Foodborne Illnesses & Allergens:
Developing Policies & Procedures from Selected Cases & Settlements

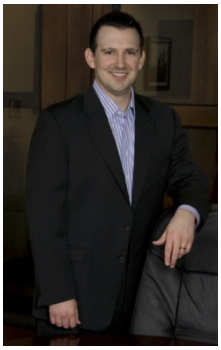
The Seventh Annual Hospitality Law Conference
February 9-11, 2009
Houston, Texas

David T. Denney
THE LAW OFFICES OF DAVID T. DENNEY, PC
3102 Maple Ave., 4th Floor
Dallas, Texas 75201
214.800.2319
david@foodbevlaw.com

THE LAW OFFICES OF DAVID T. DENNEY

A PROFESSIONAL CORPORATION

David T. Denney
3102 Maple Ave., 4th Floor
Dallas, Texas 75201
214.800.2319
david@foodbevlaw.com
www.foodbevlaw.com



David Denney founded and chaired the *Food, Beverage and Hospitality* practice group at a large Dallas law firm before opening the Law Offices of David T. Denney, PC, in February 2007.

The Firm's food and beverage practice represents clients in various types of litigation and counsels clients on such matters as the formation, purchase and sale of business entities, commercial leases, foodborne illness and allergy liability, employment matters and alcoholic beverage licensing.

David's professional commitment to the food and beverage community is highlighted by his industry-wide involvement:

- Member, Professional Advisory Committee for the INTERNATIONAL CULINARY SCHOOL AT THE ART INSTITUTE OF DALLAS;
- Guest lecturer at ART INSTITUTE OF DALLAS and the Texas outposts of LE CORDON BLEU in both Austin and Dallas;
- Created an ongoing lecture series for the GREATER DALLAS RESTAURANT ASSOCIATION entitled *How to Grow Your Restaurant Company*;
- Frequent contributor to *Restaurant Startup & Growth Magazine*;
- Features in both *Nation's Restaurant News* and *QSR Magazine*;
- Panelist, April 2008 DINEAMERICA Conference in Houston, Texas; and
- Panelist, February 2009 FS/TEC Conference in Orlando, Florida.

David earned his J.D. from the Southern Methodist School of Law in 2001, is a member of both the Texas and Tennessee State Bars, and is licensed to practice before all federal district courts of Texas.

David is also a Member of the NATIONAL RESTAURANT ASSOCIATION, the GLOBAL ALLIANCE OF HOSPITALITY ATTORNEYS, SLOW FOOD INTERNATIONAL and the COLLEGE OF THE STATE BAR OF TEXAS.

TABLE OF CONTENTS

I. SCOPE OF ARTICLE

This article seeks to provide basic background information on the types of claims an operator might face in the context of litigation stemming from foodborne illness or allergic reaction. Further, the article explores selected cases and news headlines, and suggests policies and procedures that can be implemented to prevent similar claims.

II. INTRODUCTION

Food and beverage operations, whether in hotels, restaurants or catering venues, are constantly at risk for lawsuits stemming from customers contracting a foodborne illness or suffering an allergic reaction. A basic understanding of the potential theories of liability is useful in evaluating the many cases in this field.

A. LEGAL FOUNDATIONS OF LIABILITY IN FOODSERVICE

Plaintiffs often sue food and beverage operations under a variety of causes of action. Understanding the various theories of liability can provide insight into developing prevention techniques and training foodservice staff on the importance of diligent food handling.

1. Breach of Warranty

Breach of warranty cases are of particular concern not only because they have historically been applied with inconsistency across various jurisdictions, but also because of the possibility that such a breach could trigger liability under (often stringent) state consumer protection statutes. For example, a plaintiff may pursue an action under the Texas Deceptive Trade Practices Act ("DTPA") for the breach of an express or implied warranty.[1] Further the DTPA provides for not only an award of attorneys' fees to a successful plaintiff, but will allow a plaintiff to recover treble damages in the event of a "knowing" breach of warranty;[2] that is, one done with "actual awareness" of the breach (such awareness can be inferred).[3]

a. Implied Warranty of Fitness for Human Consumption

In the sale of goods context, "merchantable" means that a product is fit for the ordinary purpose(s) for which it is sold.[4] In the case of food or beverage, that ordinary purpose is human consumption. Thus, any foodservice operation that serves food or drink

---

[1] TEX. BUS. & COM. CODE §17.50 (a)(2).

[2] *See Id.* §17.50(b)(1).

[3] *See Id.* §17.45(9).

[4] *See* UNIFORM COMMERCIAL CODE, Article 2 – SALES, §2-314 (2), *available online at* http://www.law.cornell.edu/ucc/2/article2.htm (last visited Jan. 6, 2009).

to a customer is impliedly warranting that the product will be fit to eat or drink. Section 2-314 of the Uniform Commercial Code provides for an implied warranty of merchantability in the sale of goods, and expressly states that the serving of food or drink for value constitutes a "sale."[5]

Historically, courts have used two tests to determine whether a food product is defective and, consequently a defendant's liability, if any. The legal theory under which these tests are employed is the Common Law "Implied Warranty of Fitness for Human Consumption," which applies to food or beverages purchased for consumption on- or off-premises from restaurants, grocery stores, concessionaires, vending machines, etc.

The "Foreign/Natural" test is the older theory, still used in a few states. Not surprisingly, this test draws a distinction between the "foreign" and "natural" characteristics of a food product ingredient. If an object or substance in a food product is natural to any of the ingredients of the product, there is no liability for injuries caused; if the object or substance is foreign to any of the ingredients, the seller or manufacturer of the product may be liable for any injury caused.[6]

The Foreign/Natural test began to fall out of favor in light of cases finding that the test's focus on the product in its natural form failed to recognize that sellers might fairly be held responsible in some instances for natural substances in food that caused injury.

Conversely, the "Reasonable Expectation" test examines what is reasonably expected by the consumer in the food product as served, not what might be foreign or natural to the ingredients of that product before preparation. The majority of jurisdictions dealing with the defective food products issue have adopted some formulation of the Reasonable Expectation test. As applied to common-law negligence, the Reasonable Expectation test is related to the foreseeability of harm on the part of the defendant; that is, the defendant has the duty of ordinary care to eliminate or remove in the preparation of the food served such harmful substance as the consumer of the food, as served, would not ordinarily anticipate and guard against.[7] Under the approach adopted by the Restatement (Third) of Torts: Products Liability, a consumer's expectation is based on culturally defined, widely shared standards allowing a seller's liability to be resolved by judges and juries based on their (subjective) assessment of what consumers have a right to expect

---

[5] *See Id.* §2-314(1).

[6] *See Jackson v. Nestle-Beich, Inc.*, 589 N.E.2d 547, 548 (Ill. 1992); *see also Mix v. Ingersoll Candy Co.*, 59 P.2d 144, 148 (Cal. 1936) (holding the defendants not liable for a restaurant patron's damages from injuries resulting from alleged negligence and alleged breach of implied warranty because a bone in the chicken pie was a natural substance) (overruled by *Mexicali Rose v. Superior Court*, 822 P.2d 1292 (Cal. 1992)); *Webster v. Blue Ship Tea Room, Inc*., 198 N.E.2d 309, 312 (Mass. 1964) (holding the defendant restaurant not liable for alleged breach of implied warranty of merchantability because a fish bone was a natural ingredient in a bowl of New England fish chowder served).

[7] *See* Restatement (Third) of Torts: Products Liability § 7 rep. n.1 to cmt. b (1998).

from preparation of the food in question.[8] Notably, the Reporters to the Restatement state that the majority view is unanimously favored by law review commentators.[9]

Numerous cases have, for what it's worth, juxtaposed the two tests.[10]

b. Express Warranty

An express warranty is "any affirmation of fact or promise made by the seller which relates to the goods and becomes part of the basis of the bargain."[11] Issues with express warranties arise when purveyors make overt statements about a product. Examples of might occur in writing (i.e. on a menu), and might look like: "Wild Salmon" or "No Sulfites," or they can occur orally, such as: "We can serve you a meal without nuts."

2. Strict Liability in Tort

In addition to other possible causes of action, plaintiffs in foodborne illness cases will often seek recovery under a "Strict Liability" theory, alleging that a product was so dangerous as to require a warning to consumers.[12] Though this cause of action is really just another way of pleading the Implied Warranty of Fitness for Human Consumption,[13] but Plaintiffs routinely plead both in strict liability and for breach of warranty (probably to ensure bootstrapping into the consumer protection statutes). Historically, courts have not found that the UCC warranty claims preclude parallel causes of action in strict liability.[14] Finally, plaintiffs will also plead negligence, but neither the strict liability nor breach of warranty causes of action require a showing of negligence to recover damages.

Enough raw shellfish cases have been decided under a strict liability theory that by now foodservice operators should know to put a disclaimer on menus. Raw shellfish contains bacteria that can cause infection, illness and even death in people with

---

[8] *Id.* cmt. b.

[9] *Id.* rep. n.1 to cmt. b.

[10] *See Schafer v. JLC Food Sys., Inc.*, 695 N.W.2d 570 (Minn. 2005); *Porteous v. St. Ann's Cafe & Deli*, 713 So. 2d 454 (La. 1998).

[11] *See* UNIFORM COMMERCIAL CODE, Article 2 – SALES, §2-313 (2).

[12] *Clime v. Dewey Beach Enter.*, 831 F. Supp. 341 (D. Delaware 1993).

[13] *See Evans v. MIPTT, LLC,* 2007 Tex.App. LEXIS 4680, *1 (Tex.App.—Houston [1st Dist.] 2007) (plaintiff "claimed that the restaurant was (1) negligent, and (2) strictly liable as a preparer or server of food, for providing defective food that was unsafe for its intended purpose, consumption.").

[14] *See Wachtel v. Rosol*, 159 Conn. 496 (1970).

compromised immune systems or certain liver, stomach or blood disorders.[15] Without a disclaimer, courts have found the delicious but bacteria-laden foods inherently and unreasonably dangerous.[16]

B. FOODBORNE ILLNESS: THE BASICS

Eating in restaurants increases the risk of contracting foodborne illness, as compared to eating at home. [17] The privilege of serving over 70 billion meals per year[18] places a great responsibility on the U.S. foodservice industry to ensure those meals are safe to eat.

Foodborne illness can originate from a variety of different sources, including:

1. pathogens "naturally" occurring in/on food (i.e. *vibrio* bacteria in oysters);

2. pathogens introduced through improper handling/storage (i.e. undercooked protein); and/or

3. pathogens introduced into/onto prepared food by an employee (i.e. employee with illness; employee's failure to wash hands).

Lawsuits over foodborne illness outbreaks appear to be on the rise, as are the number of plaintiffs per suit and the monetary damages awarded in these suits.

Appendix 1 details the most common foodborne pathogens, both bacterial and viral, and the cases examined below all deal with one or more of the listed pathogens. For one in the unenviable position of evaluating a foodborne illness claim, Appendix 1 may assist in that evaluation by providing a quick reference for symptoms and incubation periods that can be compared with the complaint.

---

[15] *See, e.g., Edwards v. Hop Sin, Inc.*, 140 S.W.3d 13 (Ky. Ct. App. 2003) (genuine issue of material fact precluded summary judgment for restaurant where customer contracted illness after consuming raw oysters and distributor had included warning on hazards of eating raw oysters and instructed retailer to inform customers of those hazards, because jury could find retailer altered the product by failing to convey warning to its customer).

[16] *See Edwards, 140 S.W.3d* at 17.

[17] Jones T, Vugia D, Selman, C, Angulo F, and the EIP FoodNet Working Group. Eating in Restaurants: A Risk Factor for Foodborne Illness? Findings from FoodNet to Be Explored by EHS-Net. International Conference on Emerging Infectious Diseases. Atlanta, GA, March 2002.

[18] Jones T, Vugia D, Selman, C, Angulo F, "Eating in Restaurants: A Risk for Foodborne Disease?" Clinical Infectious Diseases, Vol. 43, p. 1324 (Nov. 2006).

Of all the listed pathogens, Norovirus (formerly known as the Norwalk Virus) is of growing concern to foodservice operators. While not the most physically dangerous of the foodborne pathogens, his bug is "thought to be the culprit for at least half of all gastrointestinal illness in the United States – an estimated 23 million cases each year."[19] The pathogen is highly contagious and hardy – able to withstand freezing, heat to 140 º F (60º C) and low levels (10 ppm) of chlorine.[20] Specifically, typical restaurant sanitizers such as quaternary ammonium chloride solutions are ineffective against Norovirus.[21]

C. ALLERGENS: THE BASICS

A food allergy is an abnormal response to a food triggered by the immune system. Though many people often have gas, bloating or another unpleasant reaction to something they eat, this is not an allergic response. Such a reaction is thought to not involve the immune system and is called "food intolerance." Only about 1.5 percent of adults, and up to 6 percent of children younger than 3 years in the United States (about 4 million people), have a true food allergy.[22]

Food allergy patterns in adults differ somewhat from those in children. The most common foods to cause allergies in adults are shrimp, lobster, crab, and other shellfish; peanuts; walnuts and other tree nuts; fish; and eggs. In children, eggs, milk, peanuts, soy and wheat are the main culprits. Children typically outgrow their allergies to milk, egg, soy and wheat, while allergies to peanuts, tree nuts, fish and shrimp usually are not outgrown.[23]

If the statistics on the allergic population are not enough to make foodservice operators take extreme caution with allergens, then their employees' knowledge (or lack thereof) surely will.

A recent study in the *Journal of Allergy and Clinical Immunology* involving different types of employees (managers, servers and chefs) across a wide range of restaurant types, found that restaurant workers believe themselves to have a high knowledge of allergy-related issues, as well as a high estimation of their ability to deal with an allergy emergency. Not surprisingly, however, their actual knowledge was revealed to be woefully inadequate. For example, 34% of those surveyed believed fryer

---

[19] Lisa Jennings, "Norovirus threat spurs new focus on sanitation, sick-leave policies: strict rules may help prevent costly outbreaks of stomach 'bug'," NATION'S RESTAURANT NEWS, Vol. 40, No. 15, April 10, 2006.

[20] NOROVIRUS: TECHNICAL FACT SHEET, *available at* http://www.cdc.gov/ncidod/dvrd/revb/gastro/norovirus-factsheet.htm (last visited Dec. 23, 2008).

[21] *See supra*, note 19.

[22] Ray Formanek Jr., "Food Allergies: When Food Becomes the Enemy," in *FDA Consumer Magazine*, *available online at* http://www.fda.gov/fdac/features/2001/401_food.html (last visited Dec. 23, 2008).

[23] *Id.*

heat would destroy allergens, 29% thought removing an allergen from a finished meal would render the dish safe, and 25% believed that consuming a "small amount" of an allergen would be safe for a person with a food allergy. Only 25% of those who recognized "milk" as an allergen also recognized the term "casein." Only 44% of respondents indicated that a plan was in place in the event of a diner's allergic reaction, and only 48% indicated awareness of a specific plan by which the establishment would work to provide a safe meal for an allergic diner.[24]

III. SELECTED FOODBORNE ILLNESS CASES

A. *Sarti v. Salt Creek I, Ltd.* [25]

1. Pertinent Facts

No discussion of recent foodborne illness caselaw could be complete without a review of the recent *Sarti* opinion. In October 2008, a California Court of Appeal reversed a trial court's decision to overturn a $3.2 million jury verdict against restaurant, and in the process reduced the plaintiff's burden of proof by requiring her to put forth only enough evidence to allow a "reasonable inference" of causation.

Salt Creek Grille is a small chain with five locations (total) in California and New Jersey. In this case, the Plaintiff and her friend split an appetizer consisting of raw tuna and raw vegetables. She became nauseous and chilled the next day, then suffered constant diarrhea, fever, and chills the day after. This continued for ten days, by which time she was unable to move her legs and had trouble focusing her eyes. Paramedics were called and she was placed into intensive care where she was diagnosed with a variant of Guillain-Barre syndrome. Campylobacter bacteria were found in her system, and expert testimony later established that her Guillain-Barre syndrome was a reaction to the constant diarrhea brought on by the campylobacter.[26]

Campylobacter is not found in raw tuna (unless that tuna has been cross-contaminated by raw chicken, where the bacterium is common). The health department identified four practices at the Salt Creek Grille that could lead to cross-contamination: rags were not sanitized in between wiping down surfaces, there was an insufficient amount of sanitizer in the dishwasher, raw chicken tongs were sometimes used to handle cooked food, and raw vegetables were stored underneath raw meat so that a drop of raw meat juice could get on the vegetables.[27]

---

[24] Ahuja, Hsi & Sicherer, "Food Allergy Management from the Perspective of Restaurant/Food Establishment Personnel," Journal of Allergy and Clinical Immunology, Volume 117, Issue 2, Page S36 (February 2006).

[25] *Sarti v. Salt Creek I, Ltd.*, G037818 (Cal. App. 10/27/2008) (the case is so recent that the opinion has been attached as **Appendix 2**. References herein refer to the page numbers of the Appendix copy).

[26] *Id.* at 3.

[27] *Id.* at 3-4.

Notably, Plaintiff's friend who shared her appetizer did not get ill.[28] The restaurant took great pains to separate raw tuna from raw chicken, including defrosting it in a different place than where chicken is stored, having the chef use a newly cleaned cutting board for tuna, and preparing the tuna at the opposite end of the cook's line from where the chicken is cooked. Chicken was prepared in a separate room, different colored cutting boards were used for tuna and chicken, and the same chef did not prepare both items.

Despite the fact that the Plaintiff worked as a supermarket checker the day she became ill and could have been exposed to the campylobacter from a leaking bag of raw chicken she might have scanned, the jury found in favor of the plaintiff, awarding nearly $3.2 million in damages. The Plaintiff never completely recovered from her illness, had to use a walker for eight months, and only retains about 40% of her normal endurance.[29]

2. Analysis

The trial court granted a Judgment Notwithstanding the Verdict ("JNOV") in favor of the restaurant, based entirely on a reading of *Minder vs. Cielito Lindo Restaurant* for the proposition that reasonable inferences are never, or hardly ever, available in food poisoning cases.[30] The appellate court disagreed that *Minder*, strictly construed, precluded the use of reasonable inferences to show causation in food poisoning cases.[31]

In *Minder*, two couples ate Sunday brunch. One couple contracted Shigella Flexneri Group B, which caused both to suffer stomach upset and fever.[32] Heath inspections performed two, and then one month before the incident uncovered some unsanitary conditions at the restaurants. The couple's treating physician, however, gave opinion testimony that their illness "occurred as a result of [the] contaminated food" they had eaten. . . ." Despite the physician's testimony and generally unsanitary conditions at the restaurant, the court reversed jury awards to the plaintiffs on the grounds that "they had not met their burden of showing that the probable cause of their illness was contaminated food. . . ."[33]

In *Sarti*, the court of appeals opined that food poisoning cases follow the same rules as other tort cases and, to the extent that the *Minder* opinion suggested a no-

---

[28] *Id.* at 4.

[29] *Id.*

[30] *Id.* at 5 (citing *Minder v. Cielito Lindo Restaurant*, 67 Cal.App. 3d 1003 (Cal. Ct. App. 1977).

[31] *Id.* at 5.

[32] *Id.* at 6.

[33] *Id.* at 7.

inference rule in food poisoning cases, it contradicted established California precedent.[34] That court also held that *Minder's* suggestion that all other possible causes must be excluded in a food poisoning case conflicted with California precedent, and held that the exclusion of possible alternatives is not the rule in California.[35] The court further held that the appropriate standard was not "probable cause," but, rather, was whether the Defendant's actions were a "substantial factor" in causing the harm.[36]

The court of appeals, though, held that there was sufficient evidence, and expert testimony, to allow the jury to reasonably infer that particular unsanitary conditions found at the restaurant caused the cross-contamination with raw chicken that led to Plaintiff's illness. In particular, the jury could reasonably infer from the lack of proper sterilization in the dishwasher and the waiter's constant use of an unsterilized wipe down rag that a rag used to wipe down a raw chicken board was used to wipe down a raw tuna board or, alternatively, the jury could infer that a drop or two of raw chicken juice may have leaked onto the raw vegetables stored underneath.

What is alarming about the *Sarti* opinion is that not only was the plaintiff's burden of proof relaxed, but the court relied upon caselaw decided prior to *Minder* and certainly prior to the development of modern scientific techniques available to evaluate evidence that can obviate the need for inferences.

3. Developing Policies and Procedures

First, keep your facility up to code. If, however, a health inspector makes a finding of an unsanitary condition (here, four conditions were identified that could contribute to cross-contamination), ***remedy it***. If a case is filed in California these failures could be enough to create the inference that results in a judgment against you.

B. *Evans vs. MIPTT, LLC* [37]

The *Evans* case provides something of a counterpoint to *Sarti*.[38] Sometimes the restaurant wins one.

---

[34] *Id.* at 17.

[35] *Id.* at 19.

[36] *Id.* at 21.

[37] 2007 Tex.App. LEXIS 4680 (Tex.App.—Houston [1st Dist.] 2007).

[38] *See also Smith vs. Landry's Crab Shack, Inc.* 183 S.W.3d 512 (Tex.App.—Houston [14th Dist.] 2006) (holding that though a finding of cause in fact may be supported by circumstantial evidence, it cannot be supported by mere conjecture or speculation. A fact may not be inferred from circumstantial evidence that could support multiple inferences if none is more probable than the others).

1. Pertinent Facts

Plaintiff consumed two plates of crabs at the Defendant restaurant and became very ill while "waiting for the crab serving area of the buffet to refill another plate."[39] Her symptoms included stomach cramps, dizziness, nausea and severe diarrhea, and she was taken to the hospital where she was subsequently diagnosed with acute gastritis.

While an inspection of the restaurant by the health department the next day (prompted, of course, by the plaintiff's complaint) showed a temporary quarantine for the dishwasher due to inadequate concentrations of bleach in sanitizing, and food debris found on the can-opener roller, the report also stated that the buffet was under proper temperature control and there was no evidence of mishandling.[40]

Defendant sought a no-evidence summary judgment, claiming that Plaintiff had no evidence to support her claim that the food was defective or unsafe when she received it, and that she had no evidence to support her claim that the Defendant breached any duty to her or that damages resulted from any such breach.

2. Analysis

The court found that summary judgment for the restaurant was proper because the Plaintiff's evidence was so weak that it created no more than a mere "surmise or suspicion."[41]

A party may rely on circumstantial evidence to prove a claim that a food product is defective.[42] However, a claim of sudden illness, standing alone, is insufficient to create a fact issue to overcome a no-evidence motion for summary judgment. Conclusory contentions by the Plaintiff that the health inspector's report showed *possible* causes of her illness fell short of sufficient evidence as well. Finally, Plaintiff's medical records failed to refer to the crab consumed as either defective or spoiled, or the cause of her illness. They merely referred to acute gastritis and *possible* food poisoning.

C. *Woeste vs. Washington Platform Saloon & Restaurant* [43]

This now-famous case bears repeating because of its simple lesson and because its facts juxtapose nicely with *Edwards v. Hop Sin, Inc*.[44]

---

[39] *Id.* at *1.

[40] *Id.* at *10-12.

[41] *Id.* at *15.

[42] *Id.* at *8.

[43] 836 N.E.2d 52 (Oh. App. 2005).

[44] *Supra,* notes 15-16 (140 S.W.3d 13 (Ky. Ct. App. 2003)).

1. Pertinent Facts

The Plaintiff's husband died as a result of contracting the bacteria *vibrio vulnificus* after consuming raw oysters at the Defendant restaurant, Washington Platform. While the *vibrio* bacterium has no effect on the majority of the population, it can cause death or serious injury in those with weakened or impaired immune systems. Plaintiff's husband suffered from Hepatitis C and cirrhosis of the liver, making him particularly susceptible to *vibrio*. He died one week after contracting *vibrio* from the raw oysters.[45]

The restaurant's menu contained the following warning:

> Consumer Information: There may be risks associated when consuming shell fish as in the case with other raw protein products. If you suffer from chronic illness of the liver, stomach or blood, or if you are pregnant or if you have other immune disorders, you should eat these products fully cooked.[46]

The Plaintiff's husband, however, ordered his oysters without opening or reading the menu (and, thus, the warning). [47]

Plaintiff alleged that Washington Platform was negligent and strictly liable for failing to adequately warn of the dangers of eating raw oysters, and that the restaurant violated Ohio's Pure Food and Drug Law by receiving and delivering adulterated oysters.[48]

She further alleged that the seafood harvesting company, Johnny's, was negligent for breaching a duty not to abuse the temperature of harvested oysters, was strictly liable for failing to warn of the dangers associated with the oysters, and that Johnny's violated Ohio's Pure Food and Drug Law by receiving or distributing adulterated oysters.[49]

2. Analysis

The Court held that Washington Platform's warning, present in its menu, adequately put a patron on notice of the risk associated with eating raw shellfish. The restaurant could not be subjected to liability for the deceased's failure to read the warning provided in the menu. The Court held it was unreasonable and impractical to require the

---

[45] *Woeste,* 836 N.E.2d at 55.

[46] *Id.* at 56.

[47] *Id.* at 55.

[48] *Id.* at 57.

[49] *Id.* at 58.

restaurant to post warnings in other, more visible locations throughout the restaurant. Placing the warning next to the menu item in question was sufficient.[50]

The Court further held that neither the restaurant, nor the supplier violated Ohio's PURE FOOD AND DRUG LAW because the oysters were not adulterated, *since the* vibrio *bacteria is naturally taken in by oysters when they feed*, and is therefore naturally occurring.[51]

The Court found no evidence in the record to support a claim that Johnny's abused the temperature of harvested oysters. It also found that the warning placed by Johnny's on each sack of oysters was adequate and sufficient.

3. Developing Policies and Procedures

Many states have enacted a statutory duty to warn diners of the risk(s) associated with consuming raw oysters or any raw animal protein.[52] In fact, between the incident complained of in *Woeste* and the appellate decision in that case Ohio enacted a duty to warn law.

Even in states with no statutory duty to warn, however, menu disclaimers such as the one that saved the restaurant in this case are well worth the cost of printing.

D. Houlihan's – Geneva, IL (2007)

1. Pertinent Facts

January 2007: William Marler filed a class action lawsuit against Houlihan's Restaurant after the restaurant notified the county health department that a food worker was diagnosed with Hepatitis A. Alleged damages included emotional distress, loss of wages and, in some cases, medical expenses.

The lawsuit alleged that all customers who were at the restaurant between January 8 and January 19, 2007, were put at risk for contracting Hepatitis, as well as allegations of negligence in preparation and distribution of food.

An estimated 3,000 patrons dined at the restaurant during the time period when an employee infected with Hepatitis A was working and potentially contagious. The Illinois public health network gave shots of immune globulin to more than 2,000 people to minimize the effects of the exposure. Health department officials praised the restaurant for its cooperation with the investigation.

---

[50] *Id.* at 57.

[51] *Id*.

[52] *Id.* at 56-7 (discussing "duty to warn" laws in Louisiana, Texas and Ohio).

July 2007: Houlihan's settled the case for $300,000. At the time the settlement was announced, the class was made up of fifty members, each entitled to receive $200.00 in settlement proceeds (leaving $290,000 for the lead plaintiff's attorneys and the name plaintiff).[53]

As of the date of the settlement, **none** of the estimated 3,000 patrons had contracted Hepatitis.

2. Developing Policies and Procedures

The infected worker was sick on the job for eleven days. Foodservice operators should seriously evaluate their paid-leave programs (or lack thereof) in contrast to the possible liability of *merely exposing* customers to the possibility of illness. Had a patron in this case actually contracted Hepatitis A, the litigation would still be in its infancy and the damages would be in the multi-millions of dollars.

E. Carrabba's Italian Grill – Lansing, MI (2006)

1. Pertinent Facts

In January 2006, nearly 500 diners were sickened after a Carrabba's employee worked while infected with Norovirus. After the employee got sick in the restaurant, news of the outbreak did not begin to reach public health officials for 24-48 hours: consistent with the virus's incubation period.

Same-store sales dropped between 20 and 40% in the week following the incident, which was widely reported in the local media.[54] In response, Carrabba's took out a full-page ad in the local newspaper apologizing for the incident and inviting its affected customers to settle with its insurance company.[55] The company paid approximately $100,000 to those electing to settle, while a few joined a class-action suit against the company.[56]

---

[53] Paul Dailing, "Restaurant settles hepatitis A lawsuit," Kane County Chronicle (July 26, 2007), *available online at* http://www.kcchronicle.com/articles/2007/07/26/news/local/doc46a83640e021a673652763.txt (last visited Jan. 5, 2009).

[54] Lisa Jennings, "Norovirus threat spurs new focus on sanitation, sick-leave policies: strict rules may help prevent costly outbreaks of stomach 'bug'," NATION'S RESTAURANT NEWS, Vol. 40, No. 15, April 10, 2006.

[55] Bob Krummert, "Food Safety: Even the Experts are not Immune," *Restaurant Hospitality Magazine*, May 31, 2006, *available online at*, http://restaurant-hospitality.com/food_safety/rh_imp_13126/ (last visited Dec. 23, 2008).

[56] L. Jennings, *supra*, Note 54.

2. Developing Policies and Procedures

a. Anytime anyone – whether employee or guest – gets sick in your establishment, presume that person is infected with Norovirus.

Further, seriously consider closing the unit to ensure proper cleaning. Pathogens in vomit become airborne and can land as far as 15 feet away. Inadequate cleanup can result in the rapid spread of an outbreak.[57]

b. Have appropriate cleaning agents on hand.

The CDC recommends a high concentration of bleach to assure Norovirus is killed.[58] Suppliers can provide "vomit cleanup kits" that can be stored onsite in case of such an incident.

c. Address the outbreak (quickly and thoroughly).

Below is the transcript of an interview with one diner who saw the Carrabba's ad and elected to settle – certainly a better deal for the company than litigating a 500-member class action suit:[59]

> Amy Paulis, Carrabba's victim: *It just took its toll on me, because it hit my family. The only person who didn't get sick was my husband.*
>
> She says her two children didn't even eat at Carrabba's with her, but picked up the stomach virus anyway. Health department records show over 400 others got sick too, but Paulis says she's feeling even better now that she may be getting a settlement from the restaurant for her all her pain. Just like the full-page apology asks, Paulis says submitted her claim online.
>
> Amy Paulis: *I just explained that I missed two days of work, and so did my husband, to stay home and take care of our children.*
>
> She says she hasn't heard back from Carrabba's yet, but other friends like this one who dined with Paulis that fateful night have already gotten a response.

---

[57] ECOLAB, INC.: "Tips for Helping to Reduce Norovirus Risk" (2007), *available online at* http://www.ecolab.com/PublicHealth/images/NorovirusTips.pdf (last visited Dec. 23, 2009).

[58] NOROVIRUS: FOOD HANDLERS, *available online at* http://www.cdc.gov/ncidod/dvrd/revb/gastro/norovirus-foodhandlers.htm (last visited Dec. 23, 2008).

[59] Interview on WLNS TV 6, available from Kansas State University foodsafety archives, at http://archives.foodsafety.ksu.edu/fsnet/2006/2-2006/fsnet_feb_20.htm (last visited Dec. 23, 2008).

> Amy Paulis: *I believe it was $300 that they ended up compensating her for missing work, her meal and just being sick, pretty generous.*
>
> And even though other victims are going another route, suing over the illness outbreak. Paulis says that's not an option for her.
>
> Amy Paulis: *If they're willing to have their insurance company compensate people that were sick, and they've admitted that they made a mistake, and they're going to correct it, then that's good enough for me.*

d. Rethink Your Sick-leave Policy (Again)

Carrabba's still does not offer paid sick leave, but the chain requires that managers now ask an employee calling in sick about her specific symptoms. If experiencing vomiting or diarrhea, she will be excluded from work for 72 hours. Further, managers are given discretion as to whether the employee will be paid for that time.[60]

An established sick-leave policy or a reasonable variant like the one Carrabba's adopted could provide some protection in the event of a similar lawsuit.

F. *Reno Hilton Resort Corp. v. Verderber* [61]

1. Pertinent Facts

Plaintiffs brought a class action against RENO HILTON RESORT CORP. and Park Place Entertainment, Inc., as a result of a Norovirus outbreak at the Reno Hilton in May and June of 1996 which caused the illness of over 1,300 staff and guests. The trial court then divided the action into two phases. The first phase consisted of a jury trial regarding liability for negligence, malice and fraud, as well as class-wide punitive damages. The second phase was to consist of individual hearings to assess compensatory damages for each class member.[62]

After deliberating for ***less than one hour***, the jury imposed $25 million in punitive damages after finding that Reno Hilton's policy of unpaid sick leave was the *proximate cause* of the outbreak. Following the conclusion of Phase I, Reno Hilton moved for JNOV or, alternatively, a new trial, both of which were denied. [63]

---

[60] L. Jennings, *supra*, Note 54.

[61] 106 P.3d 134 (Nev. 2005).

[62] *Id.* at 135.

[63] *Id*. (emphasis added).

2. Analysis

The Nevada Supreme Court dismissed Reno Hilton's appeal because since the second phase of the trial had not concluded, no final judgment had been issued. While the particulars of the appeal are not specifically relevant for our purposes, it is illustrative to point out that this **2005** opinion, which merely continued the process of litigation and appeal, originated with a **1996** incident.

3. Developing Policies and Procedures

The *Verderber* jury found that the absence of a sick-leave policy *proximately caused* the outbreak. No amount of post-crisis management or safe-handling procedures can prevent liability if your *lack of a policy* equals causation.

IV. SELECTED ALLERGEN CASES

A. Chinese Restaurant, Minneapolis, MN [64]

1. Pertinent Facts

A diner at a Chinese restaurant knew, based on experience, to inquire whether the restaurant's egg rolls were prepared in peanut oil. His server assured him they were not, but she did not know that the egg roll recipe had been changed *several years earlier* to include peanut butter, which was used to enhance taste.

Ninety minutes after his first few bites, he was dead.[65]

After the man developed the allergic reaction, his wife and mother summoned the manager, who disclosed that peanut butter was an ingredient in the egg roll (the allergic diner had a prescription for epinephrine but it was unclear whether he injected himself with it). The man drove himself to a near-by urgent care center, where he went into shock, his throat swelled, he stopped breathing and was pronounced dead.[66]

2. Analysis

As might be expected, the man's wife sued the restaurant. As part of a subsequent settlement for $450,000, the restaurant agreed to change the language on its menu to alert customers that it will disclose ingredients in foods if requested.

---

[64] Neither the case information, nor the particulars of the settlement, are readily available.

[65] Anon. 1992. "Restaurant settles suit in fatal allergic reaction." *Star Tribune*. Aug. 8 p. 3B. Minneapolis, MN. (cited in O. P. Snyder; D. M. Poland, "Adverse Reactions to Food, Food Allergy and Sensitivity: A retail food hazard problem," HOSPITALITY INSTITUTE OF TECHNOLOGY AND MANAGEMENT, June 1997, *available online at*: http://www.hi-tm.com/Documents/Allergy.html (last visited January 6, 2009)).

[66] *Id.*

B. *Livingston v. Marie Callender's, Inc.* [67]

1. Pertinent Facts

A diner asked his server whether the soup contained MSG, another common allergen. She assured him that it did not, and the restaurant advertised its soup as "made from the freshest ingredients, from scratch, . . . every day."[68]

After consuming the soup, he suffered MSG Symptom Complex, which caused his lungs to shut down and sent him into cardiac arrest, resulting in brain damage due to lack of oxygen. This diner survived to sue the restaurant. [69]

2. Analysis

The appellate court reviewed the case under the application of strict liability principles – that is, whether the soup contained "an ingredient to which a substantial number of the population are allergic;" or an ingredient "which the customer would reasonably not expect to find in the product." [70]

The Plaintiff did not contend that the restaurant had a duty to warn about possible adverse reactions to MSG, instead contending it had an obligation to warn customers that MSG was present in the soup. [71]

The court of appeals upheld a trial court finding that the restaurant was not negligent, but remanded for a determination by the trier-of-fact the "failure to warn" cause of action. Of particular import, the court of appeals reversed the trial court's dismissal of the Marie Callender's corporate entities. [72]

C. *Walker v. Bertucci's, Inc.* [73]

1. Pertinent Facts

A woman with a tree nut allergy *asked her server* whether the chicken pesto sandwich contained nuts, and the server erroneously assured her that it did not. The pine

---

[67] (1999) 72 Cal. App. 4th 830 [85 Cal. Rptr. 2d 528].

[68] *Id.* at 832.

[69] *Id.* at 833.

[70] *Id.* at 839.

[71] *Id.* at 840, n.4.

[72] *Id.* at 841.

[73] Neither the case information, nor any settlement (if any), are readily available.

nuts in the sauce sent her into anaphylactic shock, resulting in a coma that lasted until she died a week later.

The restaurant did not disclose the secret recipe for the sandwich to its servers, so the server did not know what the ingredients were when she answered the diner's question. [74]

2. Analysis

The widower's wrongful death lawsuit, which sought more than $10 million in damages, claimed that the restaurant did not properly inform its employees of product ingredients, and that the "Express Lunch" menu encouraged the restaurant's employees to act "quickly rather than safely," (despite the fact that the restaurant's Express Lunch is not timed, and lasts until 4:00 p.m.).[75]

D. *Puccio v. Apple American Group* [Applebee's] [76]

1. Pertinent Facts

In March 2005 a plaintiff with a severe allergy to fish visited Applebee's and suffered a "severe allergic reaction" after consuming his food. Then, in November 2005 he returned to the same Applebee's with friends, and was "concerned for his safety" such that he specifically informed the server about his allergy to seafood. The server *assured him* that his food would be prepared without coming into contact with seafood.[77]

Unfortunately, his food was most likely prepared on a grill that had previously been used to prepare seafood (cross-contaminated). He again suffered a severe reaction, and was promptly rushed to the emergency room for life-saving treatment. [78]

2. Analysis

The server's assurance that the restaurant would provide a safe meal is almost certainly an express warranty, and the cross-contamination of the plaintiff's food is almost certainly a violation of that warranty. When a restaurant takes an affirmative stance on its

---

[74] Robin L. Allen, "Bertucci's, Inc. served with $10.4 M wrongful-death suit," NATION'S RESTAURANT NEWS, April 10, 2006, available online at http://findarticles.com/p/articles/mi_m3190/is_/ai_17241723 (last visited Jan. 6, 2009).

[75] *Id.*

[76] Cause no. 07-C-726, before in the Monongalia Circuit Court (Nov. 1, 2007).

[77] Cara Bailey, "WVU Student has allergic reaction, sues Applebee's," The West Virginia Record (Nov. 9, 2007), *available online at* http://www.wvrecord.com/news/203738-wvu-student-has-allergic-reaction-sues-applebees (last visited Jan. 7, 2009) (emphasis added).

[78] *Id.*

ability to provide a safe meal to an allergic diner, it should make every conceivable effort to do so.

The lawsuit seeks unspecified damages stemming from claims the plaintiff suffered "serious injury and damages, pain and physical disability, mental anguish and great discomfort of the body," in addition to claims that he will suffer some permanent disability and loss of future enjoyment.

E. DEVELOPING POLICIES AND PROCEDURES TO AVOID ALLERGY LIABILITY

1. Get the Necessary Information

Some establishments require servers to ask each table whether there are allergy issues that should be addressed, while others place a statement on the menu akin to, "So we may serve you better, please inform your server of any dietary restrictions." Furthermore, if there are "hidden" allergens in certain dishes (i.e. peanut butter in the chili), consider disclosing that on the menu for those specific items.

2. Give the Necessary Information

Many restaurants elect to post allergy information on their Web sites. Restaurants catering to children might elect to post information specific to nuts, dairy, gluten (wheat), and MSG – all allergens to which millions of children are allergic. Others provide contact information (usually an email address) for additional allergy-related questions or post menu suggestions on their website for diners with allergies to the major groups listed above.

3. Develop an action plan for dealing with an allergic diner's request: NEVER LET A SERVER ANSWER QUESTIONS ABOUT INGREDIENTS OR MAKE ASSURANCES ON BEHALF OF THE RESTAURANT

High turnover in both front- and back-of-the-house employees will likely make it impractical to keep all employees up-to-date on ingredient information. Thus, the most comprehensive policy for managing these concerns will be to name one manager-level staff member per shift to handle all allergy questions. A manager will be more likely than a server or host to take ownership of such a situation and ensure the diner's needs are met. The designee does not need to be fully versed on each ingredient that goes into each dish, but such an employee can be more specifically trained on ingredients and will be more competent to discuss allergy concerns with the kitchen than a server.

a. Designate one manager-level employee per shift to handle ingredient/allergen questions;

b. Ensure he/she is trained on the appropriate information, including the major allergens, use of those allergens in menu items, prevention of cross-contamination, ;

c. Train the staff to look to that person for answers:

1) Include the policy in the employee handbook; and

2) Enforce the policy (failure to enforce the policy against noncompliant employees could expose you to liability);

d. Consider publishing allergy policies on the web; and

e. Disclose allergens on the menu when possible.

4. **Train staff about potential allergens and how to spot symptoms of a severe allergic reaction (**NRA *Food Allergy Training Guide*) **so help can be summoned as quickly as possible**;

5. **Track the ticket from the table to kitchen, and back. Consider using a special ticket (i.e. bright color) for orders containing allergy concerns.**[79]

a. Notify manager of the food allergic diner;

b. Manager talks with diner to get information about the diner's needs, helps with menu suggestions, and communicates with chef;

c. Chef checks ingredients;

d. Kitchen staff prepares food using these precautions:

1) Wash hands/put on gloves;

2) Use clean pans, knives, utensils, work surfaces and grill; and

3) Use fresh ingredients (i.e. open a new container of salt; fresh garnish);

[79] Sheila R. Cohn, MD, Manager, Nutrition Policy for National Restaurant Association. "Food Allergens: Presentation to Joint Fall Educational Conference," Oct. 18, 2002; *see also* Stephen Barth, "Food and beverage Liability Prevention," *Food Safety Solutions*, Summer 2005, *available online at*: https://www.daydots.com/magazine/Magazine_M2-0012/thelaw.pdf (last visited Jan. 5, 2009).

e. Manager, server, or chef hand-carries plate separately from rest of table's order; and

f. Server checks with diner immediately to be sure everything is satisfactory .

6. Avoid cross-contamination:

a. Clean grill/fry oil;

b. color-coded cutting boards; stations with designated tools; and

c. Spillage (if a dish becomes contaminated, it must be replaced – removal of an allergen is not enough).

7. Place notice on menus alerting diners to inform you of allergic conditions.

V. SELECTED HEADLINES (You Would Prefer to Avoid)

A. "Calif. Eatery Gives Toddler Margarita" [80]

1. The two-year-old grew drowsy, started vomiting a few hours later and was rushed to the hospital; and

2. Margarita mix (including tequila and triple sec) was in plastic bottle at the bar identical to the one containing juice.

B. "Asparagus Sauce Killed Diner at Award-Winning *Tables*" [81]

1. Tests showed *bacillius cereus* bacteria at 9.8M per 10M parts;

2. 1.0MM parts per 10MM is toxic;

3. Bacteria likely built up when cream sauce was left out after having been refrigerated and re-heated over at least 48-hours;

4. "A chef of about 30 years…he said he believed his taste and smell test was enough to ascertain its safety"; and

5. The sauce may have been out as long as seven hours…

[80] ASSOCIATED PRESS (Antioch CA), June 19, 2007.

[81] THE DAILY TELEGRAPH (AUS), Match 27, 2008.

C. "Woman allegedly bites into roach at FW restaurant" [82]

1. Article specifically identified the location of the Bennigan's restaurant, and that the diner had ordered buffalo wings and potato skins;

2. 4 roaches were found by inspectors near the grill;

3. Restaurant had been fumigated two days earlier; and

4. The pest control company told the newspaper that it had found "even more roaches in the kitchen and bar."

VI. CONCLUSION

Preventing liability for foodborne illness and allergy claims starts – and ends – with the operator. Without hands-on efforts to develop policies and procedures to reduce risk, an understanding of the foundations of such liability will really only provide the savvy defendant with an ability to anticipate the direction of the plaintiff's punches before they land.

Train your staff, enforce your policies and anticipate possible areas of weakness so your operation stays out of the headlines.

[82] THE DALLAS MORNING NEWS, July 5, 2007.

APPENDIX 1

These general descriptive criteria have been used by the national Foodborne Disease Outbreak Surveillance System for many years. They were most recently published in Center for Disease Control and Prevention. *CDC Surveillance Summaries*, March17, 2000. MMWR 2000; 49(No.SS-1) and recently updated July 27, 2006.

Bacterial

Pathogen	Incubation	Symptoms	Duration	Source
Bacillus cereus	1-6 hours (vomiting); 6-24 hours (diarrhea)	Nausea and vomiting *or* colic and diarrhea	24 hours (short form); 24-48 hours (long form)	Soil organism found in raw, dry and processed foods, e.d. rice
Campylobacter	2-10 days; usually 2-5 days	Diarrhea, cramps, fever and vomiting; diarrhea may be bloody	2-10 days	Raw and undercooked poultry, unpasteurized milk, water
Clostridium botulinum (botulism)	2 hours to 8 days; usually 12-48 hours	Vomiting, diarrhea, blurred vision, double vision, difficulty swallowing, descending muscle weakness	Variable (days to months)	Home-canned food, improperly canned commercial foods
Clostridium perfringens	6-24 hours	Cramps, diarrhea	24-48 hours	Meats, poultry, gravy; foods kept warm
Enterro-hemorrhagic E. coli, including E. coli O157:H7 and other Shiga toxin-producing E. coli (STEC)	1-10 days; usually 3-4 days	Diarrhea, frequently bloody; abdominal cramps (often severe); little or no fever; 5-10% develop Hemolytic-uremic syndrome (HUS) and average of 7 days after onset, when diarrhea is	5-10 days	Ground beef, unpasteurized milk and juice, raw fruits and vegetables, contaminated water, sprouts, person to person

		improving (more common in children, elderly and immune-compromised)		
Listeria	9-48 hours for GI symptoms; 2-6 weeks for invasive disease	Fever, muscle aches and nausea or diarrhea; pregnant women may have flu-like illness and stillbirth; elderly, immune-compromised and infants infected from mother can get sepsis and meningitis	Variable	Fresh soft cheeses, unpasteurized or inadequately pasteurized milk, ready-to eat deli meats and hot dogs
Salmonella	6 hours to 10 days; usually 5-48 hours	Nausea, diarrhea, cramps, fever	4-7 days	Poultry, eggs, meat, unpasteurized milk or juice, raw fruits and vegetables (e.g., sprouts), person to person
Shigella	12 hours to 6 days; usually 2-4 days	Abdominal cramps, fever and diarrhea; stool may contain blood and mucus	4-7 days	Contaminated food or water, raw foods touched by food workers, raw vegetables, egg salads, person to person
Staph (toxin)	30 minutes to 8 hours; usually 2-4 hours	Nausea, cramps, vomiting, diarrhea	24-48 hours	Custards, cream fillings, potato or egg salad, sliced meats
Vibrio cholerae	1-5 days	Profuse watery diarrhea and vomiting, severe dehydration	3-7 days	Contaminated water and shellfish, street vended

				food
Vibrio parahaemolyticus	4-30 hours	Watery diarrhea, abdominal cramps, nausea, vomiting	2-5 days	Undercooked or raw seafood (fish and shellfish)
Vibrio vulnificus	1-7 days	Vomiting, diarrhea, abdominal pain; more severe in patients with liver disease or who are immune-compromised; can cause invasive infection (sepsis)	2-8 days	Raw seafood, particularly oysters, harvested from warm coastal waters
Yersinia	1-10 days; usually 4-6 days	Appendicitis-like symptoms (diarrhea and vomiting, abdominal pain)	1-3 weeks	Undercooked pork, unpasteurized milk, contaminated water

Viral

Pathogen	**Incubation**	**Symptoms**
Hepatitis A	15-50 days; median: 28 days	Jaundice, dark urine, fatigue, anorexia, nausea
Norovirus (NoV)	12-48 hrs (median 33 hours)	Diarrhea, vomiting, nausea, abdominal cramps, low-grade fever
Astrovirus	12-48 hrs	Diarrhea, vomiting, nausea, abdominal cramps, low-grade fever

Alan Melnick, MD, MPH
Associate Professor
OHSU Department of Family Medicine
3181 SW Sam Jackson Park Road
Portland, OR 97239

See also http://www.cdc.gov/foodborneoutbreaks/guide_fd.htm.

APPENDIX 2

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ALEXIS SARTI, Plaintiff and Appellant, v. SALT CREEK LTD., Defendant and Respondent.	G037818 (Super. Ct. No. 05CC08588) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Derek W. Hunt, Judge. Reversed with directions.

Bremer Whyte Brown & O'Meara, Keith Bremer, Tyler D. Offenhauser; Snell & Wilmer, Richard A. Derevan and Todd E. Lundell for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Roy G. Weatherup, Caroline E. Chan; Osman & Associates and Richard L. Scott for Defendant and Respondent.

* * *

The trial judge in this case read *Minder v. Cielito Lindo Restaurant* (1977) 67 Cal.App.3d 1003 (*Minder*) for the proposition that reasonable inferences are never, or hardly ever, available in food poisoning cases. Based entirely on the *Minder* opinion, he granted a judgment notwithstanding the verdict (often called a "jnov") even though the judge himself made it clear he would have voted *with* the jury on the question of liability.[1]

We can understand why the judge was so cautious, but we do not think that *Minder*, strictly construed, should be read to preclude the use of reasonable inferences to

---

[1] We apologize for a long opinion with many topics and subheadings. For the convenience of readers who might like an overview of this opinion, here is an organizational outline:

I. BACKGROUND
II. ANALYSIS
  A. The *Minder* Case
    1. Overview
    2. The *Minder* Facts
    3. *Minder*, Strictly Construed
    4. The *Minder* Analysis
    5. A Critique of the *Minder* Analysis
      a. general departure from established rules of tort causation
      b. *Minder's* departure from established case law allowing use of reasonable inferences
        i. *Dougherty v. Lee*
        ii. *Grinnell v. Pfizer*
      c. *Minder's* preference for a rule requiring exclusion of all possible alternative causes also departed from case law
      d. *Minder's* variance from current California tort law regarding the standard of causation
      e. *Minder's* miscitation of the *Beaupre* decision
  B. The Case Before Us
    1. The Inference Here Was Reasonable
    2. Salt Creek's Rule-Out-All-Alternatives-Argument: In its Direct Form
    3. Salt Creek's Rule-Out-All-Alternatives-Argument: Its "Gotcha" Form (Based on Acquiescence to a Bad Jury Instruction)
  C. The Cross-Appeal
    1. The Consistency Issue
    2. The Jury Misconduct Issue
IV. DISPOSITION

show causation in food poisoning cases. To the degree that *Minder* may, arguendo, be susceptible for the proposition that inferences are unavailable in food poisoning cases, or that food poisoning defendants are somehow accorded a special, protected status with an abnormally "heightened" standard of causation, we respectfully decline to follow it. Despite intimations in the *Minder* opinion to the contrary, food poisoning cases are governed by the same basic rules of causation that govern other tort cases. Reasonable inferences drawn from substantial evidence are indeed available to show causation. We will therefore reverse the jnov and order reinstatement of the original verdict.

I. BACKGROUND

On April 7, 2005, Alexis Sarti and a friend ate at the Salt Creek Grille. They split an appetizer consisting of raw ahi tuna, avocado, cucumbers and soy sauce. Sarti became nauseous and chilled the next day. The day after that she suffered constant diarrhea, fever and chills. The diarrhea continued for the next ten days. By April 19, Sarti was unable to move her legs and having a hard time focusing her eyes. Her mother called the paramedics, who took her to the emergency room. Her admitting physician took a "food history." She was put into intensive care, where a neurologist diagnosed a variant of guillain-barre syndrome (a disease that damages peripheral nerves). She was tested, and found to have campylobacter bacteria, which was the only pathogen found in the sample. Expert testimony would later indicate that Sarti's guillain-barre was an idiosyncratic immuno-suppressant reaction to the constant diarrhea brought on from campylobacter.

Campylobacter is *not* found in raw tuna, unless that tuna has been cross-contaminated by raw chicken, where the bacteria is common. Sarti's sickness was reported to the Orange County Health Department. The report resulted in a "food borne illness" report dated May 5, 2005 -- a little less than a month after the meal. The report identified four practices at the Salt Creek Grille that could lead to cross-contamination. Specifically: Wipe-down rags were not being sanitized between wiping down surfaces. There was also an insufficient amount of sanitizer in the dishwasher. Chicken tongs were sometimes used for other food (the tongs would take raw chicken off the grill and then

cooked food would be touched with the same tongs). Raw vegetables were stored under "raw meat" (the expert testifying did not say what kind of raw meat), so that a drop of raw meat juice might get on the vegetables. There was also testimony that the waiter who served Sarti had used a wet, unsanitized rag stored underneath the bar to wipe down Sarti's table.

Sarti, who was about 21 years old at the time she came down ill, never completely recovered. She had to use a walker for eight months, and to this day retains only about 40 percent of what would have been her normal endurance. She sued the partnership that owns the Salt Creek Grille for breach of warranty.

There was plenty of substantial evidence on which the jury could have found the restaurant *not* liable: Sarti's friend who split the appetizer did not get sick. The Salt Creek Grille takes great pains to separate its raw tuna from its raw chicken, including defrosting it in a different place in the walk-in freezer than where the chicken is stored, having the chef use a newly cleaned cutting board for the tuna, and preparing the tuna at the opposite end of the cook's line from where the chicken is cooked. Chicken is prepared in its own separate room. Different colored cutting boards are used for tuna and chicken, and the same chef does not prepare both items. And Sarti herself worked as a supermarket checker the day she became ill, and could, at least in theory, have picked up campylobacter from a leaking bag of raw chicken she might have scanned.

But the jury didn't find the restaurant not liable. The jury returned a verdict of $725,000 in economic damages and $2.5 million in non-economic damages (obviously pain and suffering). The trial judge perceived that the jury's verdict was based on the *inference* that the practice of using the same wipe down rag (or storing raw meat over raw vegetables, or touching cooked food with chicken tongs that had previously touched raw chicken) had led to cross-contamination from raw chicken to raw tuna.

The trial judge himself was plain that he believed that Sarti had indeed presented "the jury with sufficient evidence to avoid a jnov." Indeed, he said, referring to his role as "13th juror," that "I must say *I would have voted with the jury on the question of liability* in this case." (Italics added.) He elaborated: "I think this case was tried well

within the profile of what I routinely see in negligence cases and, for that matter, breach of warranty cases. . . . I think Ms. Sarti won this case fair and square except . . . ."

Except for the one thing that brings us to the instant appeal. The trial judge read *Minder v. Cielito Lindo Restaurant, supra,* 67 Cal.App.3d 1003 for the black-letter rule of law that inferences are off limits to prove a food poisoning case. (The remainder of his "fair and square except" comment was: " . . . for what I perceive to be as the heightened causation requirements of the *Minder* case.")

The trial judge had earlier noted that *Minder* "found that causation had not been shown as a matter of law." Continuing, he said, "and that means to me that the concept of inferences, which are otherwise permitted in civil cases, apparently play little or no role in food poisoning cases. And remember, an inference is not evidence itself, an inference is the result of reasoning based upon collateral evidence." He made it clear that it was only under the compulsion of the *Minder* case that he granted the restaurant's motion for judgment notwithstanding the verdict.

II. ANALYSIS

A. The *Minder* Case

1. *Overview*

It is understandable why the trial judge here ruled as he did. All trial courts are bound by all published decisions of the Court of Appeal (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), the only qualifications being that the relevant point in the appellate decision must not have been disapproved by the California Supreme Court and must not be in conflict with another appellate decision. As the Supreme Court said in *Auto Equity Sales* (a case that ought to be covered in the very first weeks of every legal research and writing class in any California law school): "Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of stare decisis makes no sense. The decisions of this court are binding upon and must be followed by all the state courts of California. *Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this*

state, and this is so whether or not the superior court is acting as a trial or appellate court. Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction." (*Ibid.*, italics added and original italics deleted.)[2]

Unlike at least some federal intermediate appellate courts,[3] though, there is no horizontal stare decisis in the California Court of Appeal.[4] *This* court -- this panel -- is not bound by *Minder* and we may take a more critical approach to that opinion. Strictly construed, *Minder* simply held in the case before it that there wasn't enough evidence upon which a reasonable inference could be drawn that the *particular kind* of unsanitary practices found at the restaurant could be linked to the *particular kind* of food poisoning sustained by the plaintiffs. To the degree that, for sake of argument, *Minder* stands for more than just that (e.g., as standing for a rule that unsanitary conditions are per se insufficient to establish a reasonable inference of food poisoning), we respectfully decline to follow it.

2. *The Minder Facts*

A couple ate a Sunday afternoon lunch at a Mexican restaurant, apparently in company with another couple. The husband felt a stomach upset thereafter. Three days later he began sweating, developed a fever. Meanwhile his wife felt a little nauseated on that Sunday afternoon, and her symptoms lasted for two days, when she became feverish and chilled. After a culture it was determined that both of them had Shigella Flexneri Group B.

---

[2] The passage means that a trial judge sitting in San Francisco is equally bound by decisions from divisions of the Court of Appeal sitting in Fresno, San Diego and even Orange County just as much as he or she is bound by decisions by a panel sitting in San Francisco. California doesn't work the way the federal courts do, with so-called "rules of the circuit" where a trial judge is bound to a given intermediate appellate subdivision.

[3] For example, the sprawling Ninth Circuit adheres to a rule of "intracircuit stare decisis" because consistency would otherwise be impossible. (See Ulrich & Sidley & Austin LLP, 1 Fed. Appellate Prac. Guide 9th Cir. 2d § 8:19 (accessible on Westlaw, database updated April 2008) ["The Ninth Circuit's 28 authorized, active judges can be combined into 3,276 different three-judge panels . . . The principal way the Ninth Circuit avoids having these shifting three-judge panels issue conflicting decisions is to follow a rule of intracircuit stare decisis: panel decisions bind subsequent panels except in certain narrow situations discussed below or unless overruled by the court en banc."].)

[4] E.g., *Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480, 1489, fn. 10 ["Contrary to Jessen's contention, we are not bound by the contrary decision by Division One of this court. . . . One district or division may refuse to follow a prior decision of a different district or division, for the same reasons that influence the federal Courts of Appeals of the various circuits to make independent decisions" (internal quotation marks deleted)].)

In subsequent litigation against the Mexican restaurant, there was evidence that about two months before, a health inspector had "observed dirt, grease and food particles in the corners of the floor and behind the stove." (*Minder, supra*, 67 Cal.App.3d at p. 1007.) Other unsanitary conditions included (a) an ice machine without a side panel (hence susceptible to dust and flies), and food stored directly on the floor. And, when the health inspector revisited the restaurant a little more than a month prior to the plaintiffs' lunch, conditions had not changed. Another inspection a month afterwards yielded the same result, so the inspector requested stool samples of all food handlers and employees. The result was "'no enteric'" -- which means not within the intestine. And because of those results, the inspector was "unable to form any conclusions or opinion with respect to whether or not a food poisoning case had occurred." (*Ibid.*) There was also evidence of "certain" health and safety violations from an inspector who visited the restaurant about two years prior to the plaintiffs' meal, and he noted "certain violations" of the Health and Safety Code, though the *Minder* court did not enumerate what they were. (*Ibid*.)

However, the couple's treating physician gave opinion testimony that their illness "occurred as a result of [the] contaminated food" they had eaten that Sunday. (*Minder, supra*, 67 Cal.App.3d at p. 1006.)

Despite the treating physician's testimony and the *general* evidence of unsanitary conditions, the *Minder* court reversed awards of about $6,000 each in favor of the couple, concluding that they had not "met their burden of showing that the probable cause of their illness was contaminated food" at the Mexican restaurant. (*Minder, supra*, 67 Cal.App.3d at p. 1008.)

3. *Minder, Strictly Construed*

Let us now analyze the nature of the plaintiff's case in *Minder*. There was evidence of unsanitary conditions, including the opening of the ice machine to flies and dust, dirt and grease, and food stored directly on the floor. Those conditions raised the question: Would it have been reasonable for the trier of fact to *infer* a link between the

unsanitary conditions and the illness that the treating doctor opined came from food poisoning contracted the day the couple ate at the restaurant?

Reading *Minder* strictly, there simply wasn't enough of a specific link between the *particular* kind of food poisoning (Shigella Flexneri Group B) and any *particular* unsanitary condition at the restaurant. The opinion, for example, sets forth no facts indicating *how* "observed dirt, grease and food particles in the corners of the floor and behind the stove," or how the possibility of contamination of ice to dust and flies, or how food stored directly on the floor, causes Shigella Flexneri. The opinion recounts no expert testimony making the link.

To be sure, the testimony from the plaintiffs' treating physician comes close, but there is nothing in his testimony, at least as recounted by the *Minder* court, that actually connected the Shigella Flexneri to the unsanitary conditions found at the restaurant. The one person who might have given an opinion making the link -- the health inspector who requested the stool samples from the restaurant's employees -- conspicuously was "unable to form any conclusions." (See *Minder, supra*, 67 Cal.App.3d at p. 1007.)

To sum up: In *Minder*, even with the testimony of the treating physician, there was no evidence to reasonably infer a link between the particular kind of food poisoning involved and the specific unsanitary conditions at the restaurant.

4. *The Minder Analysis*

It is one thing for an appellate court to arrive at a sound result. It is quite another to arrive at a sound result in conformity with settled law. While *Minder's* result, strictly construed, may be sound, much of the analysis by which it got there was seriously flawed.

The *Minder* court began its legal discussion with the proposition, taken from a Missouri Supreme Court case (*Stewart v. Martin* (1944) 353 Mo. 1) that merely showing that someone "'became sick'" after eating at a restaurant does not establish that "'unwholesome'" food served at the restaurant caused the illness, or even establish a "'prima facie case'" that food served at the restaurant caused it. That idea was

immediately reiterated with a quotation from an Arkansas Supreme Court case (*Franke's Inc. v. Bennett* (1941) 201 Ark. 649), the point of which was that "'the proof must go further'" than mere after-the-restaurant-meal illness. (*Minder, supra*, 67 Cal.App.3d at p. 1008.)

So far so good. The *Minder* court was merely making the point that the logical fallacy of "post hoc, ergo propter hoc" (after the fact, therefore because of the fact) is not available to win a food poisoning case. And of course no one can reasonably quarrel with that particular supposition. Just because you get sick soon after eating at a restaurant doesn't prove bad food or some other contamination at the restaurant caused it. Any other rule would be untenable, since it would make restaurants de facto health insurers of their customers.

The *Minder* court then repeated the same thought again, this time by quoting a passage from a Missouri appellate court about illness following a swig of cola being insufficient. (*Williams v. Coca-Cola Bottling Company* (Mo.App. 1955) 285 S.W.2d 53, 57.) Then it noted that in the case sub juris there was "no evidence that the food, drinks, dishes, silverware, etc., appeared to be contaminated in any way." (*Minder, supra*, 67 Cal.App.3d at p. 1009.) Again, so far so good.

At that point the *Minder* court listed a series of common scenarios about what might, or might not, show causation in food poisoning cases. It was at this point that the court's analysis began to stray from established California rules of causation. The main source for these scenarios appears to have been a loose leaf treatise, 2 Frumer and Friedman, Products Liability, as it stood in 1977.

The first scenario was other people getting sick from "the same food" at about the same time. The *Minder* court quickly (and gratuitously) opined that the fact that other people get sick at the same time from the same restaurant was "not controlling." The supporting quote from the Frumer and Friedman treatise, however, didn't exactly spin the point that way. The quote said that other people getting sick at the same time "'*may* justify a finding of unwholesomeness,'" but also that other people *not* getting sick "'*may* justify a converse result.'" (*Minder, supra*, 67 Cal.App.3d at p. 1009,

quoting 2 Frumer & Friedman, Products Liability [loose leaf treatise as of 1977[5]] p. 667; our italics added.) The *Minder* court then added, without authority, that it was "not inclined to be overly impressed" with other-people-getting-sick-at-the-same-time evidence, but noted in any event that the husband in the other couple who ate with the plaintiffs at the Mexican restaurant was unaffected, and while his pregnant wife had diarrhea a few days later, "her doctor could not diagnose the cause." (*Minder, supra*, 67 Cal.App.3d at p. 1009.)

The second scenario was a "process of elimination," which apparently the *Minder* court was more inclined to be "impressed" with, e.g., if other persons ate everything that the plaintiff ate except for one thing (the court's example was a tamale), that would point to that one thing as "the cause of illness." (*Minder, supra*, 67 Cal.App.3d at p. 1009.) There was no such evidence, though, in *Minder*.

The third scenario was a "scientific analysis of the food" itself, but the court noted that none of the food in the case was analyzed and stool samples of the restaurant employees proved negative. (*Minder, supra*, 67 Cal.App.3d at p. 1009.)

And, then, finally, the *Minder* court listed a catch-all "Other causes" category. The *Minder* court, however, did not actually define the category in terms of those items of evidence that might prove causation, as much as it was articulating a reason to reject causation. Thus immediately after introducing the category, "Other causes," the court began with a sentence to the effect that if the illness was "explainable on grounds other than unwholesomeness," then "it may be necessary to exclude such causes." (*Minder, supra*, 67 Cal.App.3d at p. 1009.)

Reading just that sentence, it is not clear what the court meant, though one can perhaps detect the intimation of a rule that plaintiffs in food poisoning cases must rule out all other possible causes to prevail. (As we will soon see, at least one California food poisoning case had already rejected the rule-out-all-other-possibilities rule.) The

---

[5] Because the Frumer & Friedman Products Liability treatise is kept and updated in a loose leaf format, our court librarian informs us that it is practically impossible to reconstitute the treatise exactly as it was read by the *Minder* court in 1977.

example the *Minder* court gave immediately after its statement came from a Georgia appellate case (*Payton v. Lee* (1953) 88 Ga.App. 422). In that Georgia case, according to *Minder*, the fact that the plaintiff fell ill after eating potato salad and her illness was diagnosed by her physician as food poisoning was insufficient because the plaintiff had not excluded the possibility of her food poisoning being caused by a viral infection going around in the community at the time. (*Minder, supra*, 67 Cal.App.3d at p. 1010.)

The *Minder* court next noted that testimony in the case before it that *if* the plaintiffs, or even one of them, had eaten at "a restaurant" the day before they ate at the defendant's restaurant, it was "just as logical that the contamination could have resulted therefrom" (presumably meaning, at the other restaurant) or had "come from a source other than food." (*Minder, supra*, 67 Cal.App.3d at p. 1010.) And then the court pointed out that neither plaintiff could recall whether they had eaten at home or at a restaurant, or both, on" the day before they ate at the defendant's restaurant. (*Ibid*.)

At that point in the opinion the *Minder* court shifted its organizational structure from a list of scenarios to a reliance on precedent, namely the case cited earlier from the Missouri Supreme Court, *Stewart v. Martin*. The *Minder* court said the facts before it were "very similar" to those in *Stewart*. (*Minder, supra*, 67 Cal.App.3d at p. 1010.)

In *Stewart*, the plaintiff became ill after eating a ham sandwich at a restaurant, and his treating physician said it was food poisoning. However, the plaintiff had eaten or drank on four different occasions within the previous 18 hours of becoming sick, and there was "'no medical testimony whatever'" to "'prove'" that eating the ham sandwich caused the illness. (*Minder, supra*, 67 Cal.App.3d at p. 1010.) Again, one can detect in the *Minder* court's discussion of *Stewart* (as in its discussion of *Payton*) the whisper of a preference for a bright-line rule requiring food poisoning plaintiffs to rule out all other possible causes of food poisoning in order to prevail, though the *Minder* court never quite dared speak its name.

At this point the *Minder* opinion had two more substantive paragraphs to go and it had yet to confront the plaintiffs' strongest evidence (other than, arguably, the

treating physician's opinion). That was the evidence of the health violations noted by previous health inspectors.

The *Minder* court began by noting that two health inspectors had testified as to "certain unsanitary conditions" found at the restaurant (conspicuously not recounted in the opinion at that point), and then flatly declared: "These conditions, absent further evidence, could not establish probable cause." (*Minder*, *supra*, 67 Cal.App.3d at p. 1010.)

Let's stop here for a second. Where did that phrase "probable cause" come from? The phrase first appeared in the court's statement of the "sole issue on appeal" (*Minder*, *supra*, 67 Cal.App.3d at p. 1008), and then twice in the way the court framed the scenarios it had just discussed (see *id*. at p. 1009 ["can support an inference of probable cause"]). But the *Minder* court never actually provided any authority for the proposition that a plaintiff in a food poisoning case must "establish probable cause," it just seemed to assume that everybody already knew that "probable cause" was the standard -- except to the extent that, after its flat declaration, it impliedly supported its statement with what came next, which was a précis of the only California authority the *Minder* court relied on, the case of *Beaupre v. Nave* (1970) 13 Cal.App.3d 402.

Before we discuss how the *Minder* court handled *Beaupre*, let's look at the *Beaupre* decision itself first. In *Beaupre*, unrelated plaintiffs sued the owners of a restaurant for having contracted hepatitis. The 1970 *Beaupre* opinion treats hepatitis as one disease, and gives no hint that the disease may be classified into the various types, A, B, C, et cetera, that we now, in 2008, take for granted. In fact, the court would recount that the "cause of the illness from which each plaintiff suffered is not so well known that we may rely upon any causative evidence other than that produced through the testimony of medical experts" (*Beaupre*, *supra*, 13 Cal.App.3d at p. 404), a comment which, of course, is out-of-date. Everybody with internet access can now know that *some forms* of hepatitis are *viral* and thus can be transmitted via food.

In any event, one must read *Beaupre* carefully in order to ascertain the decision's "procedural posture," that is, how the case got to the Court of Appeal from the

trial court. The procedural posture of the case is mentioned rather casually, literally as an afterthought in a sentence primarily devoted to what was then the current state of knowledge about hepatitis.[6] But in that sentence one learns that the case was tried to the court, "sitting without a jury," and the court, *as trier of fact*, had made "findings of fact" adverse to the plaintiffs. So, the conflicts and inferences in the evidence *had* to be drawn in favor of the defendant restaurant, which is what the *Beaupre* court said in the next sentence. And the appropriate resolution of the conflicts and inferences meant, as the *Beaupre* court said next, that in order for the *plaintiffs* to prevail on appeal, the evidence had to be clear, certain, "without dispute," and point "unerringly to the determination of a particular issue." (*Beaupre, supra*, 13 Cal.App.3d at p. 404.)

In short, the plaintiffs in *Beaupre* were contending on appeal that they *had* to win on the causation issue, *as a matter of law*. And, of course, they lost, because there was substantial evidence to support a defense verdict: The *Beaupre* court needed merely to recount a few points to demolish the plaintiffs' hopes of winning on appeal. (Those points were: one medical expert gave only 10 percent odds that the plaintiffs had contracted hepatitis at the defendant restaurant, another expert testified that foodborne hepatitis was extremely rare worldwide (only 10 to 20 foodborne outbreaks *ever*), and there was expert testimony to the effect that, given the respective dates of the outbreaks, the foodhandler could not have transmitted the disease. (*Beaupre, supra*, 13 Cal.App.3d at pp. 404-405.))

Later in the opinion the *Beaupre* court did allude to "various sanitation violations" (*Beaupre, supra*, 13 Cal.App.3d at p. 405), but that was in the context of quoting some of the trial court's *other* findings which were being challenged on appeal.

---

[6] Here's the sentence: "The cause of the illness from which each plaintiff suffered is not so well known that we may rely upon any causative evidence other than that produced through the testimony of the medical experts, and since this appeal seeks to reverse the finding of fact on the issue of causation drawn by the trial judge sitting without a jury, we look only to that evidence which would support his conclusion." (*Beaupre, supra*, 13 Cal.App.3d at p. 404.)

(The *Beaupre* opinion has a way of backing into some important facts.[7]) Specifically, findings 8 and 9 of the trial court did, indeed, acknowledge that "'From time to time, the food, beverages, utensils, bathroom and floors of the restaurant were unclean'" and also "'not reasonably fit for the purpose for which they were intended.'" (*Id*. at p. 406.)

The point of that whole discussion, though, was that the trial court had clearly found, as a matter of fact, that any sanitation violations were neither the "proximate cause" nor the "cause in fact" of the plaintiffs' hepatitis. (*Beaupre, supra*, 13 Cal.App.3d at p. 407.) Thus the "sum" of all the findings -- that is, even with a recognition of some sanitation violations -- fell "short of the necessary finding that anything that the defendants did or failed to do *caused* any injury to the plaintiffs." (*Ibid*., italics in original.) And so the trial court's judgment for the defendant restaurant was affirmed. The plaintiffs did not win, that is, did not win in the appellate court as a matter of law when they had lost according to the trier of fact.

We now turn to how the *Minder* court treated *Beaupre*, which is to be found in *Minder's* third-to-the-last paragraph. As we just noted, the *Beaupre* decision was used by *Minder* as implied support for the flat proposition that certain unsanitary conditions, "absent further evidence" -- and apparently, by "further evidence," the *Minder* court meant that the opinion of the treating physician didn't count for anything -- could not "establish probable cause." (See *Minder, supra*, 67 Cal.App.3d at p. 1010.) It is a four sentence passage (all of which is now quoted in this footnote[8]), leading to a punch line conclusion in the subsequent paragraph that the plaintiffs' evidence was insufficient. Here is the substance of each of those four sentences:

---

[7] Shakespeare had Brutus do the same thing in his speech to the crowd in Julius Caesar. As Judge Posner points out, Brutus "buried" the best reason he had to assassinate Julius Caesar -- "'but, as he was ambitious, I slew him'" -- in a subordinate clause. (Posner, Law and Literature: A Misunderstood Relation (Harvard University Press 1988) p. 278.)

[8] Here is the passage: "In *Beaupre v. Nave*, 13 Cal.App.3d 402, plaintiffs alleged they had contracted infectious hepatitis because they were frequent patrons in defendants' restaurant. The trial court had found that '"'From time to time defendants did violate health and sanitary rules . . . the food, beverages, utensils, bathroom and floors of the restaurant were unclean . . . and were not reasonably fit for the purpose . . . intended.'"' (*Id*., at p. 407.) The trial court nevertheless decided plaintiffs had failed to prove causation. This court, after citing the above findings agreed and said at page 407: "'But the sum of all these findings falls short of the necessary finding that anything that the defendants did or failed to do *caused* any injury to the plaintiffs."'" (Italics in original.)

Sentence one: a restatement of the plaintiffs' allegation they contracted hepatitis from eating at the defendant restaurant. Sentence two: a quotation from findings of the *Beaupre* trial court acknowledging unclean food, beverages, et cetera from time to time. (And with *no* mention of the trial court's other findings specifically rejecting causation as a matter of fact.) Sentence three: a statement that the trial court in *Beaupre* found the plaintiffs had "failed to prove causation." (And -- to be a bit repetitive ourselves -- with no mention of the trial court's role as a finder of fact.) Sentence four: a statement that the Second District (i.e., the *Beaupre* panel) "agreed" with the failure to prove causation, and then quoting the sum-of- all-these-findings-fell-short passage from *Beaupre* (which we have also mostly quoted above). (*Beaupre, supra*, 13 Cal.App.3d at p. 407.)

Then came the final substantive paragraph of the opinion, which simply restated the *Minder* court's conclusion that the plaintiffs, as respondents, had "as a matter of law, failed to meet their burden of showing that the probable cause of their illness was contaminated food eaten at [the] restaurant." (*Minder, supra*, 67 Cal.App.3d at p. 1011.)

5. *A Critique of the Minder Analysis*

The trial court read the *Minder* analysis as requiring a "heightened" level of proof of causation in food poisoning cases. To the degree that there is, indeed, support for such a view in the text of the case itself, we respectfully decline to follow it, for no less than five separate reasons:

a. *Minder's* general departure from established rules of tort causation

The *Minder* court never expressly said that it thought that defendants in food poisoning cases deserved a break from ordinary rules of tort causation, but that thought permeated the court's analysis, and it was certainly picked up by the trial judge in our own case, who described *Minder* as enunciating a "heightened" standard of causation.

We cannot agree, however, with the strong implication in the *Minder* analysis that food poisoning cases are somehow unique in tort law. Ironically, the current version of Frumer & Friedman's treatise on products liability -- the 1977 version of

which seemed to have played a role in *Minder's* analysis -- is plainly to the contrary. Food poisoning cases follow the same rules as other tort cases: "The basic elements of proof in a food poisoning case are essentially those of any personal injury action." (4 Frumer & Friedman, Products Liability, § 48.06, p. 48-23 (rel. 109-8/2008).)

The current Frumer and Friedman treatise, apparently like its 1977 version, also continues to list the sort of facts that can prove a food poisoning case, but the spin is significantly different than the one apparently described in the *Minder* opinion. The current treatise states that "The *ideal* factual situation in a food poisoning case" would have all of these four elements: simultaneous illness of a group of people who eat the same food at the same time, all "patients" manifesting classic food poisoning symptoms, prompt investigation of suspect food (like potato salad left out too long), and "microscopic examination" of that food, which might show, for example, a staph infection, and which would correlate with the same infection sustained by the plaintiff. (4 Frumer & Friedman, *supra*, § 48.06[2], p. 48-24, italics added.)

But the Frumer & Friedman treatise recognizes that this "ideal . . . situation" will not always present itself to a court, and thus notes that often the plaintiff will have "recovered to the point where recovery of the pathogenic bacteria is no longer possible" and, also the food may not be "available for bacteriological study," besides which, often doctors may decide that the illness is not serious enough to "warrant[] the expense of such an investigation." (4 Frumer & Friedman, *supra*, § 48.06[2], p. 48-24.) And thus the treatise recognizes that: "Food poisoning cases, just as any other personal injury cases, often depend upon expert testimony." (*Id*. at § 48.06[3], p. 48-25.)

b. *Minder's* departure from
established case law allowing
use of reasonable inferences

While the *Minder* court never straight out declared that inferences are off limits in food poisoning cases,[9] its treatment of the various scenarios and its discussion of sanitation violations suggest that the court did not think that reasonable inferences are available to prove a plaintiff's case in a food poisoning case. (Either that, or, its implication is that no inference is ever quite good enough to be reasonable.) To the degree that the *Minder* opinion does indeed suggest a no-inference rule (or, at least, a presumption against inferences different from other tort cases), it contradicted established precedent in existence at the time.

i. *Dougherty v. Lee*

Minder did not consider *Dougherty v. Lee* (1946) 74 Cal.App.2d 132 (*Dougherty*). *Dougherty* was also a food poisoning case, except it didn't involve human beings. It involved hay fed to cows.

In *Dougherty*, a rancher bought a ton of baled Sudan hay from a hay seller. The next morning he opened two or three bales and fed it to his cows. He fed some of the same hay that evening. The next morning five cows were dead and three were sick; two of those died, the other recovered. A postmortem by a veterinarian determined that the dead cows had botulism. However, an analysis of the hay was "not so conclusive," though a sample of the hay produced "some organism that looked like botulina bacilla." (*Dougherty, supra*, 74 Cal.App.2d at p. 133-134, internal quotation marks omitted.)

The appellate court upheld an award for breach of warranty against the hay seller. In setting out its initial conclusions, the court used language -- "There can be little doubt" and "It seems quite persuasive" -- that showed reasonable inferences were

[9] Twice, in the context of listing scenarios of what might or might not show causation of food poisoning, the court used the same phrase, "support an inference of probable cause." (*Minder, supra*, 67 Cal.App.3d at p. 1009.)

obviously available to prove food poisoning. (*Dougherty, supra*, 74 Cal.App.2d at p. 134.)

Then later, *Dougherty* made the availability of reasonable inferences quite explicit, doing so in the context of a plaintiff's burden of proof. Basically, the court said that the same rules of inference and substantial evidence applied in the food poisoning case before it as would normally apply in other civil cases. The *Dougherty* court quoted a passage about the burden of proof from a Supreme Court case, *Barham v. Widing* (1930) 210 Cal. 206 (a case involving an alleged improper solution or unsterile hypodermic needle used in treating an infected jaw), the punch line of which was a reiteration of the basic substantial evidence rule. Quoting from page 215 of the *Barham v. Widing* case, the *Dougherty* court said: "'It is not necessary *in the trial of civil cases* that the circumstances shall establish the negligence of the defendant as the proximate cause of injury with such absolute certainty *as to exclude every other conclusion*. *It is sufficient if there is substantial evidence upon which to reasonably support the judgment*. (*Ley v. Bishopp* 88 Cal.App. 313, 316.)'" (*Dougherty, supra*, 74 Cal.App.2d at p. 136, italics added.)

Next, *Dougherty* stated that the foregoing rule, from normal "civil cases" should apply to food poisoning cases: "Suits for damages resulting from partaking of poisoned food, whether they are based on negligence or upon a breach of implied warranty, are closely allied, and we assume the foregoing rule would apply to both classes of cases." (*Dougherty, supra*, 74 Cal.App.2d at pp. 136-137.)

Then the *Dougherty* court put its explicit imprimatur on the use of inferences in food poisoning cases: "Where *the evidence is susceptible of a reasonable inference that death or illness resulted from the eating of contaminated food, a prima facie case of negligence or of a breach of implied warranty of the fitness of the food, has been established, and it is erroneous for the court to direct a verdict for the defendant.* Under such circumstances a judgment for the plaintiff on that issue should not be disturbed on appeal." (*Dougherty, supra*, 74 Cal.App.2d at p. 137, italics added.)

ii. *Grinnell v. Pfizer*

A vaccination case, also decided prior to *Minder*, and also clearly approving of the use of reasonable inferences to prove causation, is *Grinnell v. Charles Pfizer & Co.* (1969) 274 Cal.App.2d 424 (*Grinnell*). There, the two plaintiffs came down with polio after ingesting the Type I Sabin oral polio vaccine. In affirming large judgments for both plaintiffs on both a strict liability and breach of warranty theories, the *Grinnell* court stated that certain facts "entitled" the jury "to reasonably infer that the material issued by defendant was not accurate when it excluded all possible contraindications."[10] (*Grinnell, supra*, 274 Cal.App.2d at p. 441.) Moreover, said the court, since the jury was "entitled . . . to infer that the vaccine was defective and caused plaintiffs to contract polio, the jury was also entitled to conclude that the vaccine was not of the quality represented by defendant," ergo defendant breached its express warranty. (*Id*. at pp. 441-442.)

c. *Minder's* preference for a rule requiring exclusion of all possible alternative causes also departed from case law

Another rule that the *Minder* opinion never actually articulated, but which may arguably be mined from its analysis is a requirement that the plaintiff rule out all other causes of the illness. The argument for an "all alternatives must be ruled out" approach is also pressed by Salt Creek directly in the case before us. Salt Creek asserts that California law "requires proof excluding other causes."

We have already quoted the plain language from the *Dougherty* decision that shows that exclusion of alternatives is *not* the rule. (But we'll quote it again: "'It is not necessary in the trial of civil cases that the circumstances shall establish the

---

[10] Those facts were: (1) The Surgeon General had issued some information "indicating a risk of vaccine-induced polio to adults" and studies beginning in 1961 showed "a risk to those over 30 years of age"; (2) reports "that attenuated strains of polio virus were genetically unstable"; and (3) there had been several cases "classified as compatible with vaccine-induced polio" after "ingestion of oral polio vaccine." (*Grinnell, supra*, 274 Cal.App.2d at p. 441.)

negligence of the defendant as the proximate cause of injury with such absolute certainty as to exclude every other conclusion.'" (*Dougherty, supra*, 74 Cal.App.2d at p. 136, quoting *Ley v. Bishopp, supra*, 88 Cal.App. at p. 316.)) We need only add that the rule-out-all-other-possible-causes rule is contrary to what our Supreme Court would later say in *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041 (*Mitchell*), as we are about to show.

d. *Minder's* variance from current
California tort law regarding the
standard of causation

We now come to that problematic phrase, "probable cause," that the *Minder* court treated, without authority, as the talisman for what the plaintiffs had to prove in that case. If a law student had only the *Minder* case, he or she would likely assume that the causation element in California tort and warranty law was "probable cause."

"Probable cause" is an important phrase in criminal law, and, of course, the lack of it in a previous lawsuit is an *element* of a civil tort cause of action for malicious prosecution. Ironically enough, in both the criminal and malicious prosecution contexts courts have tended to define the phrase fairly leniently. Thus in the criminal context, probable cause has been defined as "an '"honest and strong suspicion'"" (e.g., *People v. Perrusquia* (2007) 150 Cal.App.4th 228, 236 (dis. opn. of Bedsworth, J.)) or "a reasonable ground for belief of guilt" (e.g., *Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1044 (internal quotation marks omitted).) In the civil malicious prosecution context it has been defined with similar lenienty, as whether "any reasonable attorney would have thought the claim tenable." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 886 (*Sheldon Appel*).)

Which is all very curious, because one cannot read the *Minder* opinion as a whole without getting the distinct impression that what it meant by "probable cause" was a far cry from honest suspicion, reasonable ground, or reasonable tenability. Clearly, *Minder* had something more "heightened" in mind, something that, for example, would

be impervious to such evidence as a treating physician's opinion or conclusions that might readily be drawn from the fact of the sanitation violations.[11]

Minder's "probable cause" language was at the very least dubious even at the time. (See *Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, 127 [impliedly endorsing a plaintiff's "substantial factor" causation analysis in the context of strict products liability case].) But it is most certainly inconsistent with the law of causation as it stands today, in the light of the *Mitchell* case.

Mitchell was the case that disapproved an old jury instruction (BAJI No. 3.75) because it used the phrase "proximate cause," finding the phrase confusing, and endorsed a rival jury instruction (BAJI No. 3.76), which asked "whether the defendant's conduct was a *substantial factor* in bringing about the injury." (See *Mitchell*, *supra*, 54 Cal.3d at p. 1049, italics added, internal quotation marks omitted.) And, indeed, in the case before us, the jury was given (and correctly so in light of the *Mitchell* case) a substantial factor instruction, with "substantial factor" being defined as "factor that a reasonable person would consider to have contributed to the harm." In fact, that instruction told the jury, "It [the substantial factor] does not have to be the *only* cause of the harm." (Italics added.) Whatever else, "substantial factor" does not equal "exclusive factor."

e. *Minder's* miscitation of
the *Beaupre* decision

Particularly relevant in the case before us is the question of what inferences are reasonable from sanitation violations in a restaurant food poisoning case. As we have noted, there was no evidence recounted in the *Minder* decision linking Shigella Flexneri to the *kind* of sanitation violations found at the Cielito Lindo restaurant. Thus the court's declaration that "These [meaning the sanitation violations recounted pages prior]

---

[11] Here's a law school hypothetical: Suppose the *Minder* court had used the phrase "probable cause" the way *Sheldon Appel* would later define it? Would the result in *Minder* be any different? Our answer: It should have been. Under the *Sheldon Appel* standard surely a treating physician's opinion would make a reasonable attorney believe in at least the reasonable tenability of a food poisoning claim.

conditions, absent further evidence, could not establish probable cause" might have been accurate at the time. (*Minder*, *supra*, 67 Cal.App.3d at p. 1010.) As noted above, though, *Minder* did not operate in a "substantial factor" world. It is thus interesting to wonder whether the *Minder* court could have written that sentence post-*Mitchell*.

But in any event the *Minder* court's treatment of the earlier *Beaupre* decision was certainly incorrect at the time. Plainly said: You cannot cite a case that simply affirms a defense judgment because there was substantial evidence for the *trier of fact* to find that restaurant food did not cause food poisoning, *despite* health violations, for the legal proposition that health violations cannot support a restaurant food poisoning verdict as a matter of law. That is the sort of misreading of a case that usually gets a first semester law student a bad grade on a legal writing assignment. We will charitably assume that the *Minder* court was simply having a bad day.

B. The Case Before Us

1. *The Inference Here Was Reasonable*

In the case before us, unlike *Minder*, there was expert testimony expressly making the link between the particular kind of food poisoning involved (campylobacter) and the particular unsanitary conditions found at the restaurant -- cross-contamination from raw chicken. An expert for Sarti, Dr. Andrew Kassinove, testified that anything that might have touched something that touched raw chicken would be cross-contaminated. Particularly given the lack of proper sterilization in the dishwasher and the waiter's constant use of an unsterilized wipe down rag, a reasonable jury could infer either that a rag used to wipe down a raw chicken board was used to wipe down a vegetable or tuna board, or, alternatively, that a drop or two of raw chicken juice may have leaked onto some of the vegetables stored beneath it. As Dr. Kassinove testified: "Any preparation in this case -- this case dealt with raw cucumbers, wasabi, ginger, all those in addition to Ahi tuna which were uncooked, and vegetables that easily could have been prepared on a surface that had cross-contamination."

We should add that Dr. Kassinove also testified as to any necessary implications from Sarti's companion's *lack* of illness. Dr. Kassinove said that it was

"very common for people to eat at the same restaurant or eat the same meal and only one person get sick. That one person had the misfortune or the metabolism or the bad luck that their body was susceptible to it at that time. . . . [¶] . . . Maybe two people even could be contaminated who ate from the same dish, but it's much more likely one person would get sick. Also, that one person might get sicker than the other two people who ate the contaminated piece of chicken. It's very common for one to get really sick, the other one to get a little stomach upset or some mild symptoms."

The expert testimony in this case linking the particular kind of food poisoning experienced by the plaintiff to the particular kind of health violation attributable to the defendant is what distinguishes this case from *Minder*.

It also distinguishes this case from *Reese v. Smith* (1937) 9 Cal.2d 324, where there was a positive exoneration of the defendant's food by the health department because a sample of the food was available for examination the next day after the plaintiff took sick.

In *Reese*, a seamstress stopped at a meat market about 5 o'clock, where she purchased a pound of linked sausages. She went home and, about a half an hour later, made herself a fried sausage sandwich, using only a portion of the sausage. The remainder went back to the "ice box." (This was the 1930's, remember.) She became ill "as she finished" eating the sandwich; within a few minutes neighbors offered their assistance and the police were summoned. One of the officers examined what was left of the sausages with his flashlight, and noticed several maggots on the open end of the sausage. Also, a neighbor testified that he saw two maggots between two of the linked sausages. The plaintiff's physician testified that the plaintiff had suffered "botulism" and in his opinion it was caused from eating the sausages. (*Reese, supra*, 9 Cal.2d at pp. 325-326.)

The trial court, sitting without a jury, did the intuitive thing and awarded plaintiff a damage award against the meat market. The Court of Appeal reversed, and that opinion was later adopted verbatim by the Supreme Court (hence almost all the opinion is one long quote from the appellate court's opinion; all our quotations from the

opinion thus omit the initial quotation marks showing the high court was quoting from the lower court).

Why should the Supreme Court reverse a judgment for the plaintiff when maggots had been found on meat the plaintiff had consumed almost immediately before? The answer lies in a fact in *Reese* that is not common in food poisoning cases: A sample of the food consumed could be scientifically tested contemporaneously with the illness.

It turned out that the very next day after the seamstress took ill, inspectors from the city health department visited the plaintiff's home and made an examination of the remaining sausages, including a *microscopic* examination. Those inspectors testified that the remainder of the sausages appeared fresh and wholesome and maggot-free when they examined it, and, more importantly, the microscopic examination showed no "organism of the food poisoning groups" to be present. (*Reese, supra*, 9 Cal.2d at p. 327.)

Now, the *Reese* court did acknowledge that no examination was made specifically for botulism, and that was because -- and the *Reese* court emphasized the expert testimony in this regard was uncontroverted -- botulism only flourishes in environments without oxygen. (*Reese, supra*, 9 Cal.2d at p. 327.) Moreover (again, an uncontroverted point in the *Reese* case) botulism takes at least "several hours" to manifest itself after the "contaminated food is eaten." (*Ibid*.) The court noted, in contrast, that the "only expert evidence offered by [the] plaintiff" was that of her physician, who diagnosed the case as one of botulism. (*Ibid*.)

The *Reese* court then reasoned that maggots themselves are "not poisonous," not necessarily confined to rotting food and described maggots as "but the larvae of insects, most commonly that of the housefly." (*Reese, supra*, 9 Cal.2d at p. 328.) In fact, the court went on to say that maggots "are used in modern surgery for the treatment of open wounds." (We would note that antibiotics were not in general use in 1937.) Since, "The only credible evidence as to the condition of the meat was that it was pure and wholesome when chemically analyzed on the day following the sale," the *Reese*

court concluded that the treating physician's inference that his patient's botulism was the result of eating the sausages was not reasonable. (*Id*. at p. 329.)

A close reading of the *Reese* case shows that its somewhat counterintuitive result is "explainable" on the ground that the evidence that the sausages were "wholesome" was so strong as to be preclusive of any contrary possibility, much less inference. After all, it is the rare food poisoning case where city health inspectors get to make a microscopic examination of a portion of the suspect food the very next day (and we note, presumably the passage of time would only increase the probability of maggots) and rule out any organism from "food poisoning groups." And indeed, the later *Dougherty* opinion would distinguish *Reese* on that very basis. (See *Dougherty*, *supra*, 74 Cal.App.2d at p. 138.)

On top of that, the treating physician's opinion that his patient was ill with botulism, when examined in the light of the uncontroverted evidence that botulism could "only flourish where there is no oxygen," that botulism "does not manifest itself for several hours after contaminated food is eaten" and, of course, that the plaintiff became ill almost immediately upon consuming the sausage sandwiches, completely undercut the plaintiff's case. (*Reese*, *supra*, 9 Cal.2d at p. 327),

Perhaps not wanting to be associated with maggoty sausages, Salt Creek has not cited or relied on the *Reese* decision in any way in its briefing. Though *Reese* on the surface *Reese* seems a strong case for the defense in food poisoning cases, on reflection it actually underscores our "strict" reading of *Minder*. That is, in *Reese*, there was no evidence (at least presented to the 1937 court) that linked the plaintiff's particular illness, which was botulism, to any particular health hazard attributable to the defendant. For the *Reese* court, the timing of the illness, the relatively oxygen rich environment of the ice box, and the microscopic examination ruled out any attribution of the plaintiff's *botulism* to the sausage that had maggots on it. And, we should add, the *Reese* court did not suggest that inferences were off limits, as a matter of law, to prove a food poisoning case. It merely held that under the particular evidence before it, the inference of causation was not reasonable.

2. *Salt Creek's Rule-Out-All-Alternatives-Argument: In its Direct Form*

Salt Creek asserts that Sarti was required, as a matter of law, to exclude all "possibilities" other than the meal she had at the restaurant. As we have already shown in our criticisms of *Minder*, that point is untenable. *Mitchell* plainly demonstrated that California law on causation is "substantial factor." And, as the prior *Dougherty* opinion expressly stated, a plaintiff need not "'exclude every other conclusion'" than the defendant's negligence. (*Dougherty*, *supra*, 74 Cal.App.2d at p. 136.)

At this point, we should confront the semantic danger in the word "possibility." The word must necessarily connote something more than bare conceivability or plausibility, otherwise it would swallow up the universe. For example, in a food poisoning case, how could the plaintiff disprove that she *didn't* pick up some nasty bacteria (here, campylobacter) because she touched a doorknob that had been previously touched by someone who had been handling raw chicken or who had changed a diaper, and hadn't washed his or her hands? Well, yes, one might reason, it is conceivable that that might have happened. It is ludicrous, though, to suggest that such bare conceivability must, *as a matter of law*, defeat a food poisoning claim.

The relevant question is this one: Was there any *substantial evidence* that someone who had just handled raw chicken (or changed a diaper or whatever) and who hadn't washed his or her hands touched something that the plaintiff soon touched, and then the plaintiff, say, ate a hamburger or a sandwich without washing her hands, after which she became sick within a time frame consistent with the illness that she, indeed, contracted? In the Georgia *Payton* case, which served as the inspiration for *Minder's* "explainable on other grounds" language, there was certainly substantial evidence of such an alternative "explanation" for the disease (the virus going around town at the time).

Given the facts of the case before us, we are spared the tough problem of whether the existence of an alternative "explanation" supported by substantial evidence competing with the finding the jury actually chose might somehow defeat, as a matter of law, the jury's finding of food poisoning from the restaurant meal. (We don't think so,

given the *Mitchell* case, because substantial factor does not have to be the "exclusive factor," but that precise problem can await another day.) Salt Creek has cited no substantial evidence *requiring a finding* that Sarti picked up the campylobacter from handling a leaky package of chicken while working at a checkstand, or handling a cat, or somehow being exposed to a baby in the house, or eating in the lunch room with the employees from the meat department.

One must remember, it is the winning party after a jury trial, not the losing party, who gets the benefit of reasonable inferences from the evidence. Under classic rules of appellate review, we are required to accept the inference, if reasonable, that Salt Creek got sloppy with its wipe-down rags over the inference that Sarti ran a leaky bag of chicken through a checkout scanner and then didn't wash her hands before touching some food she ate.[12]

3. *Salt Creek's Rule-Out-All-Alternatives-*
Argument: Its "Gotcha" Form
(Based on Acquiescence to a Bad Jury Instruction)

A variation on Salt Creek's exclusion-of-all-else theory is based on Sarti's failure to challenge all the language in the "substantial factor" jury instruction, which, ironically as Salt Creek now reads it on appeal it believes *required* the jury to find for the defense unless Sarti ruled out all other causes. Deconstructed, Salt Creek's argument is: Even if a rule-out-all-possibilities rule is not the law, Sarti's lawyers effectively agreed to that faulty rule in a jury instruction, and therefore she *must* lose because of *their* acquiescence to an instruction even if it does not accurately reflect the law.

---

[12] Here's a another law school hypothetical: Suppose the trial judge had *granted* a new trial motion based on insufficient evidence (see Code Civ. Proc., § 657) because *he* drew the inference that Sarti was exposed to campylobacter from a bag of leaky chicken (or by shaking hands in the lunch room with an employee from the meat department or some similar encounter with someone who had just changed diapers without washing, or whatever). Would *that* decision be upheld on appeal under the abuse of discretion standard for the granting of a new trial because, on review from the granting of a new trial motion, we would be required to draw all reasonable inferences in favor of the trial court's decision? That is, would an inference that Sarti got the campylobacter from a bag of leaky chicken be strong enough to sustain the new trial grant? Our answer: We'll leave that one for another day.

The jury instruction consisted of two paragraphs, which we now quote in full: "A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm. [¶] In food poisoning cases, the plaintiff must prove that the food was unwholesome or unfit and caused her illness. If you find that her illness is explanable [*sic*] on grounds other than unwholesomeness of the food, you must determine by a preponderance of the evidence that plaintiff has excluded such other causes."

We recognize that this is not the most felicitous jury instruction around. On the one hand, the phrase from the last sentence, "explanable [*sic*] on grounds other than unwholesomeness of the food," was obviously lifted verbatim from the passage in the *Minder* case about the Georgia potato salad decision. (See *Minder*, *supra*, 67 Cal.App.3d at p. 1009.)

On the other hand, the first paragraph, which plainly says that food poisoning did not "have to be the only cause of the harm," is certainly an accurate statement of basic tort causation in light of *Mitchell*. Counsel for Sarti, of course, had no choice in acquiescing to the "explanable on grounds other" clause of the instruction, because -- until our opinion in this case -- no published appellate decision has had occasion to note that *Minder's* 1977 approach to causation is inconsistent with current law as established in *Mitchell*. Thus, apropos our initial discussion of *Auto Equity Sales*, the trial court was bound to try to find some formulation that recognized both the *Mitchell* substantial factor approach and the (still technically viable at least to that point) "explanable on grounds other" language from *Minder*. The tension in the jury instruction is simply a reflection of *Minder's* tension with *Mitchell*.[13]

---

[13] Interestingly, a tension reflected in the very typeface of the written jury instruction as it appears in our record. The first paragraph, reflecting *Mitchell*, is double spaced. The second paragraph, reflecting *Minder*, is single spaced. It is as if the trial court literally cut and pasted the two competing jury instructions proposed by the two competing sides into one document.

In any event, for the same reasons outlined under the previous subheading in this opinion, Sarti's counsel's acquiescence in the (in our opinion, no longer valid in light of current law) "explainable on other grounds" language from *Minder* did *not* require the trial judge to grant the jnov motion (or require us to otherwise affirm that grant of jnov). As we have noted, and under classic rules of appellate review (inferences are not drawn in favor of the loser after a jury trial) there is no substantial evidence to transform the bare speculative possibilities of contraction of campylobacter via checkstand, baby diapers, a cat in the house or the lunchroom into a valid alternative explanation.

C. The Cross-Appeal

1. *The Consistency Issue*

The restaurant has taken a protective cross-appeal, based on the denial of a motion for new trial heard at the same time as its motion for jnov. Most of the cross-appeal is merely argument based on *Minder* by other means, i.e., contending that it was legal error to allow a verdict for the plaintiff to stand.

We should mention, though, that it was certainly within the bounds of reason, i.e., within the proper exercise of the trial court's discretion, to deny the new trial motion at least on the contingency that the jnov motion was reversed on appeal. This is not a case (like *Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs* (1998) 67 Cal.App.4th 743) where the trial judge clearly thought that the defendant should be the prevailing party, no matter what. The judge in this case made it clear on the record that he would have voted with the jury on liability, and the only reason he was granting the jnov was the *Minder* case. Thus his denial of a new trial (as an alternative result if the jnov were overturned) is logically consistent: The judge thought that there *was* substantial evidence to support the jury's verdict, and would not have overturned it except that he felt compelled to do so under the rule of stare decisis.

2. *The Jury Misconduct Issue*

Salt Creek raises, however, one issue that does not depend on the *Minder* case -- jury misconduct. The motion for new trial was supported by four very brief and

conclusory juror affidavits to the effect that the jurors determined not to follow the court's instructions. (Basically, the four jurors said that the jury "agreed" (that's the operative word in all four affidavits) to require Salt Creek to prove that its food didn't cause the food poisoning.)

The standard of review on a new trial motion alleging juror misconduct is abuse of discretion. (E.g., *People v. Williams* (1988) 45 Cal.3d 1268, 1318). There was none here. The trial judge noted the "anodyne" (literally, from the Greek, "no pain") quality of the four affidavits (one said that the jury "listened to all of the evidence presented and carefully deliberated before deciding this case" -- hardly the sort of thought that would support a finding of jury misconduct!), and said it looked as if the affidavits had been drafted merely to be "congenial" to the defendant's evidence.

The absence of any supporting detail about the jurors having supposedly "agreed" to do something contrary to an instruction supports the reasonable inference that the affidavits were mere conclusions about the jurors' mental processes. Thus it was not unreasonable for the judge to deny the motion. (See *Ford v. Bennacka* (1990) 226 Cal.App.3d 330, 336 [deliberative error based on misinterpretation of law not admissible].)

IV. DISPOSITION

The judgment notwithstanding the verdict is reversed. The case is remanded to the trial court to reinstate the original judgment. Appellant shall recover her costs on appeal.

SILLS, J.

WE CONCUR:

RYLAARSDAM, P. J.

MOORE, J.