly associated with potato salad, tuna salad, shrimp salad,

macaroni salad and chicken salad, but can also be found in raw vegetables, milk and dairy products and poultry. (See Bad Bug Book.)

Other Toxins and Micro-Organisms

The foregoing bacteria are the most common sources of foodborne illness claims. They are certainly not the only sources. For a more detailed discussion refer to the Bad Bug Book.

3. Litigation issues in foodborne illness cases

Having identified the potential sources of said contamination and illness, it is hoped that

common-sense policies and procedures can be adopted to prevent or minimise the risk of exposure and the likelihood of claims. While not the focus of this article, suggestions for such policies and procedures are set forth below. Indeed, this article presumes that a claim

for damages incurred as a result to a foodborne toxin has been presented by a prior patron.

Potential Causes of Action

(1) Negligence

The most common claim for damages stemming from an alleged foodborne illness is negligence. Typically, the claimant will assert that the food preparer/server negligently stored, prepared and/or served the food or beverage which in turn caused the injury or illness. The claim is premised upon the existence of a duty owed by the defendant to purchase, store, prepare and serve food and/or beverages which are wholesome and/or fit for human consumption.

Its symptoms include nausea, vomiting, abdominal cramps, diarrhoea, fever and headaches

Courts have found that there are specific duties in foodborne illness cases. For example, those duties include the food preparation, storage, and service of food. In essence, the defendant owes a duty to store, prepare and serve the food in accordance with existing guidelines and in a non-negligent manner. See *Mexicali Rose v Superior Court*, 1 Cal.4th 617, 822 P.2d 1292, 4 Cal.Rptr. 2d 145 (1992); *Camasso v Dorado Beach Hotel Corp.*, 689 F.Supp. 384 (D. Del. 1988); and *Zink v GMRI, NC*, 2002 WL 373342 (E.D. Mich. 2002).

The various duties imposed upon food servers/preparers by statutes and case law have resulted in negligence claims predominating over other theories of liability in actions for damages stemming from alleged exposure to foodborne toxins. The prevalence of negligence claims is also likely due to the recognition that such causes of action trigger the potential for insurance coverage.

'Negligence Per Se'

While not a cause of action in its own right in several jurisdictions such as California, the claim of negligence *'per se'* is oft times plead within complaints. Such negligence claims are necessarily premised upon the assertion that a statute, ordinance or other law imposed a duty of care upon the negligent party. In foodborne illness cases, then, the plaintiff will most often point to some statute or ordinance which was enacted to protect consumers from exposure to unwholesome food.

Virtually every federal, state and local government has taken action to regulate the food-service industry. Health and safety statutes pertaining to the storage, preparation and service of food for human consumption are common place. For example, the United States Food and Drug Administration enacted the 2005 FDA Food Code (Supplemented October 2007) which

addresses such issues and arguably creates or imposes duties upon businesses involved in food preparation and service. Other codes or regulations include the Federal Food, Drug and Cosmetic Act, 21 U.S.C. Section 301-399a (of which Sections 341-350f are specific to food); the Food Allergen Labeling and Consumer Protection Act of 2004, 21 U.S.C. Section 301; and the FDA Requirement for Hazard Analysis and Critical Control Point (HACCP) for shellfish, juices and other food.

Many states have followed suit, enacting similar statutory schemes. For example, California's 'New Food Code' went into effect on or about July 1, 2007. (See, *Health and Safety Code* Sections 113700-114475.) These 'food codes' are extremely comprehensive, regulating virtually all aspects of food storage, handling and preparation. The statutory scheme also mandates inspections by Food and Health inspectors to confirm compliance with the Food Codes of the state, county or municipality.

Courts have found that there are specific duties in foodborne illness cases

Clearly, then, ample codes, statutes or regulations exist which can form the basis of a claim for negligence *per se*. Nevertheless, it remains important to identify the specific ordinance, regulation or statute upon which the claimant relies. It is only then that one can analyse the merit of the claim. See, *Evans v Suli*, 211 Cal.App.3d 605, 259 Cal.Rptr. 535 (1989). Indeed, a claimant must allege and prove the existence of a statute, ordinance or regulation, that it was enacted to protect against the very injury sustained, and that the claimant was within the class of persons it was designed to protect.

For example, in a claim arising from the presence of bone in food consumed, the claimant must establish the existence of a statute designed to preclude that condition. See, *Evans, supra*. See also *Polite v Corey Hilliards Restaurants, Inc.* 177 Cal.App. 170, 338 S.E. 2d 541 (1985). If such a

statute does not exist or the violation thereof was not the actual cause of the claimant's injuries, then the presumption of negligence under the negligence per se doctrine does not arise. As such, a clear understanding and analysis of the statute relied upon is critical to litigating such claims.

(2) Breach of Warranty that Food or Beverage was Fit For Human Consumption

The sale of food and beverages constitutes a sale of 'goods' as defined by the *Uniform Commercial Code*. (See *Uniform Commercial Code* §2-314.) As such, actions arising from alleged foodborne illness frequently include causes of action for breach of warranty.

Typically, plaintiffs will assert that the food or beverage consumed was not 'fit for human consumption', in violation of the *Uniform Commercial Code*. See *Mexicali Rose, supra*. It is important to note there is no requirement that the claimant be the one who actually paid for the food product to have standing to plead a cause of action for breach of warranty – privity of contract is not required. See, *Conklin v Hotel Waldorf Astoria Corp.*, 5 Misc. 2d 496, 161 N.Y.S. 205 (1957) and *Walker v Hot Shoppes of New York* 21 Misc. 2d 103, 200 N.Y. S. 2d 742 (1960).

The *Uniform Commercial Code* provides for special damages for a breach of warranty. As such, plaintiffs normally plead such claims together with causes of action for negligence to maximise recovery. Please note the code differs slightly in each jurisdiction. As such, the applicable code must be examined to determine what damages are available.

(3) Strict Product Liability

Plaintiffs often assert causes of action for strict products liability as well, particularly where a

'foreign object' in the food or beverage causes injury. See, Restatement 2d, Torts, Section 402A.

'In order to prevail ..., plaintiff must establish that: (1) the product in question was defective; (2) the defect existed at the time the product left the hands of the defendant; (3) that because of the defect the product was unreasonably dangerous to the [plaintiff]; (4) that [plaintiff] was injured or suffered damages; and (5) that the defect (if proved) was the proximate cause of the injuries suffered.' See, Matthews v Campbell's Soup Co., 380 F.Supp. 1061 (S.D. Tex. 1974).

A preliminary consideration in such claims is whether the food or beverage was 'defective'. The issue is addressed by the specific state's substantive law. Not surprisingly, the substantive law differs from state to state. The majority of jurisdictions follow the 'reasonable expectation' test, while others follow the 'foreign v natural' test.

Plaintiffs will assert that the food was not 'fit for human consumption'

Reasonable Expectation Test

Under this theory, the trier of fact must determine whether it was 'reasonable' for the average consumer to expect the substance within the food or beverage consumed. See Restatement 3rd of Torts, Products Liability §7.)

'[T]he physical issue is what is reasonably expected by the consumer in the food as served, not what might be natural to the ingredients of that food prior to preparation. (Citation omitted.) Naturalness of the substance to any ingredients in the food served is important only in determining whether the consumer may reasonably expect to find such substance in the particular type of dish or style of

food served. See Ex Parte Morrison's Cafeteria of Montgomery, Inc., 431 So. 2d 975 (Ala. 1983).

While it is clearly unreasonable to anticipate certain substances in food (e.g., a ball bearing, wire, or glass (see, *Williams v A & M Operating Co., Inc.*, 973 So.2d 138 (La.App. 2 Cir.,2007), the resolution is not so clear in other instances. For example, in *Matthews, supra*, the issue was whether it was reasonable to anticipate the presence of an irregularly shaped pearl in oyster stew/soup. While the lower court concluded it was, the appellate court concluded that a triable issue of material fact remained. (See also, *Zabner v Howard Johnson's, Inc.*, 201 So.2d 824 (Fla.App. 1967). A walnut shell found in a dish of maple walnut ice cream was found not to have been reasonably expected by the average consumer.)

In contrast, the California Supreme Court concluded that a chicken bone found in a chicken burrito was not a 'foreign object' applying the same test. See *Mexicali Rose v Superior Court*, 1 Cal.4th 617, 822 P.2d 1292, 4 Cal.Rptr.2d 145 (1992). Further it was not unreasonable for a New Englander to expect to find a fish bone in a bowl of fish chowder. See *Webster v Blue Ship Tea Room, Inc.*, 347 Mass. 421, 198 N.E.2d 309 (1964). For a further discussion of this topic, see Sherry, *The Law of Innkeepers*, Chapter 19 (Cornell University Press, 3rd ed. 1993). In light of the foregoing, it is important to litigate such cases in the venue where the restaurant is located so that the 'reasonable expectations test' is applied by jurors who form the local expectations of what may or may not be reasonably anticipated in a food product.

Foreign v Natural Test

A minority of jurisdictions follow the 'foreign versus natural' test. In those jurisdictions, if the injury-producing item is 'natural' to the food,

then it is not foreign such that no strict liability cause of action will be supported. See, *Musso v Picadilly Caf terias, Inc.*, 178 So.2d 421 (La.App. 1965), wherein a cherry pit in a cherry pie was found to be a natural by-product and thus not a foreign object. The application of this test, and the outcomes it produces, are no less problematic and inconsistent than those of the 'reasonable expectations test'.

(4) Allergens/Special Ingredients/Warnings

While strict liability may be imposed for injuries or damages sustained from a 'foreign object' encountered in food, it is important to acknowledge that liability may be imposed even though the food contains no such 'foreign' objects. Courts have concluded, because of the widespread knowledge that many individuals

have certain allergies to specific foods (i.e., peanuts, strawberries, etc.), that liability may be imposed for injuries sustained as a result of failure to warn of the presence of such naturally-occurring substances in foods.

A chicken bone found in a chicken burrito was not a 'foreign object'

Breach of Warranty – Duty to Warn

In *Livingston v Marie Callender's, Inc.*, 72 Cal.App.4th 830, 85 Cal.Rptr. 2d 528 (1990), the California court allowed a strict liability for failure to warn cause of action to continue against the restaurant. Therein, the restaurant never advised or warned of MSG in their soup which caused a severe allergic reaction in the plaintiff when consumed. The issue was whether the restaurant had a duty to warn the consumer that the food contained MSG.

The court held the duty to warn exists where the product contained an ingredient to which a substantial number of persons were allergic; the ingredient is one whose danger is either not generally known or is not one which the consumer would reasonably expect to find in the product; and the seller of the product knew or

should have know of the ingredient's presence and its danger. (See, Restatement 2d of Torts, Section 402A comment J.)

In *Edwards v Hop Sin, Inc.*, 140 S.W.3d 13 (Ky.App.,2003), the court held that a restaurant should warn customers of assorted latent risks associated with the consumption of raw oysters. Also, in *Woeste v Washington Platform Saloon & Restaurant*, 163 Ohio App.3d 70, 836 N.E.2d 52 (Ohio App. 1 Dist., 2005) the court held that the menu warnings provided by the restaurant were sufficient even if it did not mention the risk of dying from eating raw seafood.

The duty to warn arises with regard to an ingredient or substance within a food product which consumers would otherwise not expect to be present. However, warnings are not necessary when one either knew or should have know of the ingredient's presence. (See, *Milles v Giant of Md., LLC*, 441 F.Supp. 2d 104 (D. D.C. 2006). No duty to warn a lactose intolerant patron of the possible dangers resulting from the consumption of milk.) Further, a court dismissed a plaintiff's claim for failure to warn of possible cross-contamination of peanut or peanut products when she suffered a reaction after consuming almond chicken. *Thompson v East Pac. Enters.*, No. 49924-6-1 2003 Wash. App. Lexis 232 (Feb. 18, 2003) *review denied*, 150 Wash. 2d. 1019, 81 P. 3d 120 (2003).

Although the 'failure to warn' causes of action may fail, the plaintiff may be able to proceed with their general negligence claim under the breach of duty of preparing and serving the food provided if the patron advised that he/she had an allergic condition and the defendant failed to properly prepare and/or serve the food after being 'put on notice' thereof. See, *Livingston v Marie Callender's, Inc.*, *supra*.

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The number of 'failure to warn' cases may increase with the advent of requirements imposed by governments for the posting of 'nutritional value' information for food served in certain restaurants. For example, California recently enacted a law requiring information on the nutritional value of food effective July 1, 2009. See *California Health and Safety Code* Section 114094 (effective July 1, 2009). Under this new statutory scheme, any food establishment with more than 19 food facilities that offer substantially the same menu items must disclose the nutritional information and calorie content of the food served by way of a menu, brochure or posting.

These new posting requirements arguably impose a duty to warn upon the restaurateur to know and warn of all ingredients in food served. This is especially true where the ingredient is a known allergen. A breach of those posting requirements which results in illness or injury may give rise to new claims for negligence and/or negligence *per se* for failure to warn. (It is also important that food service employees be properly trained and/or a procedure be established to confirm what ingredients are in food products so as to not 'assure' the public that an ingredient is or is not within the food product.)

For more information on food allergens and potential issues, please see the National Restaurant Association's web site and specifically the Food Safety and Nutrition section regarding food allergens. (See www.restaurant.org/foodsafety/.)

Causation: The Battlefield

Common to each of the foregoing theories is the element of 'causation'. Indeed, regardless of the theory, the claimant must be prepared to demon-

strate an evidentiary link between the food or beverage consumed and the illness suffered. The issue of causation presents the most difficult hurdle for the party claiming 'food poisoning'.

Indeed, the existence of a duty to serve 'wholesome' food which is fit for human consumption can seldom be refuted. Similarly, there is often no dispute that the patron became ill after having consumed the food or beverage served. Establishing a causative link, however, between the specific food or beverage ingested and the subsequent illness for purposes of imposing liability, though, is quite a different matter. This is due, in part, to the facts that (1) the aforementioned toxins could be contracted from sources other than food and beverages and (2) the symptoms are similar to other illnesses unrelated to foodborne toxins. The issue of legal or proximate cause, thus, has become the battlefield upon which such claims are won or lost.

Generally speaking, simply pointing to evidence that one became ill after consuming food or beverage is insufficient to prove that said food or beverage caused injury. See, *Minder v Cielito Lindo Restaurant*, 67 Cal.App.3d 1003, 136 Cal.Rptr. 195 (1977); *Jiles v Church's Fried Chicken*, 441 So. 2d 393 (La. App. 1983); *Mann v D. L. Lee & Sons, Inc.*, 245 Ga.App. 224, 537 S.E.2d 683, 684 (Ga.App., 2000); *Griffin v Schwegmann Bros. Giant Supermarkets, Inc.*, 542 So.2d 710 (La.App. 4 Cir., 1989); *F. W. Woolworth Co. v Garza*, 390 S.W.2d 90 (Tex.CivApp. 1965); *Frankes, Inc., v Bennett*, 201 Ark. 649, 146 S.W.2d 163, 164 (1941); *Anderson v Piccadilly Cafeteria, Inc.* 804 So. 2d 75 (2001) and *Valenti v Great Atl. & Pac. Tea Co.*, 207 A.D. 2d 340 615 N.Y.S. 2d 84 (1984). Moreover, in cases such as *Minder, supra*, courts have even rejected other 'circumstantial' evidence from which inferences of a causative link could be drawn as being insufficient to meet the plaintiff's burden because other potential and reasonable inferences as to other sources of

contamination could be drawn from the same evidence.

Recent decisions, though, have raised the question of just what evidence is sufficient for purposes of causation. In *Wilson v Circus Circus Hotels, Inc.*, 101 Nev 751, 710 P.2d 77 (1985), for example, the Nevada court held that 'circumstantial evidence' of causation was sufficient to support a jury's verdict in favour of the plaintiff. In that case, the plaintiff demonstrated he dined almost exclusively upon food served by the hotel during the incubation period for salmonella. That evidence, coupled with evidence negating other possible causes, was sufficient to support the jury's verdict.

More recently, the California Court of Appeals for the Fourth District, in *Sarti v Salt Creek Ltd.*, 167 Cal.App. 4th 1187, 85 Cal.Rptr. 3d 506 (2008), sharply criticised the reasoning and holding in *Minder, supra*. The court in *Sarti* contended that the decision in *Minder* appeared to create a new, more difficult burden of proof for

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plaintiffs in foodborne illness cases, which was contrary to California law. According to the *Sarti* court, foodborne illness cases were the same as any other tort case, and as such plaintiffs were entitled to have the trier of fact draw reasonable inferences from admissible evidence on the issue of causation.

In *Sarti*, the plaintiff suffered illness caused by the campylobacter bacteria after dining at the restaurant and sustained serious injuries. During the trial the plaintiff presented evidence of an investigation by the Health Department where potential sources of cross-contamination were identified. The plaintiff also presented expert testimony to corroborate her contention that she contracted her illness due to cross-contamination. The court concluded that plaintiff was not required to come forward with medical proof to rule out all other possibilities for her illness to

prevail, and that the evidence presented was sufficient for a trier of fact to draw an inference of causation. See also, *San Francisco v Wendy's Intern., Inc.*, 221 W.Va. 734, 656 S.E.2d 485 (W.Va.,2007).

While circumstantial evidence may be used to support a claim, it has also been used to successfully defeat such claims. See, *Brown v General Foods Corp.*, 117 Ariz. 530, 573 P.2d 930 (Ariz.App. 1978) and *Hazelton v Safeway Stores, Inc.*, 12 Kan.App.2d 377, 745 P.2d 309 (1987). (Evidence of quality control processes and compliance therewith was proper to show improbability of contamination by the food provider.)

Although courts and triers of fact may disagree about the sufficiency of evidence necessary to carry a plaintiff's burden of proof on causation, it remains clear that most if not all cases are decided upon the element of causation. Moreover, it is important to note that most if not all cases of alleged foodborne illness lack the evidence of causation presented to the court in *Sarti, supra*.

Many of the cases, do not include evidence of a specific bacteria or toxin found in the plaintiff's system. More often than not, the food which allegedly caused the illness is unavailable for testing to draw a link between the food and the toxin. The evidence presented is frequently limited to a contention that one became ill after consuming food or beverage. Even according to the court in *Sarti*, that evidence is still insufficient to prove causation.

In sum, although recent decisions have called into question the rulings in cases such as *Minder*, causation remains the weakest link in a plaintiff's claim for damages arising from exposure to a foodborne toxin. The ability to prove causation will also be the issue in claims stemming from exposure to environmental toxins.

4. Sources of environmental toxins

Legionella

Legionella is a bacteria that causes symptoms similar to pneumonia. Symptoms typically appear within 2 to 14 days after exposure. According to the Centers for Disease Control ('CDC'), there are 8,000 to 18,000 people hospitalised each year with the disease. The legionella bacteria is normally found in water, specifically warm water, such as hot tubs, cooling towers, hot water tanks, and large plumbing systems.

Norovirus

Noroviruses are a group of viruses that cause 'stomach flu', or gastroenteritis in people. The symptoms normally appear within 24 to 48 hours of infection, but can appear as early as 12 hours.

According to the Centers for Disease Control, 'viruses are very different from bacteria and parasite, some of which can cause illnesses similar to norovirus infections. Viruses are much smaller, are not affected by treatment with antibiotics, and cannot grow outside of a person's body.' The noroviruses are found in stool or vomit of affected people, and people become infected with the virus in several ways, such as eating food or drinking liquids that are contaminated with the norovirus, touching services or objects contaminated with norovirus, and then placing their hands in their mouth; and having direct contact with another person who is infected and showing symptoms (for example, when caring for someone with illnesses, or sharing food or any utensils with someone who is ill). See the CDC Fact Sheet at www.cdc.gov/ncidod/dvrd/revb/gastro/noro-qa.pdf.

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Mould

The CDC states 'there was always some mold everywhere – in the air and on many services. Molds have been on the earth for millions of years. Molds grow where there is moisture.' However, it has been argued that people with depressed immune systems or allergies, people with chronic lung illnesses can get serious infections in their lungs when they are exposed to mould spores. There are other studies being conducted on whether memory loss, lethargy, and other conditions can be caused by exposure to mould.

However, personal injuries caused by mould are only one aspect of the mould claim. There also may be a property damage claim to the property, such as a hotel or restaurant that has been exposed to mould. In these cases, entire hotels or properties may have to be closed down in order to eradicate the presence of mould from the physical structure. Remediation could include removal and replacement of framing, drywall, stucco or other components of the structure.

Hepatitis C

Hepatitis C, according to the CDC, is a disease of the liver caused by the Hepatitis C virus. It is a blood-borne pathogen that can infect employees and guests when blood from an infected person enters the body of a person who is not infected. It can exist through needle sticks or exposure to sharp objects on the job.

Methicillin-Resistant Staphylococcus Aureus (MRSA)

MRSA is a staph infection that is resistant to most antibiotics and thus can cause a permanent

condition. Originally found in hospitals, it is now being detected in jails, gyms, spas, schools and other community locations. Because it has been classified as a 'superbug' some health care providers have called it a greater threat to public health than SARS or Bird Flu.

SARS (Severe Acute Respiratory Syndrome)

The CDC defines SARS as a viral respiratory illness caused by a coronavirus which can cause symptomology and death, depending on the exposure and the person's primary care physician. The above information came from the CDC website and it should be consulted for more information on this condition. Please go to www.cdc.gov.

They are obligated to either
remedy the condition or
warn of the condition

5. Litigation issues in claims stemming from exposure to environmental toxins or bacteria

Potential Causes of Action:

(1) Negligence

As with the foodborne claims, causes of action for negligence are commonplace in actions for damages. If the defendant knew or should have known that there were toxins or other bacteria in their hotel or restaurant, they are obligated to either remedy the condition or warn of the condition so that persons do not become exposed. This could include properly maintaining the water systems so as to not cause legionella and norovirus. See *In Re Horizon Cruises Litigation*, 2000 U.S. District, Lexis 7246 (S.D.N.Y. 2000). See also *Freeman v Celebrity Cruises, Inc.*, 1994 WL 689809 (S.D.N.Y. 1994). See also *Dorin v Club Med, SA*, Index No.: 4777/82 (N.Y. Sup. N.Y.

County 1982) See also *Dickerson, Travel Law*, § 4.04[2] (Law Journal Press 2005). See also Restatement of Torts 2d. Section 343, comment B.

(2) *Negligence per se*

The negligent *per se* claim is likely to be asserted also where there exposure was due to a violation of Health and Safety Codes, building codes and/or other maintenance and sanitation.

(3) *Fear of Contracting – the Emotional Distress Causes Of Action*

Unique to these toxins is the claim that one should be entitled to recover if they 'fear' having been exposed. Once a guest or patron has been exposed to a contaminate, such as blood, a claim of 'fear of contracting HIV/AIDS' or some other health condition may be argued.

Normally, the cause of action is one based upon the intentional or negligent causing of emotional distress.

Generally, if an individual suffers a fear of developing a medical condition such as cancer or HIV/AIDS without evidence of actually suffering a 'physical injury', the courts find no support for causation of emotional distress. See, *Wilson v J & L Melton, Inc.*, 270 Ga.App. 1, 606 S.E.2d 47 (Ga.App.,2004); fear of contracting HIV/AIDS from blood in french fries; *Coca-Cola Bottling Co. v Hagan*, 813 So.2d 167 (Fla.App. 5 Dist.,2002.); fear of contracting HIV/AIDS from condom in bottle; *Macy's California, Inc. v Superior Court*, 41 Cal.App.4th 744, 48 Cal.Rptr.2d 496 (Cal.App.1.Dist.); fear of contracting HIV/AIDS from needle stick; and *Malena v Marriott International, Inc.*, 264 Neb. 759, 651 N.W.2d 850 (Neb.,2002) needle stick and fear of contracting HIV.

Depending on the state, punitive damages may also be available for reckless disregard for the rights and safety of others in the manner in which the hotel, restaurant or cruise ship maintained the premises. This is especially the case where, for example, a hotel knows that there was a potential exposure, such as to legionella, and yet took no action to warn or prevent harm to its other guests.

Causation: The Battlefield

Although there are fewer published cases regarding claims based upon exposure to the foregoing toxins and bacteria, it appears reasonably certain that the same analysis involved in foodborne illness cases will apply with regard to the issue of causation in these environmental cases. Certainly,

as above, each of the foregoing theories also requires that the plaintiff demonstrate that a breach of some duty of care owed by the defendant exposed the claimant to a toxin and/or bacteria which was the legal or proximate cause of their resultant illness,

injury and/or damages. Here, then too, the issue of causation will present the most difficult hurdle in prevailing in their claim.

Claimants will undoubtedly prepare for this hurdle by amassing considerable evidence which they believe will demonstrate a link between the alleged toxin and their illness. The evidence will necessarily include considerable expert testimony and opinion regarding the scientific properties of and current medical theories regarding the alleged toxin, how it is contracted and concentration levels necessary to cause injury. In anticipation of this effort, it is recommended that one take appropriate steps to meet this effort by the claimants.

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6. Suggestions to prevent a claim or minimise exposure

The best defence to a foodborne illness or environmental toxin claim is, as with many things, a good offence. In sum, one should implement procedures and policies designed to prevent or minimise the risk of exposure to foodborne and/or environmental toxins. Given the wide variety of professions involved in the hospitality industry a comprehensive check list is impossible. To the extent feasible, it is advisable to consult with experts to develop appropriate policies and procedures tailored to the industry. To the extent such an option is infeasible, careful consideration of the nature of one's business or service and the type of toxin one might reasonably expect to encounter should yield some common sense policies and procedures which, if adopted, can prevent or minimise exposure. For example such policies and procedures might include dealing with reputable vendors for goods and services; routine inspections of food, beverage or other product upon receipt; training and implementation of guidelines to ensure that industry standards and code provisions with regard to food and other products are met; measures to ensure proper hygiene of employees and staff; and maintenance and inspection programmes.

**The best defence is a
good offence**

7. From a litigation standpoint

In the event that a claim is suspected or presented, emphasis must be placed on early investigation and evidence gathering. One should endeavour to gather and preserve all documentary evidence related to maintenance, inspection and other records regarding compliance with

statutes, codes or regulations such as inspection reports, temperature logs, etc. A sample of the food or beverage consumed should be preserved if available. Employees should be interviewed to determine whether they were a potential source of contamination (e.g., whether they had an illness or open wound). Any and all evidence of the claimant's visit should be located and preserved, including invoices showing food ordered/served. In addition, efforts should be undertaken to determine whether others also complained of exposure or illness. The gathering of such evidence will be of assistance in the future once a claim or cause of action is presented.

8. Conclusion

Claims involving illness or injuries from foodborne and/or environmental toxins are increasing in number and complexity. Indeed, the decision in the *Sarti* case is likely to lead to not only a

further increase in the number of claims presented, but a change in the approach to such claims. Claimants and their counsel will attempt to amass evidence and experts necessary to carry their evidentiary burden on the difficult issue of legal or proximate causation.

It is critical that those within the hospitality industry respond to this anticipated onslaught of claims. Reasonable and appropriate preventative measures must be implemented, enforced and documented to prevent or minimise exposure. In addition, once a claim is suspected or presented, intensive efforts must be taken early to gather and preserve relevant evidence to assist in the defense of the claim. Furthermore, consideration must be given to retaining experts or other professionals early so as to analyse the available

evidence and develop a cohesive strategy in response. In so doing, one can amass the

weaponry necessary to meet claimants on the battlefield of causation.

The quality and effectiveness of food-borne illness outbreak investigations have, however, been criticized (Bryan, 2002; Food and Drug Administration, 2001; Jones et al., 2004). The Environmental Health Specialists Network (EHS-Net) wished to gain a better understanding of specialists' foodborne illness outbreak investigation practices and consequently spearheaded the study reported here. EHS-Net is a collaborative project focused on food and water safety research and includes epidemiologists and environmental health specialists from CDC, the Food and Drug Administration (FDA), the U.S. Department of Agriculture (USDA), the U.S. Environmental Protection Agency (U.S. EPA), and nine state public health agencies. These are those for which the biggest environmental issues are negative impacts on the environment. This includes four systems which account for most of the EU's dairy farms and where approximately 80% of dairy cows and 84% of milk production occur; four systems which have either a largely neutral effect on the environment or for which information is lacking. These represent dairy farms where 12% of EU milk is produced and 13% of dairy cows are kept; two ecologically valuable systems for which the continuation of dairy farming is the principal issue but which account for only 6% and 8% respectively. It's no secret that the hospitality industry has struggled in the past year and will continue to recover and grow in 2021. Hospitality businesses are continually faced with many challenges regarding trends and customer expectations; the industry is rapidly growing, and organisations are struggling to keep up with the demand. We have gathered together the top challenges facing the hospitality industry in 2021 listed below. 1. Implementation of Technology. Over the past year technology has ramped up within the hospitality industry; self check-ins, contactless service, online ordering and payment via apps has become the new norm.