Food and Beverage Litigation Survey

The Hospitality Law Conference
February 11-13, 2013
Houston, Texas

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I. SCOPE OF ARTICLE

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. Courts must balance the common law and these liquor liability statutes in order to assess liability.

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. CAUSES OF ACTION IN THE PRODUCT LIABILITY CASE INVOLVING FOOD

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 (merchantability or fitness for a particular purpose), and strict liability (particularly failure to warn claims), and plaintiffs usually allege these in combination. 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.
An example is *Williams v. O'Charley's, Inc.*, 728 S.E. 2d 19 (N.C. Ct. App. 2012), wherein the plaintiff Williams sued O'Charley’s for negligence and breach of implied warranty after becoming ill following a chicken dinner at the restaurant. The plaintiff presented evidence that the chicken tasted bad, and that he became ill within hours of having eaten it. He had eaten no other food that day. He experienced severe vomiting and diarrhea, and was hospitalized for a week following the incident. His treating physician opined that the chicken likely was the cause of his illness. Reviewing this evidence, the appellate court affirmed the trial court’s decision that plaintiff presented enough evidence to go to a jury.

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*, 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.

The reasonable expectation test is the majority rule in the United States. Maine is the latest state to adopt the standard as explained by the state’s highest court in *Pinkham v. Cargill, Inc.*, 55 A. 3d 1 (Me. 2012).

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The plaintiff consumed a hot turkey sandwich at a truck stop restaurant. The boneless turkey product used by the restaurant to make the sandwiches was manufactured by Cargill. Right after eating the sandwich, the plaintiff experienced severe and sudden pain in his upper abdominal area and thought he was having a heart attack. Plaintiff was later diagnosed at the hospital with an esophageal tear. Examination revealed a food bolus containing bits of bone or cartilage. The trial court entered summary judgment in favor of Cargill and noted that Maine had not established which test to use when analyzing a defective food product under the state’s strict liability statute. The trial court based its decision on the fact that bones are natural to turkey.

On appeal, the court addressed whether the foreign/natural test or the reasonable expectation test should become state standard. The court noted that the state’s strict liability statute was patterned after the Restatement (Second) of Torts § 402A, and particularly the comments which define a “defective condition” as a product that is “in a condition not contemplated by the ultimate consumer.” The Court found the comments of the Restatement to be consistent with the reasonable expectation test, and adopted that test as the standard in Maine. 55 A.3d at 6. In applying the test to the facts of the instant case, the court found that the question of whether a consumer would reasonably expect to find a turkey bone sufficient to cause an esophageal perforation in a “boneless” turkey product was one for the jury, and reversed the trial court’s entry of summary judgment. Id. at 7.

C. EMOTIONAL DISTRESS CASES

Cases involving foreign objects in food frequently involve claims centered upon emotional distress, although prevailing on these claims may prove quite difficult. A stomach turning example is Bylsma v. Burger King Corp., 2010 WL 4702296 (D. Or. Sept. 3, 2010). In this case, discussed in the 2011 case review, 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 matches 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

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1 See Restatement (Second) of Torts § 402A, comment g.
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.

Plaintiff Bylsma appealed to the U.S. Court of Appeals for the Ninth Circuit, which certified the following question to the Supreme Court of Washington: “…whether the Washington Product Liability Act permits relief for emotional distress damages, in the absence of physical injury to the plaintiff purchaser, caused by being served and touching, but not consuming, a contaminated food product.” *Bylsma v. Burger King Corp.*, 676 F. 3d 779 (9th Cir. 2012). This question has not yet been resolved.

*Agnesini v. Doctor’s Assoc., Inc.*, 2012 WL 5873605 (Nov. 13, 2012) reveals the difficulty in proving these emotional distress cases. *Agnesini* involved a group of plaintiffs who claimed that they suffered emotional distress after finding knives baked into the bread of their sandwiches purchased at Subway restaurants. One of the plaintiffs claimed that she suffers anxiety related to fast food products as a result of the incidents, and she filed a mental anguish claim. In reviewing her claim, the court noted:

> [T]he term ‘severe emotional distress' means any emotional or mental disorder ... or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so. *Id.* Moody continues to frequent fast food restaurants (albeit less regularly) and has not produced any evidence of an emotional or mental disorder. She has never sought treatment for her anxiety, nor has she offered any evidence of another severe and disabling condition diagnosed by a professional. Absent such a showing, the Court is unable to conclude that Moody could recover damages for mental anguish.

D. VIABLE DEFENDANTS

Questions frequently arise in food liability cases about who the appropriate defendants are. Naturally, plaintiffs wish to cast the net as wide as possible. The cases in this section address some of the issues which arise in litigation between franchisors and franchisees and owners and management companies.

In Chambers-Johnson v. Applebee’s Rest., 101 So. 3d 473 (La. Ct. App. 2012), the plaintiff sued Applebee’s Inc. (the franchisor of the restaurant where she alleged she was injured), the franchisee company which owned the restaurant where she ate, and the manager of that restaurant individually. The Louisiana Court of Appeals’ opinion deals with whether plaintiff could hold the franchisor entity liable for her alleged physical and psychological injuries, which occurred when she ordered a salad which contained the tip of a human finger.

Applebees, Inc. filed a motion for summary judgment in the trial court, arguing that it had no liability for the incident because it did not train, monitor, or otherwise direct the employees at the franchisee restaurant at any time. Testimony from the company’s area director revealed that the franchisee hired all of its own employees and was responsible for training them. He also stated that Applebees, Inc. did not supply food products to the restaurant. Id. at 474.

In response, plaintiff introduced a copy of the franchise agreement between the franchisor and the restaurant in question. The plaintiff argued that the agreement set the standards by which the franchisee had to operate the restaurant, and also included procedures about preparing food uniformly throughout Applebees restaurants. Finally, the plaintiff argued that the manual dictated that the franchisor would train the general manager, assistant manager, and kitchen manager of each restaurant. Id. at 475.

In reviewing all of the evidence presented, the court focused on the following paragraph of the franchise agreement, which stated that the franchisee company had to be in compliance with:

…the operating standards, methods, techniques and material taught at Franchisor's operations training course, and shall cause the employees of the Restaurant to be trained in such standards, methods and techniques as are relevant to the performance of their respective duties.

Chambers-Johnson v. Applebee's Rest., 12-98 (La. App. 5 Cir. 9/11/12), 101 So. 3d 473, 477

The court found that although the franchisor took responsibility for insuring the uniformity of products and standards, it had no role in the daily operations of the restaurant. Therefore, the court found no genuine issue of material fact and affirmed the trial court’s entry of summary judgment.

In addition to franchisor/franchisee relationships, additional complexities may be caused by management company relationships. Such was the case with Capps v. The Bristol Bar and Grille, Inc., 2012 WL 1067908 (W.D. Ky. Mar. 29, 2012). Plaintiffs became violently ill after
they ate at a rehearsal dinner at a Bristol Bar and Grille restaurant. The named defendant Bristol owns the intellectual property for the name “Bristol Bar and Grille” and several restaurants of the same name in the Louisville, Kentucky, area. Plaintiff also sued two companies that Bristol contracted with for management services; one of them paid Bristol the licensing fee and in turn hired the other to handle daily operations at the restaurant. In their contractual agreement, Bristol and the management company are referred to as “affiliates.” Bristol was further involved in the restaurant where the plaintiffs were injured in that it supplied certain base ingredients and menu items.

The court’s opinion focuses on whether Bristol could be liable notwithstanding the fact that the management company handled food preparation and other daily duties. The court found that there was sufficient evidence to establish that the plaintiffs had become ill at the rehearsal dinner; furthermore there was undisputed evidence that Bristol had provided some of the food items used to prepare that dinner. Under the circumstances, the court found that the plaintiffs had presented sufficient circumstantial evidence to support their negligence claim. *Id.* at *3.*

Plaintiffs also sought recovery against Bristol on theories of breach of warranty. The court affirmed the lower court’s entry of summary judgment on this claim. Because the plaintiffs did not purchase food from Bristol directly, but rather from the management company, they failed to satisfy Kentucky’s requirement of privity for breach of warranty claims. *Id.* at *4.*

**E. EVIDENTIARY ISSUES**

Food liability cases are very fact intensive and the presence or absence of a small fact could be dispositive of the entire case. This group of cases addresses the role of circumstantial evidence, and in turn, whether the doctrine of res ipsa loquitur should apply.

In *Currie v. The Big Fat Greek Rest., Inc.*, 2012 WL 6738381 (Oh. Ct. App. Dec. 27, 2012), the plaintiff alleged that he broke his tooth as a result of chomping on something in his gyro platter. The plaintiff admitted that he did not know what broke his tooth. Furthermore, the restaurant manager inspected the plaintiff’s food following his injury and did not find any hard objects in the food.

Given that the plaintiff only had circumstantial evidence of his injury, he claimed that the restaurant should be liable on a res ipsa loquitur theory. The court described the doctrine as follows:

> The doctrine of res ipsa loquitur is an evidentiary rule which permits, but does not require, a finder of fact to draw an inference of negligence when the logical premises for the inference are demonstrated. *Jennings Buick, Inc. v. Cincinnati*, 63 Ohio St.2d 167, 169 (1980). The doctrine originated by necessity when the true cause of an occurrence was known by or could be determined by the defendant but not by the plaintiff. *Fink v. New York Cent. R. Co.*, 144 Ohio St. 1, 5 (1944). The doctrine of res ipsa loquitur does not alter the nature of the plaintiff’s claim in a negligence action; it is merely a method of proving the
defendant's negligence through the use of circumstantial evidence. *Jennings Buick* at 170.

To warrant application of the rule a plaintiff must adduce evidence in support of two conclusions: (1) That the instrumentality causing the injury was, at the time of the injury, or at the time of the creation of the condition causing the injury, under the exclusive management and control of the defendant; and (2) that the injury occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed. *Id.*, quoting *Hake v. Wiedemann Brewing Co.*, 23 Ohio St.2d 65, 66–67 (1970).

*Currie v. The Big Fat Greek Rest., Inc.*, 2012-Ohio-6168

In this case, the plaintiff was unable to show either that (1) the gyro was in the exclusive control of the restaurant, or (2) that ordinary care was not observed. Thus, the court found that the doctrine of res ipsa loquitur did not apply. *Id.* at *3.

Res ipsa loquitur was one of the theories used by the plaintiff in *Manley v. Doe*, 849 F. Supp. 2d 594 (E.D. N.C. 2012) as well, in addition to breach of implied warranty of merchantability, negligence, and loss of consortium. The plaintiff alleged that he was injured sometime in 2007 at a Wendy’s restaurant after a plastic fragment bearing the Wendy’s logo was removed from his lung in 2009. Plaintiff sued Wendy’s International, Inc., as well as the individual company which operated a Wendy’s restaurant where he frequently ate.

The facts of the case are fascinating, and present a classic case of circumstantial evidence leading to a res ipsa loquitur theory. The Plaintiff could not pinpoint a precise date when he ate at the defendant location, but he presented evidence that he ate frequently at the restaurant in connection with trips to a nearby home improvement store. He could not produce receipts from Wendy’s, but did produce a receipt from the home improvement store during the relevant time period. He testified that he normally ate a double patty hamburger with cheese, tomatoes, pickles, onions, bacon, mayonnaise and ketchup, a side order of French fries or onion rings, and a soft drink. He further testified that he did not go to any other Wendy’s or other fast food restaurants, only non-fast food restaurants. He began having pain and coughing in 2007, and no cause was found until two years later, when the plastic fragment was found in his lung and removed. *Id.* at 597.

Based on this history, the Plaintiff claimed that he unknowingly consumed the plastic fragment (which was determined to be a piece of a Wendy’s plastic utensil) while eating a hamburger from the Wendy’s he frequented. He claimed that Wendy’s negligently prepared the hamburger, and sold unmerchantable food. Wendy’s moved for summary judgment.

Plaintiff’s inability to pinpoint the date of his visit to Wendy’s seems to have cost him the case. The court treated the plastic fragment of the utensil embossed with the Wendy’s logo as circumstantial evidence which could not tie him to any Wendy’s in particular. Furthermore, the court found that there was no evidence that the utensil had in fact been in a Wendy’s product when the Plaintiff ingested it. The court reasoned that the plaintiff “seeks to stack inference upon inference, upon inference to prove the malfunction of an unidentified hamburger. The sole
piece of physical evidence on which he relies for the multitude of inferences is the plastic fragment found in his lung over two years after he ate at the restaurant.” *Id.* at 602.

Expert testimony introduced by the defendants also damaged Plaintiff’s case. Plaintiff’s medical diagnosis raises the issue of how he could have been unaware that he swallowed the plastic fragment. In response to this issue, the defendants introduced expert medical testimony opining that the only way the gag and cough reflexes would be repressed to a degree that a person would not notice such a fragment would be if the individual was intoxicated at the time. Notwithstanding plaintiff’s denial that he was ever intoxicated while consuming a Wendy’s hamburger, defendants introduced evidence that Plaintiff abused alcohol and cocaine at different points in his life.

The court affirmed summary judgment for the defendants, and noted that the state of North Carolina’s *res ipsa loquitur* theory does not apply to an allegedly adulterated food product:

…the court concludes that no reasonable jury could find that a defect in a hamburger that defendants sold to John Manley in February or March 2007 caused his injuries. In doing so, the court heeds the admonition that the Supreme Court of North Carolina made in *DeWitt* concerning the need for a trial judge to carefully review the evidence where a person relies on a “malfunction principle,” because “small variations in facts” can lead to “diametrically opposite results.” 355 N.C. at 695, 565 S.E.2d at 154. Here, to allow John Manley’s claim to go to a jury would lead to a result whereby he essentially seeks recovery based on the fragment removed in September 2009, without evidence that a hamburger was defective at the time of sale in February or March 2007. Such a result would essentially be a *res ipsa loquitur* theory. However, under North Carolina law, a plaintiff cannot use *res ipsa loquitur* to establish liability for ingesting allegedly adulterated food. See, e.g., *Jones v. GMRI, Inc.*, 144 N.C.App. 558, 566, 551 S.E.2d 867, 873 (2001), *cert. dism. as improvidently granted*, 355 N.C. 275, 559 S.E.2d 787 (2002); cf. N.C. Gen.Stat. Ann. § 25–2–314.


The *Manley* court was certainly correct in finding that “small variations of facts can lead to diametrically opposite results.” An example of this is shown in *Johnson v. ConAgra Foods, Inc.*, 2012 WL 1139079 (Tx. Ct. App. Apr. 3, 2012). The plaintiff in the case sued ConAgra and and Albertson’s after she allegedly contracted food poisoning from a ConAgra pot pie that she purchased at Albertson’s.

Plaintiff introduced evidence that she purchased the pot pie and ate it the same evening. She became very ill later in the evening and continued to be very ill for several days. She then heard a news report about ConAgra pot pies having been contaminated with salmonella. Thereafter she went to the emergency room, and physicians there determined it was likely that the plaintiff had food poisoning. Plaintiff introduced the testimony of a medical expert who opined that the symptoms of salmonella usually manifest between twelve and seventy-two hours after an individual eats contaminated food.
At her deposition, the plaintiff was tentative about exactly when she started to feel ill, but defense counsel elicited from her a few responses which indicated that she began to feel ill soon after eating. ConAgra filed a motion for summary judgment, and argued that it was entitled to summary judgment because the plaintiff’s testimony, coupled with the testimony of her medical expert that salmonella poisoning reveals itself between twelve and seventy-two hours, meant that the plaintiff’s illness was caused by something other than the pot pie. In response, plaintiff directed the court to the errata sheet which had been filed with her deposition. In the errata sheet, the plaintiff corrected portions of the transcript about the timing of the onset of her illness, stating that she really could not remember when the symptoms began because she was in and out of sleep at the time. In reviewing the summary judgment order, the appellate court focused on this corrected testimony, and found that it raised a genuine issue of material fact. The testimony from the errata sheet raised questions about whether the plaintiff’s initial symptoms were consistent with salmonella; yet, the court found that her testimony was consistent and clear that she exhibited the symptoms of salmonella within the later window of time as defined by her expert. Thus, the court reversed the trial court’s order and remanded the case. *Id.* at *6.*

III. DRAM SHOP LAW UPDATE

Determining 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 begins with an analysis of what law applies. Depending upon the facts, common law and state statutes may both apply.

Once a court determines what body of law applies, dram shop cases encompass common questions. Was the accident foreseeable by the licensee? Is the case more of a “premises liability” case rather than a liquor liability matter? Does a state standard apply in order for liability to attach, such as “service to the visibly intoxicated” and if so, does the evidence meet that standard? The courts which reviewed the cases below respond to these questions and more.

A. DRAM SHOP LEGISLATION’S ROLE IN LIMITING LIABILITY FOR COMMERCIAL SELLERS OF ALCOHOL

Most dram shop laws are written to reinforce the notion that the consumption of alcohol is the proximate cause of alcohol-related injuries, not the sale or furnishing of alcohol. For that reason, most state laws impose liability only under certain circumstances. Moreover, most place limits on that liability.

One area where dram shop liability is usually limited is the assault and battery context, *e.g.*, plaintiff who gets in bar fight claims that bar could not control patrons’ alcohol consumption and therefore could not maintain a safe atmosphere. For example, in *Kranenberg v. TKRS Pubs, Inc.*, 99 A.D. 3d 767 (N.Y. Ct. App. 2012), the plaintiff, who was a regular customer at the defendant bar, initiated a fight with other patrons, and subsequently was pushed and fell. He argued that the bar was negligent and recklessly disregarded his safety in failing to protect him from the assault. Based on evidence in the case that the plaintiff, a regular customer and had
never caused any trouble before, the bar prevailed based on New York law holding that a premises owner has no duty to protect a customer from unforeseeable assaults. *Id.* at 218.

Nevertheless, the Court ruled that the plaintiff was entitled to a trial on his second cause of action; he claimed that the bar assumed a duty to care for him after the incident and did so negligently. Indeed, the evidence showed that one of the bar’s owners prevented a bartender from calling 911 for the plaintiff; instead the owner called a taxi to drive the plaintiff home, where he lived alone and suffered further injury due to lack of medical care. The court found that the plaintiff presented a triable issue of fact as to whether the bar owner placed plaintiff in a more vulnerable position than he would have been in had the bartender been allowed to call 911. *Id.* at 218.

Dram shop laws also limit liability by limiting the class of possible plaintiffs. In many cases “first party actions” or cases brought by intoxicated individuals themselves as opposed to innocent third parties are barred. The case of *Pineda v. Javar Corp.*, 96 A.D. 3d 731 (N.Y. Ct. App. 2012) presents this principle with a bit of a twist. Plaintiff was a passenger in a car involved in an automobile accident. Prior to the accident the plaintiff and the driver of the car had been at the defendant’s nightclub, where the plaintiff purchased alcohol beverages for the driver. In the lawsuit, he argued that the driver was visibly intoxicated, and that the nightclub should not have served him. The court affirmed summary judgment for the bar, finding that plaintiff could have no recovery when he himself had purchased the alcoholic beverages for the intoxicated driver. *Id.*

**B. HOW FAR DOES A LICENSEE’S DUTY EXTEND?**

A recurring theme in dram shop cases is the extent of the licensee’s duty of care to patrons of the licensed establishment. The two cases here from 2012 describe various issues which arise in this context.

In *Forsman v. Blues, Brews, and Bar-B-Ques, Inc.*, 820 N.W. 2d 748 (N.D. 2012), the Supreme Court of North Dakota reviewed the lower court’s entry of summary judgment in favor of a bar following a plaintiff’s claim that she was injured while caring for an intoxicated guest during a party at the bar. The plaintiff claimed that the bar knowingly served alcoholic beverages to obviously intoxicated guests at the party.

The plaintiff introduced evidence that the party was a rowdy atmosphere with intoxicated attendees. Plaintiff was thrown to the ground from a chair while helping an employee tend to an intoxicated guest. The patron who ultimately hurt her had been causing some problems for the guests earlier in the evening, and management had tried to eject her without success prior to the incident. Plaintiff presented evidence that the bar provided an open bar for its off duty employees, which included a shot drinking contest the evening of the incident. The defendant used three bartenders at the party, including a regular customer and his son, and apparently did not supervise the bartenders. *Id.* at 751.
The bar argued that summary judgment was appropriate because plaintiff had introduced no evidence that it had knowingly provided alcoholic beverages to the intoxicated patron who hurt plaintiff. The appellate court disagreed, finding that there was an issue of fact as to whether the bar had served an obviously intoxicated person, particularly because evidence was introduced that the bar attempted to eject the woman before plaintiff’s accident. *Id.* at 753.

*Olle v. C House Corp.*, 967 N.E. 2d 886 (Il. Ct. App. 2012) also addressed the scope of the licensee’s duty when the plaintiff was injured while trying to help another guest. The case involved an off-duty police officer who was injured while he was trying to break up a fight among other customers.

The plaintiff was a regular at the defendant bar. In his professional capacity, he also had been to the bar about twelve times in the two years prior to the incident to respond to calls about problems at the bar. On the night in question, plaintiff was at the bar on a date and had been drinking, although he testified that he was not intoxicated. At about 3:45 a.m., the bar owner was informed by a bouncer that a man had choked a woman on the dance floor and that there was a “big scene about the incident” occurring outside the bar. There were no security guards on duty that night, so the owner approached the plaintiff, whom he knew, for assistance. Plaintiff and the owner went outside where they found four or five people engaged in an argument. The individuals involved in the fight verbally assaulted the plaintiff and then beat him severely to the point that he was in and out of consciousness. The plaintiff testified that although he identified himself as a police officer during the fight, he did not flash a badge and did not have a service weapon on his person. The owner of the bar testified that although he did not ask the plaintiff to get directly involved in the fight, he knew he would “have his back.” Furthermore, the bouncer testified that he knew plaintiff was a police officer, and tried to help out, but when he did so, plaintiff told him “[i] have this.” Based on this exchange, the bouncer stepped aside, and further testified that he assumed that the situation would be taken care of because plaintiff was a police officer. *Id.* at 888.

The plaintiff sued the bar under both dram shop and premises liability theories. The bar raised Illinois’ “inherent risk doctrine” as a defense, and the lower court granted summary judgment on this issue, finding that the bar did not owe the plaintiff a duty of care when the risks he faced were inherent to his own job description and were not unreasonable. *Id.* at 889. On appeal, the plaintiff argued that the state dram shop act was a strict liability statute which should trump any application of the inherent risk doctrine. The appellate court reversed the trial court’s judgment, finding that the dram shop act on its face only excluded causes of action brought by intoxicated plaintiffs. Because the dram shop law did not exclude any other types of plaintiffs, the court held that the inherent risk doctrine was not a bar to plaintiff’s case. *Id.* at 891.

C. UNIQUE DEFENDANTS

Dram shop cases frequently raise the question of whether the named defendants may be so named, especially if they do not hold a liquor license. These three cases from the past year address this issue.

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In *Carruthers v. Edwards*, 2012 WL 3236604 (Ky. Ct. App. Aug. 10, 2012), the plaintiff was injured when a patron of a sports bar hit her with his car in the bar’s parking lot. The plaintiff sued the bar and the owner of the real property where the bar was located. The court considered whether the property owner, which had leased its property to the bar, was an appropriate dram shop defendant. Plaintiff argued that her injuries should have been foreseeable by the property owner for a variety of reasons. She argued, among other things, that they owned land where other bars were located and thus were familiar with liquor laws. She also argued that the property owner knew that the bar overserved its patrons. In addition, she cited the profit that the property owners made as a result of the bar’s business. The court found plaintiff’s arguments to be unpersuasive, primarily because although the property owner had interest in the bar, it was not involved in serving alcohol to patrons. Furthermore, the court held, there was no reference in the record that the property owner expressly authorized the bar to overserve patrons, or that there was a great likelihood that the bar would do so. According to the court, the landlord was justified to rely on licensing and regulation as assurance that the bar would act properly. *Id.* at *5.

*Weber v. Marino Pkg. Sys., Inc.*, 2012 WL 5373438 (Fla. 2d DCA Nov. 2, 2012) involved a claim of negligent entrustment against a valet company. The plaintiff’s decedent went to a lounge with a friend who left his car with the valet service. The friend drank heavily and was visibly intoxicated. When it was time for the pair to leave, the friend got his car back from the valet service notwithstanding his apparently intoxicated condition. The plaintiff sued the valet company for wrongful death, claiming that the company negligently entrusted the car to the driver.

The appellate court reviewed the facts of the case under a bailment theory, noting that the valet company was not a bailor as the plaintiff would suggest, but rather a bailee. Under the circumstances, the valet company did not have any right to keep the driver’s car, and in fact could have been liable for conversion under Florida law if it had attempted to keep the car based upon the driver’s intoxication. Therefore, the court found, the valet company could not be liable for negligently entrusting the car to its rightful owner. *Id.* at *2*. Plaintiff had also asserted claims against the valet company under Florida’s dram shop law, and the appellate court affirmed the trial court’s dismissal of these claims because the law only applies to licensed sellers of alcohol and would not apply to the valet service. *Id.* at *3.

In some cases, unique defendants are named in a plaintiff’s effort to circumvent the limitations of the dram shop laws. Such was the case in *Rooker v. Flanagan Corp.*, 817 N.W. 2d 31 (Iowa Ct. App. 2012). Rooker, an eighteen year old, went to the defendant bar with the individual owner, Flanagan, after whom it is named. The two were celebrating a bowling team event. Flanagan provided alcohol beverages to Rooker without accepting payment. Rooker became intoxicated and was later in automobile accident. Rooker sued the bar under a dram shop theory and Flanagan as an individual for negligence. Rooker asserted that Flanagan was a social host, not a licensee, who provided alcohol to a minor in violation of Iowa law. Rooker argued that Flanagan provided a setting in which he could become intoxicated, assisted the effort, and then allowed him to drive off without supervision. *Id.* at *1.

The appellate court confirmed that social host liability is recognized in Iowa for the
furnishing of alcoholic beverages to minors. Furthermore, because Flanagan admitted that he personally was not a licensee and that he gave drinks to Rooker, the court found that he could not be protected by the dram shop law. Therefore, the court reversed and remanded the trial court’s decision and allowed Rooker’s negligence claim against Flanagan to proceed. Id. at *5.

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 adopt training programs which include attention to food safety. 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.

Alcoholic beverage licensees should have familiarity with applicable state dram shop statutes and the circumstances under which they can be liable. Licensees should provide adequate training to their employees on responsible alcohol beverage service, so that they do not serve the visibly intoxicated, minors, and others to whom regulated products should not be sold.