BEER, BAD OYSTERS AND OTHER PITFALLS
A FOOD AND BEVERAGE LIABILITY UPDATE

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I. INTRODUCTION TO FOOD AND BEVERAGE LIABILITY

A. FOOD LIABILITY: A CRASH COURSE IN TORTS

Any review of food liability (and alcohol liability) cases requires a crash course review in the law of torts. Black's Law Dictionary defines a tort as: "A civil wrong for which a remedy may be obtained, usually in the form of damages; a breach of a duty that the law imposes on everyone in the same relation to one another as those involved in a given transaction." BLACK'S LAW DICTIONARY 1496 (7th ed. 1999) Subsumed under this definition are negligent torts[1], intentional torts[2], and even strict liability.[3]

The issues in food liability cases generally are whether, *e.g.*, a restaurant or food manufacturer's behavior, food preparation, or other activity was the proximate cause of the plaintiff's injuries, and which of the above tort standards should be applied. Although some themes run consistently through many jurisdictions, such as the abandonment of the foreign/natural test for various versions of the reasonable expectation test, outcomes in these cases vary widely.

B. ALCOHOL BEVERAGE LIABILITY: WHAT DOES DRAM SHOP LIABILITY MEAN?

"Dram Shop Liability" refers to causes of action brought against sellers and other providers of alcohol beverages resulting from injuries to consumers of alcohol beverages ("first party actions") and third parties harmed by such persons ("third party actions"). More specialized than generic tort claims, dram shop allegations are usually the basis for liability against licensed sellers of alcohol beverages.

The phrase “dram shop” originally referred to bars, saloons, and any other establishments where alcoholic beverages were sold to the public. Today, statutes and case law referring to “dram shop liability” relate to causes of action which arise after a tortfeasor has consumed alcoholic beverages at a much wider range of venues, including bars and restaurants, but also including private homes. This distinction has given rise to two types of dram shop liability under dram shop laws: commercial host liability and social host liability. All fifty states have different laws regarding liability depending on whether the server was a commercial or social host. The portion of this presentation devoted to alcohol beverage liability focuses on commercial host liability only.

II. FOOD LAW UPDATE

Most plaintiffs suing food retailers, distributors, or suppliers do so because they found something unexpected in their food. Although the fact patterns in such cases are simple, the outcomes may not be, because courts in different jurisdictions may apply different standards to determine the retailer's liability. Traditionally, courts have used two tests to determine the existence of liability in such cases: the foreign/natural test and the reasonable expectation test. Today, most jurisdictions use some version of the

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[1] A negligent tort is a failure to observe the standard of care required by law under the circumstances. *See id.* at 1497.

[2] Intentional torts are things done purposely; *e.g.*, battery, false imprisonment, trespass on land.

[3] Strict liability is liability that does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe. BLACK'S LAW DICTIONARY 926 (7th ed. 1999).

reasonable expectation test; however, in order to follow the evolution of the cases it is important to understand both rationales.

A. INTRODUCTION TO THE FOREIGN/NATURAL TEST VS. THE REASONABLE EXPECTATION TEST: BEWARE OF CHICKEN BONES

Historically, the common law foreign/natural test was used to evaluate food injury cases. Later, the test was modified by the judicially-created reasonable expectation test. In *Porteous v. St. Ann's Café & Deli*, 713 So. 2d 454 (La. 1998), the Louisiana Supreme Court summarized the two tests:

> Under the foreign-natural test, the outset determination is whether the injurious substance is "foreign" or "natural" to the food. As this test evolved nationally, the cases held that if an injurious substance is natural to the food, the plaintiff is denied recovery in all events. *Goodwin v. Country Club, 323 Ill. App. 1, 54 N.E.2d 612 (Ill. App. 1944); Brown v. Nebiker, 229 Iowa 1223, 296 N.W. 366 (Iowa 1941); Mix v. Ingersoll Candy Co., 6 Cal. 2d 674, 59 P.2d 144 (Cal. 1936), overruled by Mexicali Rose v. Superior Court, 1 Cal. 4th 617, 822 P.2d 1292 (Cal. 1992).* But if the injurious substance is foreign, the restaurant is strictly liable. …..
>
> In time, the foreign-natural test was widely criticized and rejected by many states in favor of the reasonable expectation test. Under the reasonable expectation test, the query to determine liability is whether a reasonable consumer would anticipate, guard against, or expect to find the injurious substance in the type of food dish served. *O'Dell v. DeJean's Packing Co., Inc., 585 P.2d 399 (Okl. Ct. App. 1978); Jim Dandy Fast Foods, Inc. v. Miriam Carpenter, 535 S.W.2d 786 (Tex. Civ. App. 1976); Matthews v. Campbell Soup Co., 380 F. Supp. 1061 (S.D. Tex. 1974); Wood v. Waldorf System, Inc., 79 R.I. 1, 83 A.2d 90 (R.I. 1951); Zabner v. Howard Johnson's Inc., 201 So. 2d 824 (Fla. Dist. Ct. App. 1967).* Whether the injurious substance is natural or foreign is irrelevant. Rather, liability will be imposed on the restaurant if the customer had a reasonable expectation that the injurious substance would not be found in the food product. On the other hand, if it can be shown that the customer should reasonably have expected the injurious substance in his food, that customer is barred from recovery.

(Quotations omitted; citations omitted)*; id.* at 456.

Mexicali Rose v. Clark, 1 Cal. 4th 617 (Cal. 1992) was a seminal case in the move away from the foreign/natural doctrine. In that case, the plaintiff was injured after swallowing a chicken bone in a chicken enchilada. *Mexicali Rose* was a ground breaking case, because in it the California Supreme Court adopted the reasonable expectation test, and also determined that the test may be used by a plaintiff to assert a cause of action for negligence related to failure to exercise due care in food preparation, but may not be used for causes of action in strict liability or breach of implied warranty.

Clark sued the Mexicali Rose restaurant and alleged causes of action sounding in negligence, breach of implied warranty, and strict liability. In so doing, he claimed that the enchilada was unfit for human consumption. The court reviewed similar California precedents as well as cases from other jurisdictions.

Relying on a prior case involving a chicken bone in a chicken pot pie,[4] the court determined that because chicken bones are natural to the chicken in the chicken enchilada, a plaintiff cannot reasonably expect a chicken enchilada always to be free of bones, and the restaurant had no duty to provide a perfect enchilada. *Id.* at 632. The *Mexicali Rose* court summarized the reasonable expectation test and causes of action flowing from it as follows:

> If the injury producing substance is natural to the preparation of the food served, it can be said that it was reasonably expected by its very nature and the food cannot be determined unfit or defective. A plaintiff in such a case has no cause of action in strict liability or implied warranty. If, however, the presence of the natural substance is due to a restaurateur's failure to exercise due care in food preparation, the injured patron may sue under a negligence theory.
>
> If the injury-causing substance is foreign to the food served, then the injured patron may also state a cause of action in implied warranty and strict liability, and the trier of fact will determine whether the substance (i) could be reasonably expected by the average consumer and (ii) rendered the food unfit or defective.

Id. at 633.

Based upon this holding, the court affirmed the dismissal of the plaintiff's strict liability and implied warranty claims, and remanded for further proceedings on the negligence claim. *Id*. at 634.

Two more recent negligence cases involving chicken against retailer Taco Bell demonstrate that the rationale set forth in *Mexicali Rose* is still being used by courts. In *Ruvolo v. Homovich,* 149 Ohio App. 3d 701 (Oh. Dist. Ct. App. 2002), the plaintiff sued Taco Bell and its food distributors for negligence after injuring himself when a chicken bone from a chicken gordita sandwich lodged in his throat. He alleged that the defendants were liable for failing to inspect the chicken.

Relying on two other seminal Ohio cases involving shells in seafood,[5] the court held that the plaintiff could reasonably expect chicken bones in the chicken gordita in the same way that a shell should be expected in a fried clam strip or fish bones should be expected in a fish filet. *Id.* at 703.[6] As a result of this conclusion, the court affirmed summary judgment for the defendants, and also held that the reasonable expectation test trumped the plaintiff's claim related to the defendants' inspection procedures. *Id.* at 704.

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[4] The chicken pot pie case is *Mix v. Ingersoll Candy Co.*, 6 Cal. 2d 674 (Cal. 1936). Although the results of the cases are similar, *Mix* differed from *Mexicali Rose* because the *Mix* court used the old foreign/natural test to conclude that a chicken bone, natural to a chicken pot pie, could never be used as the basis of tort liability. *Mix* at 682.

[5] *See Mitchell v. T.G.I. Friday's,* 140 Ohio App. 3d 459 (Oh. Dist. Ct. App. 2000) and *Allen v. Grafton,* 170 Ohio St. 249 (Ohio 1960), discussed *infra*.

[6] The Court also analogized the bone in the gordita to the bones in *Mix's* chicken pot pie, rather than to the later case of *Mexicali Rose*. *Ruvolo,* 149 Ohio App. 3d at 703. This is somewhat confusing because *Mix* used the foreign/natural test, and *Mexicali Rose* clearly represents the current state of the law, at least in California. Because neither *Mix* nor *Mexicali Rose* would be binding on an Ohio court, it may be that the *Ruvolo* court simply was citing *Mix* for the proposition that a chicken bone found in a chicken-based food product could not be the foundation of a straight negligence claim.

The other 2002 case against Taco Bell turned out quite differently. The facts, however, were very similar. In *Lasseigne v. Taco Bell Corp.*, 2002 U.S. Dist. LEXIS 5149 (E.D. La. March 15, 2002), the plaintiff was injured after he choked on a chicken bone in a soft taco. He argued that Taco Bell breached its duty to act reasonably as a food provider. Relying on the binding Louisiana authority of *Porteous v. St. Ann Café and Deli, supra,* the court applied the foreign-natural test to determine whether Taco Bell acted negligently. Although the court noted the similarities to *Porteous*, and noted that bones are natural to chicken, the court nevertheless found that some issues remained as to whether Taco Bell's food preparation procedures are reasonable. *Id.* at *10. The plaintiff had introduced evidence of numerous prior incidents of chicken bone complaints from Taco Bell customers. The court determined that the weight to be given to the prior complaints as part of the determination of whether Taco Bell's procedures were reasonable was an issue for the jury. *Id.* at *11.

The opposing results in the Ohio Taco Bell case and the Louisiana Taco Bell case illustrate how nearly identical cases can have different outcomes, depending on the jurisdiction. These cases also demonstrate the difficulty that national chain restaurants and retailers may experience monitoring the varying standards of care that exist around the country.

B. WHAT'S IN MY SEAFOOD?

Clams and other seafood are often the subject of food liability cases. In *Mitchell v. T.G.I. Friday's*, 748 N.E. 2d 89 (Oh. Dist. Ct. App. 2000), the plaintiff sued the restaurant where she had eaten a fried clam strip and bit into a piece of clam shell. The plaintiff eventually lost a tooth from the incident. The Ohio Court of Appeals reviewed various case precedents which collectively indicated that it was unclear whether the foreign/natural test or the reasonable expectation test governs in Ohio. Nevertheless, based on the Ohio Supreme Court's prior decision in *Allen v. Grafton*, 170 Ohio St. 249 (Ohio 1960), the court held that neither the restaurant nor the supplier had a duty to protect the plaintiff from her injury. The court held that the case could be decided without selecting one test or the other, because:

> In the present case, it cannot be disputed that the piece of clam shell which caused Appellant's injury was natural to the clam strip which she consumed. Turning to the question of whether Appellant should have reasonably anticipated the presence of the clam shell, we are reminded of the Ohio Supreme Court's holding in *Allen, supra,* that, the possible presence of a piece of oyster shell in or attached to an oyster is so well known to anyone who eats oysters that we can say as a matter of law that one who eats oysters can reasonably anticipate and guard against eating such a piece of shell * * *." 170 Ohio St. at 259. The facts of the present case are virtually indistinguishable from *Allen* except for the type of injury and that, here, Appellant was eating fried clams rather than fried oysters. We therefore hold that as a matter of law, one who eats clams can reasonably anticipate and guard against eating such a piece of shell.

Mitchell, 748 N.E. 2d at 95.

A clam shell in a fried clam strip might be an easy case, but other cases involving more latent "natural" substances in seafood have not been so simple. The renown case of *Clime v. Dewey Beach Enter.*, 831 F. Supp. 341 (D. Delaware 1993), addressed which test would apply to a fact pattern where a restaurant patron ate clams at a raw bar café and later contracted septicemia. Although the bacteria contributing to

septicemia (vibrio vulnificus) is found in raw clams, the plaintiff also had preexisting cirrhosis of the liver, a condition that causes more debilitating forms of septicemia. The plaintiff sued the restaurant in negligence and both the restaurant and the supplier of the seafood on a breach of implied warranty theory.

On the negligence claim, the court denied the restaurant's motion for summary judgment because the Plaintiff established that the restaurant had a duty to him to keep the clams at or below 45 degrees until the time plaintiff received them. As for the breach of implied warranty claim, the plaintiff claimed that the defendants should be liable because the clams contained the disease causing bacteria, even if the restaurant's handling of the clams did not cause his illness in any way. Because the Supreme Court of Delaware had not ruled on whether the appropriate test in Delaware was the foreign/natural test or the reasonable expectation test, the court reviewed cases in other jurisdictions where the two tests had been analyzed. Predicting that the Supreme Court of Delaware would follow the reasonable expectation test, the *Clime* court analyzed the facts of the case using that test, and determined that the bacteria causing septicemia naturally occurs in clams. In other words, the court determined that part of the reasonable expectation determination is whether the injury causing agent is natural to the food. *Id*. at 349. The court reasoned that consumers who elect to eat raw clams should know about the natural risks of doing so, and that therefore the supplier of the seafood was entitled to summary judgment. However, the court also held that consumers should not be held to a standard of reasonably expecting dangers that arise out of mishandling of seafood by a restaurant, and therefore submitted that issue to the jury. *Id*. at 350.

C. STRICT LIABILITY/ FAILURE TO WARN

Although most food liability cases are brought on a variety of tort theories using some version of the reasonable expectation test discussed above, other cases predominantly focus on strict liability claims and analyses.[7] Issues raised in these cases tend to concern whether the food product in and of itself was so dangerous as to require a warning to potential consumers of the product.

1. Bacteria

The recent case of *Edwards v. Hop Sin, Inc*., 2003 Ky. App. LEXIS 213 (August 29, 2003) is an interesting comparison to *Clime v. Dewey Beach Enter., supra*. Like *Clime*, the *Edwards* case involved illness resulting from consumption of raw seafood (this time, raw oysters). The plaintiff ate raw oysters at the defendant's seafood bar, and the next day became ill with septicemia. The plaintiff's condition worsened quickly as a result of his preexisting liver disease. The plaintiff argued that raw oysters were an inherently dangerous product and that the restaurant failed to warn him about these inherent dangers.

Like the *Clime* court, the *Edwards* court acknowledged that oysters naturally contain bacteria that can cause septicemia in certain individuals. However, the court concluded that because the number of such persons is statistically small, the oysters are not so dangerous that they should not be sold. Nonetheless, unlike the *Clime* court, the *Edwards* court held that the restaurant should warn consumers about latent risks attendant to consumption of raw seafood, *i.e.*, that the bacteria in the seafood may cause infection, illness, or even death, in persons with stomach, liver, or blood conditions or compromised immune systems. The court found that although the public probably reasonably can expect the risk of some illness from consumption of raw seafood, the public should not be held to a standard of knowledge that would include the severity of

[7] Of course, these theories are not mutually exclusive; many plaintiffs file complaints with alternative causes of action based on multiple tort theories, including negligence and strict liability.

possible illness in persons with the above preexisting medical conditions. The court then concluded that a jury could find that this risk would be serious enough that the restaurant should have warned against it, and remanded the case for further proceedings. *Id.* at *5-6.

2. Ingredients

Other strict liability cases involve substances which do not necessarily "naturally occur" in foods, but rather are ingredients. The issue in these cases is whether the restaurant serving the food had a duty to alert consumers that the food contained the ingredient at issue.

In *Livingston v. Marie Callenders, Inc*., 72 Cal. App. 4th 830 (Cal. Dist. Ct. App. 1999), the plaintiff ordered soup containing monosodium glutamate ("MSG") after being assured that the soup did not contain MSG. The plaintiff experienced a severe allergic reaction. The plaintiff argued that the restaurant should be strictly liable for his injuries for failing to warn of the MSG in the soup, and based this argument on section 402A, of the Restatement (Second) of Torts, comment j, which states that a cause of action for strict liability failure to warn exists where a product:

> contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, [and the seller] has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger.

The court reviewed other similar cases holding that a duty to warn arises in cases where a product's ingredients are known allergens and adopting comment j of section 402A. As a matter of law in California, a defendant may be liable for failing to warn when: a product contains an ingredient to which substantial numbers of persons are allergic; the ingredient is one whose danger is not immediately known; or the ingredient is one that the consumer would not reasonably expect to find in the product. Because these issues were not tried by the trial court, the court remanded the case for further proceedings on the strict liability issue. *Id.* at 840.

Recently, the Court of Appeals of Washington considered a case similar to *Livingston v. Marie Callenders, Inc., supra.*; however, the case had a very different outcome. In *Thompson v. East Pacific Enter., Inc.*, 2003 Wash. App. LEXIS 232 (February 18, 2003), the plaintiff, who had a known and severe peanut allergy, became very ill after eating a takeout order of almond chicken from the defendant's restaurant. She sued the restaurant under Washington's Product Liability Act and the State Consumer Protection Act. The plaintiff claimed that the almond chicken was unreasonably unsafe, and that the restaurant had a duty to warn patrons of the possibility that the almond chicken dish could be cross-contaminated with peanuts. The court disagreed.

Some of the key facts influencing the court's decision, and therefore distinguishing the case from *Livingston*, were (1) unlike the plaintiff in *Livingston*, Thompson never informed the restaurant about her allergy; (2) despite her claim that the menu should have contained a warning, Thompson admitted that she never read the menu; and (3) Thompson's friend, who placed the order, did not ask about the ingredients in the almond chicken. *Id.* at *2-3.

Citing the comments to the Restatement (Second) of Torts, section 402A[8], the court held that because peanuts are such a common allergen, the restaurant did not have a duty to warn that the chicken could contain those amounts of peanut due to cross contamination. *Id.* at *10.

Nuts are frequently the subject of these cases, not only because many people are allergic to them, but also because they can cause dental problems. In *Jackson v. Nestle-Beich, Inc*., 147 Ill. 2d 408 (Ill. 1992), the plaintiff sued Nestle after breaking a tooth on a pecan shell embedded in a chocolate-covered pecan and caramel candy. The plaintiff's complaint contained claims for breach of implied warranty and strict liability.

Nestle advocated a modified foreign/natural defense, arguing that it could not be strictly liable because the shell was natural to the pecan in the candy, and that food manufacturers whose products contained these natural ingredients should be exempted from liability because of the difficulty in extracting and detecting such ingredients. The court refused to adopt this "state of the art" defense, a type of strict liability defense that had never previously been recognized in Illinois in food product cases. *Id.* at 413.

The court further disagreed with Nestle and held that the company could be held to a strict liability standard. The fact that the pecans went through some degree of processing in order to make candy weighed in favor of imposing strict liability on Nestle because Nestle handled the ingredients, placed them in the stream of commerce, and then profited from them. *Id.* at 415. Finally, the court found that the candy did not qualify as an unavoidably unsafe product, because it lacked the social utility to be given this special exemption and designation. *Id*.

Finally, the court disregarded the foreign/natural test in favor of a reasonable expectation test; however, in finding strict liability against Nestle, noted that consumers should not bear the burden of being required to "think and chew carefully" when eating the candies. *Id*. at 417. Rather, Nestle should have posted a warning on the product alerting consumers to the potential dangers of pecan shells. *Id*. at 418.

Bones also have the potential to cause trouble. *Ford v. Miller Meat Co*., 28 Cal. 4th 1196 (Cal. Dist. Ct. App. 1994) is another broken tooth case with an opposite result on strict liability. The plaintiff sued a grocery store and meat supplier after she bit down on a small particle of bone in a package of ground beef, and alleged causes of action for strict liability, breach of implied warranty, and negligence.

In order to circumvent the holding in *Mexicali Rose v. Superior Court, supra, i.e.*, that a strict liability claim will not lie when the plaintiff's claim surrounds a substance naturally occurring in food, Ford claimed that bones do not occur naturally in ground beef, which is pulverized and therefore should not contain bones. The court was not persuaded by this contention, and struck Ford's strict liability claim based on an indistinguishable Louisiana case, cited by *Mexicali Rose*, which held that "it cannot be said, as a matter of general knowledge, that ground beef should not contain any pieces of bone." *Loyacano v. Continental Ins. Co*., 283 So. 2d 302, 305 (La. Ct. App. 1973).[9]

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[8] The Court relied upon the following excerpt from section 402A, Restatement (Second) of Torts, comment j:

> In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them.

[9] This also defeated Ford's breach of implied warranty claim.

III. DRAM SHOP LAW UPDATE

The statutes and cases analyzed in this section govern situations where someone, either the person who consumed alcoholic beverages, or a third party, is injured in an accident involving alcohol. The common law rule in most United States jurisdictions, prior to the enactment of any statutes or the hearing of any cases on the subject, was that the consumption of alcohol, rather than the furnishing of it, was the proximate cause of alcohol-related accidents.

According to the Twenty-first Amendment to the United States Constitution, each individual state may enact its own laws regarding the sale and distribution of alcoholic beverages. As this article demonstrates, those laws vary widely in the field of dram shop law. Some states have abided by the common law rule, either by express legislation, or by case law. Others, in response to a great number of drunken driving injuries and fatalities, have enacted dram shop statutes that impose liability on different classes of persons upon the occurrence of certain conditions. In many cases, dram shop legislation and judicial decisions are consistent, and in others, such as *Craig v. Driscoll*, discussed below, they are not.

A. LEGISLATED REMEDIES VS. JUDICIAL CREATION OF THE COMMON LAW: *CRAIG V. DRISCOLL*

Dram shop litigants constantly feud over the limitations on licensees' liability (often legislated in state dram shop statutes) versus the often competing interest of common law tort liability advocated by plaintiffs. Last year the Supreme Court of Connecticut overturned longstanding judicial precedent and held that Connecticut's dram shop statute did not preclude an action against a licensee for negligence arising from the service of alcohol beverages, and that the statute did not preempt such actions in a case where an intoxicated patron injures a third party. *Craig v. Driscoll*, 262 Conn. 312, 330, 813 A.2d 1003, 1015 (Conn. 2003). *Craig* is an excellent example of the conflict developing between limited liability provisions in state dram shop statutes and judicial remedies found in common law tort principles.

In *Craig*, the mother and brother of a pedestrian killed by a drunk driver sued the driver and the establishment where he had been drinking for negligent and reckless infliction of emotional distress[10] and loss of consortium. The amended complaint alleged that the bar knew or should have known that the driver was intoxicated, and an alcoholic, and that he would leave the bar in a car. Based on these facts, the court considered whether Connecticut's dram shop act would preempt a negligence action against a licensee for service to a patron, who, as a result of his intoxication, injured a third party.

Unlike some statutory schemes that preclude commercial host liability except in narrow circumstances, Connecticut's dram shop statute allows liability with a statutory damages cap and with a short statute of limitations. At the time of the *Craig* decision, section 30-102 of the Connecticut General Statutes provided in pertinent part:

[10] The Plaintiffs' amended complaint alleged that they arrived at the accident scene and saw the decedent before a substantial change in her location or condition had occurred; therefore they claimed bystander status for the purpose of their emotional distress claim.

> If any person, by himself or his agent, sells any alcoholic liquor to an intoxicated person, and such purchaser, in consequence of such intoxication, thereafter injures the person or property of another, such seller shall pay just damages to the person injured, up to the amount of twenty thousand dollars, or to persons injured in consequence of such intoxication up to an aggregate amount of fifty thousand dollars, to be recovered in an action under this section, provided the aggrieved person or persons shall give written notice to such seller within sixty days of the occurrence of such injury to person or property of his or their intention to bring an action under this section…..No action under the provisions of this section shall be brought but within one year from the date of the act or omission complained of.

Conn. Gen. Stat. § 30-102 (West 2002).

Based on the statute, the defendants in *Craig* argued that the dram shop statute is an exclusive remedy in Connecticut and that therefore the plaintiffs' negligence claims were precluded. They supported this argument with the traditional principle that the driver's voluntary consumption of the alcohol, not the licensee's serving of it, was the proximate cause of the decedent's injuries.

The court framed the issue in *Craig* as whether the legislature, in creating an affirmative remedy, intended to occupy the field of dram shop litigation, or, whether a common law remedy would frustrate the act so as to prevent the courts from recognizing a common law cause of action arising from the service of alcohol. *Craig* at 323-24. In resolving this question, the court reviewed two conflicting Connecticut precedents: *Kowal v. Hofher*, 181 Conn. 355, 436 A.2d 1 (Conn. 1980) (legislature did not intend for dram shop act to be exclusive remedy against a seller of alcohol beverages) and *Quinnett v. Newman*, 213 Conn. 343, 568 A. 2d 786 (1990) (negligence for serving alcohol not a viable action at common law because of the intervening act of the immoderate consumer whose intoxication brings about intoxication and subsequent injury). In a surprising decision, the court overruled the more recent *Quinnett*, and reverted to the holding of *Kowal*, noting the inconsistency between the two cases.

Kowal addressed the same preemption issue presented in *Craig*, *i.e.*, whether one who served alcoholic beverages to an intoxicated person could have proximately caused the injury to a third party that followed.[11] The *Kowal* court reasoned that Connecticut's dram shop law contains no provision barring common law liability; nor does the statute require a showing of a causal relation between the sale of intoxicating liquor and the subsequent injury. Further, the statute does not contain any provision that states that it is an exclusive remedy. *Kowal*, 181 Conn. at 358-59, 436 A.2d at 1. However, despite this rationale, the *Kowal* court rejected the plaintiff's negligence claim, yet determined that the plaintiff's claim based on reckless conduct could proceed. *Id*. at 361, 436 A.2d at 1.

Ten years later, when the court considered *Quinnett*, it concluded that the dram shop statute precluded a common law negligence action against a licensee for service of alcohol beverages to an intoxicated patron who injures another.[12] Oddly, the *Quinnett* decision did not even mention *Kowal.* The *Craig* court found that there was no meaningful factual distinction between the two cases (resulting from the negligence and recklessness claims or otherwise), and overruled *Quinnett* in favor of the rationale in *Kowal*.

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[11] In *Kowal*, the plaintiff's decedent was killed by a drunk driver who had been served at the defendant's restaurant.

[12] In *Quinnett*, the plaintiff's decedent was killed by a drunk driver who had been served at the defendant's bar.

In addition to overruling *Quinnett*, the Connecticut Supreme Court resolved this apparent inconsistency by probing the limitations of the dram shop statute. The court noted that the statute provides a means of recovery for plaintiffs who are unable to prove causation and culpability, subject to a statutory damages cap. Specifically, to bring a cause of action under the statute, a plaintiff must prove that: (1) there was a sale of alcoholic liquor; (2) the sale was to an intoxicated person; and (3) the intoxicated person caused injury to another person's property as a result of his or her intoxication. In other words, the dram shop statute provides for a strict liability type action, without the burden of proving knowledge by the licensee of the patron's intoxication (which would be required in a negligence action), and without the broader scope of recovery (available through a negligence action).

Therefore, the *Craig* court concluded that the dram shop statute:

> sets, in essence, a minimum recovery opportunity for persons injured as a result of the sale of liquor to an intoxicated person. By setting a *floor*, however, the legislature did not also intend to be setting a *ceiling* – and we are free, therefore, to exercise our common law authority to increase the recovery opportunity in circumstances where the state of mind of the bar owner warrants it.

(Emphasis in original). *Id*. at 328.

Based on this logic, the court found that the statute could not occupy the field of liquor liability, and that plaintiffs have the ability to supplement statutory causes of action based on the dram shop statute with negligence claims.

The *Craig* court's final inquiry, once it had determined that the dram shop statute had not preempted the plaintiff's cause of action, was to decide whether it is possible for the service of alcohol to proximately cause injury to a third party. The defendants argued, based on traditional dram shop law principles, that negligently providing alcoholic beverages to an already intoxicated person cannot be the proximate cause of subsequent injuries caused by the intoxicated person. Their theory was based on the presumption that consumption is the proximate cause of such an accident because it is an intervening force sufficient to shift all responsibility from the seller of the alcohol to the intoxicated person. The court disagreed, finding that Connecticut's general proximate cause jurisprudence does not recognize tortious acts by third parties as an intervening force if such acts are within the scope of the risk created. *Id.* at 333. Therefore, the court rejected the notion that a seller of alcohol cannot be the proximate cause of such an accident. *Id.* at 334. "If a defendant's negligence was a *substantial factor* [as that term is defined] in producing the plaintiff's injuries, the defendant would not be relieved from any liability for those injuries even though another force concurred to produce them." (emphasis in original) *Id*. at 335. "It seems self evident that the serving of alcoholic beverages to an obviously intoxicated person by one who knows or reasonably should know that such intoxicated person intends to operate a motor vehicle creates a reasonably foreseeable risk of injury to those on the roadways. Simply put, one who serves alcoholic beverages under such circumstances fails to exercise reasonable care and therefore may be held liable in negligence." *Id*. at 339-40.

The *Craig* decision, published in February, 2003, caused anxiety among licensees in Connecticut. In June, 2003, the legislature amended General Statutes §30-102. The amendment increased the statutory damages cap for both individual and aggregate claims to $250,000. More importantly, the legislature inserted the following sentence at the end of the statute: *"Such injured person shall have no cause of action*

against such seller for negligence in the sale of alcoholic liquor to a person twenty-one years of age or older." (Emphasis added).

Following the passage of the amendment, the *Craig* defendants filed a motion in the trial court to strike the negligence claims in the plaintiffs' complaint. The court denied the motion, holding that because the amendment represented a change in the substantive law, and not merely a clarification, the amendment would operate prospectively only. *Craig v. Driscoll*, 2003 Conn. Super. LEXIS 2482, *5 (Aug. 28, 2003). The trial court decision cited the Bill Analysis from the Office of the Legislature and noted that the Bill Analysis acknowledged the Connecticut Supreme Court's decision in *Craig*, and did not criticize it. *Id*. at *2-3.

In the recent amendment, the Connecticut legislature appears to have provided the very type of exclusionary language the *Craig* court found the former version of the statute to be lacking. Superficially, at least, it would seem that the *Craig* decision now has little value as a precedent for dram shop liability cases – or, does it? The amendment raises several questions for the fate of *Craig*, and even for the future of *Kowal* and *Quinnett*. Will *Quinnett* once again become good law? Will a future court draw a finer distinction between negligence principles (arguably preempted by the amendment) and the recklessness standard discussed in *Kowal* and glossed over by the court in *Craig*?[13] Or, will the holding of *Craig* be preserved and limited on its facts to infliction of emotional distress cases? Further, will there be no bounds to the apparent exclusive remedy clause in the statute, such that it will prohibit negligence actions involving a known alcoholic, or a person who is obviously intoxicated?

Whatever the effect of the amendment, at the very least, *Craig* may still provide a rationale and a model for other state courts struggling to reconcile legislated limitations on liability with traditional tort principles in cases where the statute at issue does not clearly exclude the possibility of a tort remedy.

B. FIRST PARTY ACTIONS ARE RARELY SUCCESSFUL

It has always been true that first party dram shop actions are successful only in limited circumstances.[14] This is particularly true when the plaintiffs are adults. Recently, the Supreme Court of Mississippi reaffirmed this position in *Bridges v. Park Place Entertainment*, 2003 Miss. LEXIS 758 (December 4, 2003). The *Bridges* court declined to extend relief to the plaintiff, even though he was actually

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[13] The *Craig* court did redefine reckless conduct as something beyond mere negligence: "While we have attempted to draw definitional distinctions between the terms willful, wanton or reckless, in practice the three terms have been treated as meaning the same thing. The result is that willful, wanton, or reckless conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent. . . . It is at least clear . . . that such aggravated negligence must be more than any mere mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertence, or simply inattention." (Internal quotation marks omitted.) *Craig v. Driscoll,* 262 Conn. 312, 342-43, 813 A.2d 1003 (2003). Furthermore, other Connecticut cases have held recklessness and negligence to be separate and distinct causes of action. "It is well established that causes of action for negligence and [recklessness] are separate and distinct causes of action. There is a substantial difference between negligence and [reckless] conduct, and a complaint should employ language explicit enough to inform the court and opposing counsel clearly that [reckless] conduct is being asserted." *Warner v. Leslie- Elliot Constructors, Inc.,* 194 Conn. 129, 138, 479 A.2d 231 (1984).

[14] Again, a "first party" action is one where the intoxicated person who was subsequently injured sues the licensee who sold him or her alcohol beverages. This section discusses the contrast between first party actions and "third party" actions, or those where an unrelated third person, injured by an intoxicated person, sues the establishment that sold the intoxicated person alcohol beverages.

injured by a third party. First party cases may be divided into two categories: those where the plaintiff injures himself or herself (*e.g.*, the plaintiff leaves a bar and runs into a telephone pole with his car), or the plaintiff is injured by a third party as a result of his or her own intoxication (*e.g.*, the plaintiff leaves a bar and drives the wrong way down a one way street and is hit by an oncoming car). *Bridges* is the latter type of case.

In *Bridges*, the plaintiff had been gambling and drinking with his wife at a casino. He left the casino with his wife's assistance and the two of them drove away with the wife at the wheel. At some point during the drive home, the plaintiff tried to get out of the car, causing his wife to pull over onto the shoulder of the road. The plaintiff did get out of the car, walked onto the highway toward oncoming traffic, and was hit by a car. The plaintiff sued the casino and alleged that his injuries were the direct and proximate result of the casino's serving him alcoholic beverages when he was visibly intoxicated.

The court concluded that although Mississippi's dram shop laws allow recovery for third parties (both minors and adults) against a business furnishing alcohol beverages resulting in negligent acts of an intoxicated person, those laws do not extend so far as to permit recovery for first party actions, where plaintiffs are injured as a result of their own voluntary consumption. *Id*. at *9.

As in *Bridges*, the majority rule in the United States is to prohibit such first party actions. *See, e.g.*, *Wright v. Moffitt*, 437 A.2d 554 (Del. 1981) (patron who purchases alcoholic beverages from tavern operator does not have a cause of action against a vendor for personal injuries resulting from the patron's voluntary intoxication); *Reed v. Black Caesar's Forge Gourmet Restaurant, Inc.*, 165 So. 2d 787 (Fla. Dist. Ct. App. 1964) (complaint did not state a cause of action because "the death of the plaintiff's husband was the result of his own negligence or his own voluntary act of rendering himself incapable of driving a car rather than the remote act of the defendant in dispensing the liquor"); *Riverside Enters., Inc. v. Rahn*, 171 Ga. App. 674 (Ga. Ct. App. 1984) (no cause of action in favor of an injured adult against the seller of alcoholic beverages when injuries arose from injured person's intoxication, even when the person was noticeably intoxicated at the time the beverages were purchased); *Bertelmann v. Taas Assocs.*, 69 Haw. 95 (Haw. 1987) (intoxicated persons who voluntarily consume alcohol cannot seek recovery from the bar or tavern which sold them that alcohol if they harm themselves as a result of their voluntary intoxication); *Davis v. Stinson*, 508 N.E.2d 65 (Ind. Ct. App. 1987) (intoxicated driver's operation of an automobile upon a public highway constitutes willful and wanton misconduct which bars recovery against the provider of alcohol for injuries to the driver); *Gregor v. Constitution State Ins. Co.*, 534 So. 2d 1340 (La. Ct. App. 1988) (serving of alcohol to an intoxicated patron is not an affirmative act which increases peril to the intoxicated patron for which a vendor could be held liable); *Fisher v. O'Connor's, Inc.*, 53 Md. App. 338 (Md. App. 1982) (no cause of action against a bar or tavern owner for injuries sustained by a person to whom the bar or tavern owner sold intoxicating beverages); *Jackson v. PKM Corp.*, 430 Mich. 262 (Mich. 1988) (under Michigan's dramshop act, an intoxicated person has no right to recovery from those who contributed to his intoxication); *Trujillo v. Trujillo*, 104 N.M. 379 (N.M. Ct. App. 1986) (patron has neither a common-law nor a statutory claim against a tavern for the negligent sale of alcohol to such patron); *Sheehy v. Big Flats Cmty. Day, Inc.*, 73 N.Y.2d 629 (N.Y. App. Div. 1989) (common-law cause of action will not be recognized against providers of alcoholic beverages in favor of persons injured as a result of their own voluntary intoxication); *Hamm v. Carson City Nugget, Inc.*, 85 Nev. 99 (Nev. 1969) (common law rule of non-liability was adopted; if civil liability were to be imposed upon commercial alcohol vendors, it should be accomplished by "legislative act after appropriate surveys, hearings, and investigations"); *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 332 N.C. 645 (N.C. 1992) (recovery in the wrongful death action against the seller of the alcohol by the estate of a twenty-one-year-old who was fatally injured as a result of driving while in a highly intoxicated state was barred); *Smith v. The 10th Inning, Inc.*, 49 Ohio St. 3d 289 (Oh. 1990) (intoxicated patron has no cause of action

against a liquor permit holder where the injury sustained by the patron off the premises of the permit holder was proximately caused by the patron's own intoxication); *Ohio Cas. Ins. Co. v. Todd*, 813 P.2d 508 (Okla. 1991) (tavern owner has no liability to intoxicated adult who voluntarily consumes alcoholic beverages to excess and sustains injury as result of his intoxication); *Tobias v. Sports Club, Inc.*, 332 S.C. 90 (S.C. 1998) (first party causes of action against a tavern owner by an intoxicated adult predicated on alleged violation of alcohol control statutes are not recognized); *Langle v. Kurkul*, 146 Vt. 513 (Vt. 1986) (state's dram shop act provides no remedy to intoxicated person against commercial vendor); *Estate of Kelly ex rel. Kelly v. Falin*, 127 Wash. 2d 31 (Wash. 1995) (commercial establishment owes no duty to obviously intoxicated patron to whom it serves alcohol).

Some plaintiffs suing on behalf of decedents, aware of the restrictions on first party actions, have tried to restyle their lawsuits as if they were actually cases for third party damages. For example, in *Widmer v. Hoover*, 342 Ill. App. 3d 280 (Ill. Ct. App. 2003), the husband of a woman who drove her car into a lake and drowned sued the bar where the woman and a friend had been drinking on the evening of the accident. As a result of Illinois' Family Expense Act[15] he became liable for his wife's medical and funeral expenses, and asserted that he should be able to recover under Illinois' dram shop statute for his property damage.[16]

The *Widmer* court rejected the plaintiff's attempt to categorize his wife's medical and funeral expenses as a third party damage to property claim. Because the plaintiff's monetary claims were directly attributable to injuries suffered by his intoxicated decedent, they were not recoverable. The court held that the wife's death did not convert the claim for what were essentially first party expenses (which she would have been unable to recover had she lived) into a third party claim. *Id.* at 283.

Although as a result of *Bridges* it seems the argument will not work in Mississippi, in some jurisdictions, first party actions may proceed upon a finding that the plaintiff was served while visibly intoxicated. *See*, *Lyons v. Nasby*, 770 P.2d 1250 (Colo. 1989) (although voluntary intoxication is a self-indulgent act, a tavern owner owes an intoxicated patron a duty of care not to serve that person alcohol); *Klingerman v. SOL Corp.*, 505 A.2d 474 (Me. 1986) (intoxicated person may recover damages on negligence theory from the person who sold him alcoholic beverages while he was visibly intoxicated); *Jevning v. Skyline Bar*, 223 Mont. 422 (Mont. 1986) (tavern is not responsible for furnishing a person with alcoholic beverages unless that person is visibly intoxicated); *Fulmer v. Timber Inn Restaurant & Lounge, Inc.*, 330 Or. 413 (Or. 2000) (plaintiff may bring a common-law negligence action against a person or entity that negligently supplied alcohol to the plaintiff when he or she already was visibly intoxicated and the plaintiff suffered injuries caused by that negligent conduct); *McDonald v. Marriott Corp.*, 388 Pa. Super. 121 (Pa. Super. Ct. 1989) (under Pennsylvania's dram shop law, in order for to avoid summary judgment, plaintiffs must demonstrate genuine issue of fact that defendant served alcohol to the injured party while he was visibly intoxicated and that it was that conduct that proximately caused the accident).

Two recent cases from Kentucky and New York confirm that the other exception to the "no first party" rule is for minors. In *Sixty-Eight Liquors, Inc. v. Colvin*, 118 S.W. 3d 171 (Ky. 2003), the decedent's estate and his parents sued a liquor store claiming that the store's sales to the decedent caused his injuries. The issue before the court was whether, in light of Kentucky's dram shop statute which specifically declares consumption to be the cause of alcohol accident-related injuries, the decedent's estate had a cause of action against the store even if it could be proven that his intoxication was the cause of his death. The court concluded that the statute could not protect from liability a "dram shop" that made an illegal sale. *Id.* at 175.

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[15] The Family Expense Act is codified at 750 ILCS 65/15 (West 2002).

[16] Illinois' dram shop act is codified at 235 ILCS 5/6-21 (West 2002).

In a recent New York decision, *McNeill v. Rugby Joe's, Inc.*, 298 A.D. 2d 369 (N.Y. App. 2002), the decedent's parents sued a bar where their son had spent the whole night drinking. He disappeared that evening and was found dead six weeks later in the water near the Brooklyn pier. The defendants argued that there was no causal link between their service of alcohol and the death. The court disagreed, finding that because the alcohol was illegally sold, there must only be a "reasonable or practical connection" between the sale of alcohol and the resulting injuries; the proximate cause standard that would be required in a negligence action is not used. *Id*. at 369-71.

C. RECENT CASES ON ACCIDENTS OCCURRING OFF THE PREMISES: PARKING LOTS, HIGHWAYS, AND OTHER HAZARDOUS PLACES

Many so called "dram shop" cases against bars and restaurants are not brought under the guise of any statute; rather, they are common law tort cases involving injury caused by an intoxicated person. Many of these cases can be classified as off premises cases, or, put another way, cases where the court must decide whether there is a causal connection sufficient to link the alcohol related injury back to a licensed premises. In many of these cases, there is no liability on the part of the licensee for these injuries.

Last year, the Court of Appeals of Ohio decided three such cases. In all three instances, the licensee was found to be not liable. In the first case, *McManes v. Kor Group*, 2003 Ohio App. LEXIS 1685 (April 4, 2003), the court considered whether a licensee could be liable for off-premises injuries to a patron, where the bar's security guard was involved in the event. Following a fight inside the bar and after being asked to leave by bar employees, McManes, a bar patron, died from injuries he sustained in a drunken brawl in the bar's parking lot. The bar's security guard was able to keep other patrons away from the fighting, but was not able to prevent it. The security guard called police, but only after the fight was over. The plaintiff did not sue under the dram shop law, but rather under the theory that the bar assumed a duty to provide security and then failed to provide it.

The court held that although it is possible for a landowner to assume a legal duty of security in Ohio, the scope of that duty depends on the status of those who enter the land. In this case, after McManes had been expelled from the bar, he became a trespasser on the bar's property rather than an invitee. Once he became a trespasser, the bar's duty to protect him became limited to protection from willful, wanton, or reckless conduct only. *Id.* at *18-19.[17]

The same court considered another assault case just a few months later, in *McKinley v. Chris' Band Box*, 794 N.E. 2d 136 (Ohio Dist. Ct. App. 2003); however, *McKinley* included statutory dram shop claims. *McKinley* involved a parking lot stabbing outside of the bar where all four of the participants had been served alcohol. The plaintiff sued under the section of Ohio's dram shop law that confers liability for injuries and losses arising from the negligent acts or omissions of intoxicated persons when they occur in the parking

[17] The *McManes* court left open the possibility of liability had the patron not been expelled from the bar. A California appellate court recently addressed a distinguishable case related to bar security. Unlike in *McManus*, where the security guards were employees of the licensee, *Elizarras v. L.A. Private Security Svc., Inc.*, 108 Cal. App. 4th 237, 133 Cal. Rptr. 2d 302 (Cal. Dist. App. 2003), involved a lawsuit against a restaurant and the private security service it hired for a one-time event. The minor plaintiff's decedents sued both defendants under California's dram shop act, claiming that they had breached a duty to the minors by failing to prevent them from consuming alcohol beverages. Although the exception to the sweeping immunity provided by California's dram shop act is the service of alcohol beverages to an obviously intoxicated minor, the Court held that the security company had statutory immunity because it was not a licensee who did, or could, sell or provide alcohol to the minors. *Id*. at 242-43.

lot or otherwise off the premises, when the licensee knowingly sold an alcohol beverage to an intoxicated person and the intoxication proximately caused the plaintiff's injury, death, or loss.[18] The plaintiff claimed that the bar negligently sold the man who stabbed him alcohol beverages when the bar or its employees knew he was intoxicated or likely to be intoxicated. The defendant moved for summary judgment. One of the plaintiff's key witnesses presented contradictory evidence regarding the perpetrator's state of intoxication: in an affidavit she stated that he was clearly intoxicated, but in a subsequent deposition, she directly contradicted her earlier statement without any explanation for the inconsistency. Although the plaintiff could easily prove that his injury was caused by a third party, and that it occurred in the parking lot outside the licensed premises, he could not prove that the licensee's negligent service was the proximate cause of his injuries, and the court held that this was a fact question for a jury to decide. *Id.* at 140.

Just two months later, Ohio's dram shop law was the subject of yet another lawsuit, and the Ohio Court of Appeals again reviewed a summary judgment in favor of the defendant. However, this time the court affirmed judgment as a matter of law for the defendant. In *Maunz v. Eisel*, 2003 WL22233859 (Ohio App. 6 Dist., Sept. 30, 2003), an accident occurred when a patron of a golf club lounge drove into a car being driven by a minor, causing the minor's car to hit another head on and injure the occupant of the third car. The golf club moved for summary judgment under the dram shop statute, and submitted an affidavit of an employee who stated that she was relatively familiar with the patron, and that he was not visibly intoxicated when he left the lounge. Because the affidavit was uncontroverted, the court granted summary judgment in favor of the lounge. *Id.* at *5.

Assault cases and traffic accidents are relatively common off-premises fact patterns, but other types of accidents trigger the off-premises/proximate cause inquiry. For example, in *Zapata v. Cormier*, 2003 WL 21480580 (La. Ct. App., June 27, 2003), the decedent's wife sued a bar after her husband was killed crossing the street to return to their car. After having been at another bar, the couple decided to go to the defendant's premises. After trying unsuccessfully to find a nearby parking space, the couple parked across a busy highway, and walked to the bar. When they left, the husband was hit by an oncoming car and then run over by a truck, as he attempted to cross the highway to get back to the car. The wife sued on the basis that the bar failed to provide adequate parking, failed to provide a safe environment, and failed to warn customers of a "trap like" situation. *Id.* at *3. The bar moved for summary judgment, arguing that Louisiana's dram shop law expressly provides that the consumption, not the service, of alcohol is the proximate cause of injuries.[19] The question remained whether the bar owed the decedent a duty of care beyond that set forth in the statute. The court held that because the bar owner did not own the highway, its duty of care did not extend that far, and that therefore the bar could owe the decedent no legal duty on the highway. *Id.* at *9.

IV. CONCLUSION

As demonstrated throughout this presentation, any review of food and alcohol beverage liability case law will run the gamut of different types of tort liability, with negligence and strict liability appearing most frequently. It is clear that there is no national consensus in these cases, and therefore industry members and practitioners must be mindful of the most recent law in any state where they do business. Common issues, however, repeatedly arise. Does a statute control, or the common law, and is there a conflict between the two? Is there a proximate causal connection between the injury and the alleged failure to exercise reasonable care? If an allegation exists that a duty has been breached, to whom was the duty owed, and what was the

[18] The relevant statutory section is Ohio R.C. § 4399.18.

[19] *See* La. Rev. Stat. §9:2800.1.

standard of care? Regardless of whether the issue before the court is the application of the reasonable expectation test in a food case, or statutory preemption in a dram shop case, these questions will still arise, and as litigants and courts further refine the law of torts in this field, further answers will develop.

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