Food and Beverage Litigation Survey

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Ms. DeConti is a shareholder in the Tampa office and is a member of the firm's Alcohol Beverage and Food Team. Prior to joining GrayRobinson, she was a partner with the Tampa office of Holland & Knight and a judicial clerk for the Honorable Antoinette L. Dupont, Chief Judge of the Connecticut Appellate Court. She earned her B.A. *cum laude* and with Distinction in Renaissance Studies from Yale University in 1993 and then received her J.D. *cum laude* in 1996 from the University of Miami School of Law, where she was a Harvey T. Reid Scholar.

Awarded the highest rating assigned by Martindale-Hubbell Law Directory "AV", Ms. DeConti focuses her practice on litigation and compliance matters related to the rules, regulation and business practices that govern the marketing, sale, and consumption of malt beverages, wine, distilled spirits, and other regulated products in the alcohol, food and dairy industry. She is also a circuit court mediator certified by the Supreme Court of Florida.

Ms. DeConti's trial experience includes commercial, franchise, intellectual property, and ADA cases litigated on behalf of major breweries, alcohol suppliers, wholesalers, retailers, and other members of the hospitality industry in state and federal courts and administrative agencies throughout the United States. In addition to her court experience, she represents many clients in alternative dispute resolution. She also advises clients on issues pertaining to trade regulation and marketing practices in the food, beverage and dairy industry, and concentrates on regulatory compliance, as well as advertising and promotional law. Ms. DeConti also drafts contracts related to advertising, distribution, importation, and related issues associated with the food, beverage and dairy industry.

In addition, she is fluent in Italian and French, and advises European clients on international and domestic matters. Ms. DeConti's international experience has included the negotiation, sale and purchase of Italian wineries, liaising with Italian law firms on litigation matters pending in Italy and the United States, representation of several German breweries, and advising and counseling foreign entities seeking to import products from Western Europe into the United States.

Ms. DeConti is a member of The Florida Bar and The Connecticut Bar, and is admitted to practice before the United States Supreme Court, the United States Court of Appeals for the Eleventh Circuit, as well as the U.S. District Courts for the Northern, Middle, and Southern Districts of Florida. Additionally, she is a member of the American Bar Association, the Federal Bar Association, and the Hillsborough County Bar Association. She is also a frequent lecturer to the alcohol beverage and hospitality industries.

EDUCATION:

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COURT ADMISSIONS:

- Florida (1996)
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- United States District Courts for the Middle, Northern and Southern Districts of Florida
- United States Court of Appeals for the Eleventh Circuit
- United States Supreme Court

PUBLICATIONS:

- *Food and Beverage Liability Update* – Thursday, February 2, 2006
- *Beverage Marketing* - Tuesday, January 11, 2005
- *Ingredients of a Food Related Lawsuit* - Tuesday, January 4, 2005
- *An Introduction to Food Liability* - Wednesday, December 1, 2004
- *Liability Arising From Service of Alcohol Beverages to Minors and How to Avoid It* - Thursday, October 7, 2004
- *What is Dram Shop Liability?* - Tuesday, August 3, 2004
- *Food & Beverage Liability Issues* - Monday, June 21, 2004
- *Beer, Bad Oysters, and Other Pitfalls: A Food and Beverage Liability Update* - Thursday, January 22, 2004
- *Emerging Trends in Dram Shop Liability Law* - Friday, January 24, 2003
- *Michigan Liquor Control Commission Issues Bulletin Restricting Combination Package Of Wine* - Wednesday, November 22, 2000
- *Iowa Undergoes Review Of Alcohol Rules And Regulations* - Thursday, June 1, 2000
- *Wineries Win First Round In Attack On Illinois' New Wine and Spirit Franchise Law* - Wednesday, March 1, 2000
- *Automobile Forfeiture Laws Crack Down on Drunk Drivers* - Sunday, December 19, 1999

CIVIC:

- American Cancer Society, Greater Tampa – Member, Operating Board (2002 – 2006)
- American Heart Association of Tampa Bay – Board of Directors (1999 – Present)
- Yale Club of Tampa Bay – Director (2001 – Present)
- Tampa Hope Lodge – Member, Capital Campaign Committee (2001 – 2002)
- Sacred Heart Church - Parishioner

LANGUAGES:

- Italian
- French

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A. FOOD LIABILITY: PRODUCT LIABILITY AND MORE

Food liability cases are based in tort law. Many are product liability cases including claims in negligence, breach of warranty and strict liability. Restaurants and other food retailers may be liable for the injuries and damages sustained by their patrons as a result of the restaurant or food manufacturer's behavior, food preparation, or other activity that was the proximate cause of the plaintiff's injuries. The outcomes of these cases vary widely by jurisdiction.

B. ALCOHOL BEVERAGE LIABILITY: DRAM SHOPS CASES AND OTHER TORT-BASED CLAIMS

"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 and third parties harmed by such persons. Dram shop liability is the most common type of liability that licensees of alcohol beverages are exposed to, and any party holding a liquor license may be subject to this kind of liability. Courts analyzing these cases decide how to apportion responsibility for the injury between the server and the drinker. The traditional common law rule in most United States jurisdictions was that the consumption of alcohol, rather than the furnishing of it, was the proximate cause of alcohol-related accidents. In many contexts, this is still the rule. Today, all fifty states have a statutory scheme to address these issues. In most cases, the statutes attempt to limit the licensed provider of alcohol's liability to certain delineated situations.

II. FOOD LIABILITY

Food liability claims can involve restaurants, hotels/motels, food distributors, and food suppliers. In these cases plaintiffs usually allege that the seller of the food handled or prepared the food in a negligent manner (negligence cause of action) and/or that the food product in and of itself was defective and unreasonably dangerous (strict liability cause of action). In addition, plaintiffs may allege more sophisticated complaints arising out of illness or injury from a foreign object in the food, allergens, or food poisoning (usually an e-coli or other bacteria claim).

A. THE PRODUCT LIABILITY CASE INVOLVING FOOD: NEGLIGENCE AND STRICT LIABILITY

Foods sold in restaurants, bars, hotels, and other venues are considered "products" like any other for the purpose of product liability litigation. Common causes of action are negligence, breach of warranty, and strict liability. As with most product liability cases, all companies, entities, or persons in the chain of distribution and sale of the product to the ultimate consumer may be added as defendants to the case. Therefore, if you operate a restaurant or bar, conceivably any "defective" food product which you serve your customers could be the cause for a product liability suit against you under appropriate circumstances.

A common food liability fact pattern involves injury claims arising from hot foods and beverages, particularly coffees and teas. Plaintiffs in these cases frequently allege strict liability based on the premise that the hot item is inherently and unreasonably dangerous in and of itself, and/or that the preparer was negligent in making the food or beverage item too hot. *Colbert v. Sonic Restaurants, Inc.*, 2010 WL 3769131 (W.D. La. Sept. 21, 2010) is such a case.

Plaintiff Colbert ordered a coffee with cream and sweetener from a Sonic drive-thru and asked the attendant to mix the cream and sweetener in the coffee for him. When Colbert pulled off the top of the lid to mix his sweetener and cream, he spilled the coffee and suffered second degree burns on his groin area, stomach and abdomen, and thigh. Colbert sued Sonic and alleged that the chain was negligent in failing to warn how hot the coffee was, failing to keep the coffee at a proper temperature, and failing to make sure its coffee cups were in a safe condition. Sonic and its liability insurer moved for summary judgment.

The federal district court for the Western District of Louisiana reviewed Colbert's claim under the state's product liability statute. Under the statute Colbert would have to prove: (1) that Sonic was the manufacturer of the coffee; (2) that his injury was proximately caused by a characteristic of the product; (3) that this characteristic made the product "unreasonably dangerous"; and (4) that the injury arose from anticipated use of the product by Colbert. *Id*. at *2. A plaintiff in Colbert's position could prove that the coffee was unreasonably dangerous in construction or composition, in design, because of an inadequate warning, or because it does not conform to an express warranty provided by the manufacturer. *Id.* Colbert alleged that the coffee was unreasonably dangerous in its construction or composition and because of an inadequate warning.

The court focused on the construction or composition claim first. In order to make this claim, the plaintiff must prove that the product is defective due to a mistake in the manufacturing process. *Id*. Sonic introduced evidence through several experts indicating that the temperature of the coffee was within the accepted industry range. The testimony presented by Colbert was nothing more than broad conclusory statements of his own impressions that the coffee was too hot. The court found, therefore, that Colbert failed to prove an essential element of his claim. *Id*. at *5.

The court then reviewed Colbert's inadequate warning claim. Louisiana law on the duty to warn does not extend to obvious dangers or those within common knowledge. Manufacturers are further relieved of their duty to warn "sophisticated users" of their products. The record in the case revealed that Colbert was indeed a "sophisticated user" of Sonic coffee, who should have knowledge about any dangers inherent in the product. He admitted that he has purchased coffee from Sonic numerous times before the incident in question, and in fact had spilled hot coffee on himself on other occasions. Colbert argued that he should be categorized as a "special request customer" because he had requested that the attendant mix the sweetener and cream in the coffee, but the Court concluded that this request only supported the notion that Colbert was a sophisticated consumer of coffee who knew that the coffee would be hot. *Id*. at *6. Based on these conclusions, the court entered Sonic and its insurer's respective motions for summary judgment and denied Colbert's claims.

B. FOREIGN OBJECTS IN FOOD

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 reasonable expectation test. 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 Cafe & 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*, l 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.

Ironically, although *Porteous* is frequently cited to explain the difference between the foreign/natural and reasonable expectation tests, the *Porteous* court declined to adopt either test, and instead held that the appropriate analysis is the duty risk tort analysis. This continues to be the law in Louisiana today. *See Williams v. A&M Operating Co., Inc.,* 2007 WL 4246001 (La. Ct. App. Dec. 5, 2007). Notwithstanding the vagaries of the Louisiana cases, the reasonable expectation test is the rule in most jurisdictions.

It seems that the hamburger fact pattern dominates this area more than any other scenario. Plaintiff orders hamburger, plaintiff bites on something strange in hamburger, plaintiff breaks tooth (or worse)! The outcome of these cases, however, depends on what the plaintiff bit into

and whether he or she can prove it. In last year's update we discussed *Cotter v. McDonald's Rest. Of Mass., Inc.*, 887 N.E. 2d 313 (Mass. Ct. App. 2008). *Cotter* is now the seminal case in Massachusetts interpreting the reasonable expectation test as applied to hamburgers and similar food items. In *Cotter*, the plaintiff purchased a meal at a McDonald's drive thru, and proceeded to eat his burger as he drove. He bit down on something hard, which he estimated to be the size of a BB. He tried to move the object around in his mouth to determine what it was, when he began to choke on the large mouthful. He spit the large mouthful out the window, and continued driving. He continued with his plans for the day, which included a fishing trip with his boss. The next day the plaintiff was in pain, and went to the dentist. He was diagnosed with a cracked wisdom tooth that needed extraction by an oral surgeon.

The plaintiff notified McDonald's by letter of his injuries. The parties were unable to resolve the matter, and so the plaintiff sued for negligence and breach of warranty. The trial judge granted McDonald's "no evidence" motion for summary judgment on the basis that there was no way to determine that the object plaintiff bit came from the hamburger (for example, it could have been a piece of his own tooth) and the plaintiff could offer no information about what the product was, other than its approximate size. The appellate court affirmed, because in order for the plaintiff to overcome McDonald's motion, he would have had to show that the object in the hamburger was something that a consumer would not reasonably expect to find therein. Id. At *1. Given the minimal amount of information plaintiff could offer, the jury would not be able to apply the reasonable expectation test.

This year's version of *Cotter* is *Burns v. McDonald's Corp.,* 2010 WL 4226278 (Mass. App. Div. Oct. 20, 2010), which involved similar facts. Plaintiff Burns was eating a double cheeseburger while driving his truck, and felt a molar break on a hard object which he could not recover. The bite apparently occurred while Burns was braking hard to prevent a traffic accident, and he testified that he had to push the cheeseburger into his mouth in order to grab the wheel. He spit out into a napkin and found tooth fragments, but no other objects. Coincidentally, about one month before this incident a piece of the same tooth "had come off" while Burns was eating.

McDonald's filed a motion for summary judgment based on the *Cotter* decision and Burns' inability to identify the cause of his tooth injury. The court found that Burns had no expectation of either demonstrating the identity of the object he allegedly bit down upon, or of establishing that the object was one that a consumer should not reasonably have expected to find in a cheeseburger. Therefore, the court affirmed the trial court's entry of summary judgment in favor of McDonald's.

Although *Cotter* and *Burns* focused on physical injuries, other cases involving foreign objects in food can involve claims centered upon emotional distress. A stomach turning example is *Bylsma v. Burger King Corp*., 2010 WL 4702296 (D. Or. Sept. 3, 2010). Plaintiff Bylsma, a sheriff's deputy, sued Burger King for the physical injuries and emotional distress he suffered when he found a glob of human saliva on the hamburger he ordered. He filed a complaint alleging product liability, negligence, and vicarious liability based on respondeat superior.

The evidence revealed that Bylsma was uneasy following his encounter with a Burger King employee at the drive-thru, and pulled over to examine his hamburger before he ate it. He saw the phlegm on the burger, and took a photo and video of it. Later, local police analyzed the burger in a crime lab and conclusively determined that the substance Bylsma saw was indeed human saliva. Based on these test results, search warrants were obtained for two Burger King employees and oral swabs were obtained. These tests showed a DNA match to the saliva of one of the employees, who was arrested for felony assault. *Id*. at *1.

After performing a conflict of laws analysis of what state's law should apply to the case, the court reviewed the case under Washington state's product liability statute. The statute was designed to preempt previously existing common law remedies, including negligence, in favor of creating a single cause of action for product-related harms. *Id*. at *2. Therefore, Bylsma's claims would be confined to remedies allowed by the statute.

The court began with an analysis of whether Bylsma could claim emotional distress based on his "proximity to a contaminated hamburger" when he did not eat the hamburger and did not suffer harmful physical contact with the offensive product. The court found that the state's product liability act was silent on this issue. *Id.* at *5. Furthermore, the court found that Bylsma's complaint did not allege intentional conduct by the Burger King employee, thus weakening his claim. Finally, the court held that Bylsma's other claims for negligence and vicarious liability failed as a matter of law because they were preempted by the state product liability statute. Therefore, the court denied Bylsma's claims and granted Burger King's motion for judgment on the pleadings. *Id*. at *6.

C. ALLERGENS

Allergen cases are another genre of food liability case. Some of the common issues in these cases are whether the consumer plaintiff informed the restaurant of an allergy, whether the menus contained product information about common allergens, and how the waitstaff handled information from customers about allergies, among others. Avoiding liability in allergen-based cases can be very difficult for restaurants, especially because some of the most common allergens, *e.g*., dairy, nuts, strawberries, are so prevalent in restaurant recipes. *Anderson v. Real Mex Restaurants, Inc.*, 2010 WL 457522 (D. Md. Feb. 3, 2010) is an example of a case filed by a plaintiff with a dairy allergy.

Plaintiff Anderson had a well-established dairy allergy since childhood. On the occasion in question, she ate at a Chevy's restaurant with four friends, and she ordered a chopped salad. The standard chopped salad at Chevy's was served with blue cheese, and because Anderson was allergic to the blue cheese, she requested that it be removed. Apparently she had made this same order without incident on at least four prior occasions. Anderson looked at her salad to make sure the cheese was missing, did not see any cheese, and ate the salad. Anderson's friends all ordered menu items with dairy ingredients, including a guacamole appetizer prepared tableside, and Anderson did not share them. After Anderson left the restaurant, she suffered a severe allergic reaction and was hospitalized.

Anderson sued the restaurant chain on a negligence theory of *res ipsa loquitur*. In short, she argued that there could be no other explanation for her injuries other than Chevy's negligently leaving some cheese in the salad. The restaurant moved for summary judgment. The court found that Plaintiff had insufficient evidence that the source of the dairy product was the salad, and that she was not able to conclusively exclude other sources. As a result, the Court held that Anderson's *res ipsa loquitur* claim failed as a matter of law. *Id*. at *3.

D. BACTERIAL INFECTIONS – FOOD POISONING!

Frequently litigation arises as a result of the plaintiff having become ill from a bacterial or viral infection he or she contracted directly from food or from an infected restaurant worker. "Food poisoning" cases fall within this category. The following cases are examples of these problems.

In *Corbi v. Harrah's Hotel & Casino*, 2010 WL 4226523 (D. N.J. Oct. 21, 2010), the plaintiffs, a married couple, sued Harrah's after they claimed they contracted salmonella after eating in a Harrah's restaurant or restaurants. Within twenty-four hours of their arrival at Harrah's, both plaintiffs were very ill. Mrs. Corbi's injuries were more serious; she suffered a ruptured colon and acute peritonitis and required two surgeries.

The plaintiffs were able to present to the court a detailed list of the foods they ate in common for sixty-five hours prior to the onset of illness. Plaintiffs presented expert witnesses who opined that the contaminated food had to have come from Harrah's because of the type of foods the plaintiffs consumed and the timing of the consumption relative to their becoming ill. Harrah's presented its own experts who introduced testimony to oppose these claims. Harrah's filed a motion for summary judgment.

The court focused on whether the Plaintiffs could offer evidence from which a reasonable jury could conclude that the food they consumed at Harrah's was the proximate cause of their salmonella poisoning. The court cited other New Jersey food poisoning case precedents holding that a plaintiff may survive a motion for summary judgment if the court may draw the inference that the defendant (or another party not before the court) is responsible for the wrongful conduct and each defendant before the court fails to prove that it is not responsible for the plaintiff's injuries. *Id*. at *6.

Here, the court found that based on the evidence presented by plaintiffs, a reasonable jury could conclude that their salmonella poisoning was caused by a food item they ate at Harrah's. Furthermore, plaintiffs introduced evidence that documented sanitation violations at Harrah's supported a causal connection between the food consumed and the onset of illness. Health inspection reports from before and after plaintiffs' stay indicated that the restaurant consistently failed to meet industry standards for safety and cleanliness. *Id.* at *7. Based on this evidence, the court denied Harrah's motion for summary judgment.

Griffin v. Wilcohess, LLC, 2010 WL 3803695 (D. S.C. Sept. 23, 2010) is another recent case involving salmonella poisoning. The plaintiff ate a double cheeseburger from a Wendy's

restaurant and later got food poisoning caused by salmonella. The plaintiff sued on a negligence theory and the restaurant moved for summary judgment.

South Carolina law requires the plaintiff in a case such as this to prove traditional negligence: duty, breach of duty, causation, and damages. The burden is on the plaintiff to show that the cheeseburger was unfit and was the cause of his illness.

The court found that the plaintiff was unable to prove that the cheeseburger was unfit based upon the following evidence. A district manager for Wendy's testified that 3,452 food items were sold at the Wendy's location where the plaintiff bought the cheeseburger on the same day, and there were no other reports of illness. The store maintained a 100% retail food inspection rating from the state health department. Furthermore, Wendy's introduced a Operations Standards Manual, which prohibits employees from serving undercooked food, and even the Plaintiff testified that the cheeseburger appeared fully cooked. *Id.* at *1.

In addition, the court ruled that the plaintiff could not introduce any evidence to show that the cheeseburger caused his illness; a diagnosis of salmonella from a treating physician was not enough to create that causal connection. This was compounded by testimony from a defense expert, who opined that the period of time between the time the plaintiff ate the cheeseburger and the onset of illness was too short an incubation period for salmonella. Based on all of this evidence, the court found that any factual disputes that could be raised by the plaintiff were not material, and therefore were not sufficient to defeat the defendant's motion for summary judgment. *Id*. at *2.

Notably, both *Corbi* and *Griffin* illustrate the weight that restaurant inspection reports carry in evidence, though with different results. *Corbi* demonstrates how a pattern and practice of poor reports and violations can tip the scales in a plaintiff's favor, while *Griffin* is an example of how an exemplary inspection record can be a strong defense for a food establishment in the event a plaintiff sues and is attempting to prove causation.

III. DRAM SHOP LAW UPDATE

A licensee's liability exposure in a situation where someone, either the person who consumed alcoholic beverages, or a third party, is injured in an accident involving alcohol, will depend on several factors, including but not limited to the state law where the accident occurred. The degree to which the accident was foreseeable by the licensee is always an issue. These cases involve not only automobile accidents, but also assault cases inside the licensed premises and off the premises. Recently, courts also considered some interesting legal issues raised by plaintiffs based on vicarious liability and respondeat superior theories.

A. THE FORESEEABILITY QUESTION

When judges and attorneys use the term "foreseeability" in dram shop cases, they are discussing whether a particular injury or event was predictable in advance by the licensee. Put in more colloquial terms: should the licensee have seen the accident or injury coming? Should the

licensee have "known better"?[1]

Many licensees ask how much responsibility they have for making sure patrons leave the premises safely and do not get behind the wheel of a car in an intoxicated condition. More specifically, licensees ask what duty they have to do any of the following: (1) call a taxi for the patron or otherwise find a designated driver to escort the patron off the premises; (2) follow the patron to the parking lot to make sure he or she does not get behind the wheel of a car; (3) attempt to keep the patron on the premises until he or she is ready to drive; (4) serve the patron food or non-alcohol beverages until such time as the patron is able to drive away safely. Once these duties have been assumed, how far do they go? For example, does the licensee actually have a duty to make sure that the patron actually goes home?

A recent case focusing on foreseeability issues was *Centerfield Bar, Inc. v. Gee*, 930 N.E. 2d 622 (In. Ct. App. 2010). In this case, an assault occurred inside the licensed premises. The injured customer, Gee, was playing pool with his assailant, whom he had just met at the bar. Gee was at the bar with his wife, who was dancing as the men played pool. The record reveals that when the assailant missed a shot, he said to Gee "[i]f she hadn't been shaking her f'n ass, I'd have made that shot." Gee apparently told the man "[d]on't disrespect my old lady," at which point the assailant apparently repeated "[w]ell, if she hadn't been shaking her ass, I'd have made that shot." *Id.* at 623-624. The men began to fight and the bartender and sole employee working at the time called 911. Gee was stabbed at least seventeen times and had to be airlifted to the hospital.

Gee sued Centerfield Bar and alleged that his injuries were caused by the bar's failure to remove or control the dangerous assailant. In addition, Gee claimed that the bar had served his assailant to the point of intoxication, and also that the bar was "an establishment with a history of patrons who act in a hostile and disorderly manner." *Id*. The bar moved for summary judgment, which the lower court granted in part and denied in part. The trial court entered summary judgment for the bar on the dram shop claim in which Gee alleged the assailant was served to the point of intoxication, but denied the motion with regard to Gee's premises liability claim based on evidence presented that there had been prior police calls made from the bar related to fights around the pool table and a corresponding claim that injuries at the pool table area should have been foreseeable to the bar. The bar appealed this part of the trial court's decision.

The court found that the bar, as the party moving for summary judgment, had the burden of proof to show that the fight by the pool table was not foreseeable. In making its assessment, the court reviewed the following pieces of evidence. The sole employee on duty that evening testified that she did not expect the fight because it happened so quickly and because the assailant had not given her any other cause for concern. On the other hand, the bartender testified that she had witnessed multiple fights around the pool table over the game of pool and over women. In addition, she testified that the bar did not employ any servers, bus boys, bouncers or security personnel of any type, and that she had been trained to dial 911 or the manager/owner immediately in the event of an emergency. The bartender also testified that she

[1] Black's Dictionary defines "forseeability" as: "[t]he quality of being reasonably anticipatable. Foreseeability, along with actual causation, is an element of proximate cause in tort law." (8th ed., 2004)

maintained a "barred list" of about fifteen to twenty individuals who were banned from the bar for various reasons. Finally, the court reviewed the following interrogatory response that the bar had provided in discovery:

> Our bartenders are women. They are not expected to physically control anyone. They are told to be observant and if an argument occurs, order those involved to leave. If the individuals persist in their conduct, they are to call 911. If a fight occurs, they are to dial 911 immediately.

Id. at 627.

Based on all of these facts, the court concluded that the bar could not reasonably contend that the fight at the pool table was unforeseeable, and affirmed the trial court's denial of that portion of the bar's motion for summary judgment. *Id*. at 628.

For another instructive fact pattern on foreseeability issues, see the facts of *Rizzi v. U.S. Liability Ins. Co*., 2010 WL 3174008 (Conn. Super. July 13, 2010), *infra*, discussed in section III.D. regarding insurance coverage issues.

B. ASSAULT CASES IN AND OUTSIDE THE BAR

Not all dram shop claims involving assaults begin inside the bar premises as in *Centerfield*. Traditional criminal assault or intentional tort cases may become dram shop actions if the plaintiff alleges that his or her assailant was intoxicated, even if the altercation at issue occurs off the property of the licensed premises. In such a case it is sometimes difficult to determine causation or responsibility.

Dugan v. Olson, 74 A.D. 3d 1131, 906 N.Y.S. 2d 277 (N.Y. Ct. App. 2010) is a recent example. Plaintiff Dugan was injured by defendant Olson at 1:45 am. Dugan's evening had started much earlier at dinner at a restaurant where he had consumed two beers. Later that evening, after smoking marijuana, he went to the bar of co-defendant Minnesota's Grill and Bar, where he consumed four or five beers. After leaving Minnesota's on foot, Olson encountered Dugan some two blocks away, a fight developed, and Olson hit Dugan over the head with a glass bottle. Dugan sued the bar under the dram shop act and claimed that Olson was visibly intoxicated when he left the bar. The bar filed a motion for summary judgment, which the trial court denied.

The court found that plaintiffs suing under New York's dram shop act must prove that the defendant licensed premises sold alcohol to a person who was visibly intoxicated and that the sale bore a reasonable or practical connection to the resulting damages. *Id*. at 278. Because the bar was able to present testimony that Olson was not visibly intoxicated when he left the bar and because plaintiff could not refute that evidence, the court found that the plaintiff was unable to establish a causal connection between the service of alcohol to Olson and the injury to Dugan.

C. THE EMPLOYEE PROBLEM

Dram shop cases usually involve a fact pattern where a patron comes into a retail establishment, becomes intoxicated, and leaves and causes injury to him or herself, or to a third party. However, because of the access to alcohol that employees have in restaurants, bars, and other establishments holding alcohol beverage licenses, another fact pattern involves the licensee's own employees, rather than a guest. The cases in this section address problematic situations which were ultimately caused by the retailer's employees.

In addition, businesses which do not hold alcohol beverage licenses may also become defendants under a vicarious liability or respondeat superior theory of liability if their employees are deemed to have consumed alcohol and caused an injury while in the scope of their employment.

The case of *Gray v. D&G, Inc.,* 2010 WL 4913264 (Ind. Ct. App. Dec. 3, 2010) illustrates what can go wrong when employees overserve customers they know. Plaintiff Gray drank at the Sandstone Bar from lunchtime until the bar closed at 1:00 a.m. the following morning. The bartender on duty was Gray's girlfriend, and the two of them planned to go to another bar together after Sandstone closed. However, before they had the chance to leave, Gray went outside to show another friend his motorcycle. He decided to drive the motorcycle and wrecked it, injuring himself only.

Gray sued Sandstone for his injuries, and Sandstone defended on the basis that Gray was voluntarily intoxicated. The trial court held that Gray's voluntary intoxication precluded any recovery, and he appealed.

The appellate court examined Indiana's dram shop statute and concluded that a voluntarily intoxicated adult consumer may assert a personal injury claim against the provider of alcoholic beverages if: (1) the provider had actual knowledge that the consumer was visibly intoxicated at the time the beverage was furnished and (2) if the consumer's intoxication was a proximate cause of the injury or damage alleged. *Id.* at *3. Here, the court found that genuine issues of material fact existed as to the extent of Sandstone's knowledge of Gray's intoxication, particularly given that his girlfriend was the bartender on duty. *Id.* at *5,

Last year's update included *Lev v. Beverly Enterprises Massachusetts, Inc.,* 74 Mass. App. Ct. 413, 907 N.E. 2d 1114, (Mass. Ct. App. 2009), a case involving the issue of employer host liability. Since last year's conference *Lev* was appealed, and we now also have the benefit of the decision of the Massachusetts Supreme Court in the case. *See Lev. v. Beverly Enterprises-Massachusetts, Inc.,* 457 Mass. 234, 929 N.E. 2d 303 (Mass. 2010). The facts of *Lev* were as follows.

Lev involved an employee of a nursing home company who became intoxicated at a restaurant where he had been drinking alcoholic beverages during a meeting with his work supervisor. The employee worked as a chef, and he and the supervisor discussed menus and an upcoming Department of Health Survey, both of which fell within his work responsibilities. After he left the restaurant, the chef struck the plaintiff, a pedestrian, with his car. The plaintiff

sued the Beverly Enterprises Company under the theory that the company sponsored the driver's intoxication during a work related event, and a Massachusetts trial court entered summary judgment for the defendant.

The plaintiff in *Lev* argued to the appellate court that Beverly should be liable because of its company policy which prohibited Beverly employees from drinking alcohol on the company premises or while conducting business off the company premises. The plaintiff's theory was that the violation of this policy indicated liability on behalf of the company. The court did not find this persuasive, and to the contrary, opined that finding liability on this basis would discourage businesses from adopting responsible alcohol prohibition policies for employees. 907 N.E. 2d at 1119.

Secondarily, the plaintiff also claimed that Beverly was liable under the doctrine of respondeat superior. The court also rejected this contention. The court found that there is no liability for employee travel back and forth to home for a fixed place of employment, and the court interpreted the employee's time at the restaurant as a work related activity, and therefore analogous to this principle. 907 N.E. 2d at 1120 and 1121.

On appeal to the State Supreme Court, the plaintiff reargued the respondeat superior claim against Beverly by focusing on the fact that the discussion at the restaurant was clearly work-related. The Supreme Court agreed with the conclusion of the two lower courts that respondeat superior did not apply based on the application of the "going and coming rule", which generally states that an employer is not responsible for an employee's actions while in transit to or from work. The Court concluded that even it the chef's meeting with his supervisor at the restaurant was within the scope of his employment, that scope of employment terminated when the chef left the restaurant to drive home. 929 N.E. 2d at 309.

In addition, the Supreme Court reviewed plaintiff's general negligence claim. This claim turned on the question of whether Beverly owed a duty to the plaintiff to prevent its employee from driving in an intoxicated condition. Because Beverly did not hold a liquor license, the court considered whether Beverly could be held responsible for Plaintiff's injuries under a social host liability theory. *Id.* at 310.

Social host liability in Massachusetts is governed by whether the social host is able to control the alcohol beverages being served.[2] In this case, the supervisor did not order, serve, or pay for the drinks consumed by the chef. Because the court found that the supervisor (and hence the employer) did not control the alcohol consumed, it also concluded that Beverly did not owe a duty to the plaintiff, even though the supervisor was aware of the consumption, made no attempt to stop the drinking, and allowed the chef to drive away from the restaurant. *Id.* at 311.

[2] Interestingly, the court noted that there is no higher standard of social host liability in Massachusetts such as employer host liability when the defendant is an employer. This question was resolved in *Mosko v. Raytheon Co.,* 416 Mass. 395, 622 N.E. 2d 1066 (1993), a case where an employee caused injury following a company Christmas party held at a restaurant unrelated to the company.

Finally, the court reviewed Beverly's company policy against substance abuse and concluded that it did not create a duty of care toward the plaintiff, a member of the general public, because on its face the policy was drafted to protect those affiliated with Beverly, not the public at large. *Id.* at 314.

Compare the behavior of the employees in the *Lev* case to those involved in *Hicks v. Korean Airlines Co.*, 2010 WL 3834881 (Ill. Ct. App. Sept. 29, 2010). *Hicks* also involved claims of respondeat superior and vicarious liability. In this case, an employee of Korean Air injured plaintiff in an automobile accident following a night out with business colleagues at two restaurants. The plaintiff claimed that the intoxicated driver attended two company events that evening: a dinner at the first restaurant to entertain an executive of Korean Air, and a farewell celebration at the second restaurant in honor of an employee being transferred to another location. The plaintiff alleged that the first dinner was within the scope of the driver's employment because it included a work discussion regarding the launch of a credit card linked to the airline's frequent flyer program. Furthermore, the plaintiff asserted that the dinner was paid for by an executive of Korean Air, though Korean Air maintained that although the executive may have paid, he was not reimbursed by any company expense account. Korean Air filed a motion for summary judgment in the trial court and argued that injuries arising from alcohol consumption were preempted by the state dram shop law, and further argued that it could not qualify as a dram shop. The plaintiff conceded that Korean Air was not a dram shop, but opposed the motion for summary judgment on the basis that meetings such as the one the driver attended with dinner and drinks were a common and expected employment requirement at Korean Air and that Korean Air assumed responsibility for making sure its employees left those functions safely. The lower court granted summary judgment for Korean Air, and the plaintiff appealed.

The appellate court reviewed Illinois precedents which have held that courts should not impose liability on employers under the common law or the dram shop law for supplying free alcohol to employees at employer-sponsored events. *Id*. at *2. Indeed, this was the basis for Korean Air's motion for summary judgment arguing that the airline could not be liable. The court held, however, that notwithstanding the dram shop act's preemption of alcohol claims, the statute would not preempt claims such as respondeat superior which are based on legal theories independent from the defendant employer's provision of alcohol. Therefore, the appellate court reversed the trial court's decision. *Id*. at *7.

D. INSURANCE COVERAGE ISSUES

Every year we see cases related to insurance coverage disputes arising from cases involving dispensing of alcoholic beverages and/or violent behavior resulting from consumption of alcoholic beverages. Many licensees have general liability insurance policies for their establishments, but do not understand the scope and limits of those policies. It is important to work with your insurer to understand the scope and limits of your policy and to understand whether you need to purchase additional coverage, such as a dram shop or liquor liability rider.

Even where a licensee understands the scope of its insurance policy, coverage disputes may arise based on claims made by plaintiffs. The recent case of *Rizzi v. U.S. Liability Ins. Co.,*

2010 WL 3174008 (Conn. Super. July 13, 2010) is a relevant example. This case illustrates not only the difficulties with interpreting insurance coverage matters, but also the liabilities that irresponsible employees may incur. The incredible underlying facts giving rise to this insurance coverage dispute are as follows.

Plaintiff's decedent sued a Connecticut nightclub alleging negligent training and supervision. The decedent had been inside the nightclub for about six hours. Near the end of his stay, he locked himself in the men's room for about thirty minutes and came out with no clothes on. Apparently, employees of the nightclub tied his pants around his waist and wrapped his head in a tank top before ejecting him from the premises, while other employees ridiculed him. He walked around the backyard of the nightclub where he fell down a steep embankment and was found dead some twelve hours later. Among other things, plaintiff claimed negligent supervision against the nightclub for failure to train its employees to obtain police or medical attention for a customer acting in a bizarre or intoxicated manner, to call the home or family of such a customer, to call a taxi, or to care for the decedent in a reasonable manner after partially dressing him. In the underlying action, the insurance company declined to defend the nightclub and refused to provide coverage. Plaintiff's decedent settled its lawsuit against the nightclub, and this case deals with the insurance coverage issues.

The policy at issue obligated the insurance company to defend liabilities imposed on the nightclub "by reason of the selling, serving, or furnishing of any alcoholic beverage." *Id.* at *3. The insurance company argued that the Plaintiff's complaint specifically pled negligent supervision as opposed to injury arising out of the sale or service of alcohol beverages; therefore the insurance company took the position that it had no duty to defend or indemnify.

The court ruled that it is the allegation of facts that brings an injury within insurance coverage – not the actual success or failure of a plaintiff's claims. Therefore, the claim itself determines the insurer's duty to defend. *Id.* at *5. In this case, because the plaintiff's claims did not specifically allege liability arising from the selling, serving, or furnishing of alcohol, the court found that the insurance company did not have a duty to defend. Consequently, the court also held that where there is no duty to defend there can be to duty to indemnify, and the court entered summary judgment for the insurance company. *Id.* at *6-7.

IV. CONCLUSION

Liability arising out of the sale and service of food and alcoholic beverages should be of concern to all in the food and beverage business. The cases discussed in this annual review are helpful in illustrating some best practices for your operations, as well as some common mistakes.

In the food area, restaurants and other food sellers should review menus, websites, and other literature to determine if additional warnings or disclosures are needed. Restaurants should understand and document their supply chain for the food they serve so that in the event of an injury, causation may be more easily identified. Finally, compliance with state and local health inspections should be a priority.

Alcoholic beverage licensees should have familiarity with applicable state dram shop statutes and their limitations. They should also be knowledgeable about the scope of their insurance policies and any applicable exclusions, so as to ensure that coverage is sufficient. Finally, educating employees about responsible service of alcohol beverages and how to handle intoxicated patrons is critical.

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