Restaurant Liability for Contaminated Food and Beverages Pursuant to Negligence, Warranty, and Strict Liability Laws

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ABSTRACT

Managers, owners and employees of all food providers must make sure that their products are safe, wholesome, and unadulterated prior to selling them. They must all be experts in making, storing, selling, preparing, and serving food. Otherwise, they could hurt consumers and face lawsuits since foodborne illnesses are a serious problem in the United States and around the world. Each year, about 48 million people in the United States suffer from foodborne illnesses that are linked to Salmonella, Norovirus, Listeria, and E. coli. This article examines three legal liability theories of negligence, warranty, and strict liability that are linked to contaminated food and beverages provided by restaurants. The authors end with recommendations to restaurant owners, employers, and managers on how to avoid liability by going above and beyond the law to provide quality food and beverages.

Keywords: *Restaurant, Contamination, Negligence, Warranty, Strict liability.*

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1. INTRODUCTION

In the modern world, foodborne illnesses are a serious problem in the United States as it hurts consumers, brands, and keeps medical facilities tied up with the treatment of unnecessary illnesses. Cogan (2016) using data from the Centers of Disease Control and Prevention, reports that one in six people in the U.S., approximately 48 million, suffer from foodborne illnesses annually, which are principally caused by Salmonella, Norovirus, Listeria, and Escherichia coli (E. Coli). Moreover, annually, 128,000 people require hospitalization and 3000 die from foodborne illnesses (Cogan, 2016). What legal redress do these harmed consumers have? That question is the essence of this article. The issue of the legal liability for contaminated food is even more pronounced today because many supermarkets and grocers are now engaging in much more take-out food business; and, moreover, the food meals and items involved are a lot more sophisticated and complex than past offerings. The *Wall Street Journal* (Newman, 2016) pointed out three recent contamination examples: Whole Foods Market, Inc. was ordered by the Food and Drug Administration (FDA) to commercially close one of its commercial kitchens that produced fresh meals for stores due to concerns about safety lapses in a Boston-area facility which resulted in a listeria outbreak; also in 2016, an E-coli outbreak that sickened 19 people that was linked to rotisserie chicken salad that was made at Costco Wholesale Corp.; and deli foods from the Boise Co-Op, a natural foods grocer in Idaho, were tied to a salmonella outbreak in 2015 that made almost 300 people sick. The *Wall Street Journal* (Newman, 2016) further reported that the U.S. Centers for Disease Control and Prevention indicated that food contamination outbreaks doubled from 2014 to 2015, where in that latter year 23 outbreaks occurred, 572 people were sickened, and 42 people were hospitalized. Salmonella was the most frequent outbreak linked to stores, followed by the norovirus (Newman, 2016). Nevertheless, freshly prepared meals are plainly now "big business." The *Wall Street Journal* (Newman, 2016) reported that in 2005 freshly-prepared foods generated $15 billion in sales, but that amount nearly doubled to approximately $28 billion in 2015. *Fortune* (Kell, 2016) recently profiled one of these new companies called Blue Apron, which bills itself as a "meal-kit-delivery startup" company, selling meal kits (recipes and ingredients) using an "eclectic mix" of "precise" oils, spices, proteins and farm-fresh foods as well as other ingredients (Kell, 2016). One meal example is a summer green salad with green beans and carrots, grilled barramundi on top of an heirloom-tomato salad with smashed crispy fingerling potatoes. The company is just four years old and is valued at $2 billion with 4000 employees, selling 8 million meal kits a month, which cost $9.99 per person or $8.74 each for a family plan, excluding delivery costs (Kell, 2016). Furthermore, as reported in the *Wall Street Journal* (Haddon and Nassauer, 2016) Amazon.com, has developed an e-commerce fresh food business, called Amazon Fresh, which is aggressively competing with traditional grocers and other online food merchants. In 2014, the *Wall Street Journal* (Haddon and Nassauer, 2016) reported that Amazon and other online food merchants achieved $6.3 billion in sales, which amount was up 20% from 2013.

When it comes to the safety of food items and ingredients, regardless of how or where purchased, the consumer is in a decidedly disadvantageous position when it comes to information. Cogan (2016) explains:

> Consumers are burdened by significant informational asymmetries with respect to the food they eat. Possessing less information than farmers, processors, transporters, retailers and others who grow, handle, prepare, and sell food, consumers cannot fully discern risky food from safe food. Was the food dropped on the floor? Was it exposed to contaminants and pathogens? Consumers almost never know. Furthermore, the nature of foodborne illness creates its own information problems. The period of time between infection by a pathogen and the onset of symptoms is variable. Some foodborne illnesses take a few hours to develop, while others can take a week or more. This not only makes it harder for victims of foodborne illness to link their sickness to a particular food, but the passage of time increases the likelihood that evidence of the contaminated food (i.e., the leftovers) will

be unavailable for testing – thereby severing the empirical connection between the illness and its food source (pp. 1501-1502).

Yet despite the aforementioned informational and practical problems, the consumer harmed by unsafe food or beverage products does have certain legal avenues to pursue to achieve redress. This article will examine three legal doctrines that the injured consumer can use to sue restaurants as well as other parties on the food chain, to wit: the common law tort of negligence, warranty law based on statutory law in the Uniform Commercial Code, and the common law tort of strict liability. The article, after this introduction section and brief definitions and limitations sections, provides a legal overview of these three legal doctrines wherein basic principles and elements are set forth and illustrated. The article then examines the three main legal areas in the context of recent food and beverage case law involving restaurants. Recent court cases are examined in depth. Next, based on the legal analysis, the knowledge and experience of the authors, as well as insight gained from legal and management commentary, the authors discuss the implications of food and beverage liability for employers and managers in the restaurant business. Then, premised on the legal analysis and discussion of liability implications the authors provide certain recommendations to restaurant owners, employers, and managers on how to avoid liability. The article ends with a brief summary.

2. DEFINITIONS OF KEY TERMS

Food contamination or contaminated food is the presence in food of harmful, unpalatable, or otherwise foreign substances, for example, microorganisms, diluents, dirt, dust, chemicals, toxic substances, microbes, and/or organisms, before, during, or after processing or storage, which can cause consumer illness (Encyclopedia of Medical Concepts, 2016; Wikipedia Food Contaminant, 2016). Adulterated food, generally, is food that is not pure, safe, or wholesome because it contains poisonous or deleterious substances or contains foreign matter or filth or food that is otherwise contaminated, and thus the food is injurious to health (Wikipedia, 2016). Note that the federal government in the Food, Drug, and Cosmetic Act and the Federal Meat Inspection and the Poultry Products Inspection Act has other detailed and technical standards of what makes food "adulterated," including impermissible and permissible pathogens (that is, microorganisms such as bacteria) in certain types of food (U.S. Legal – Legal Definitions, 2016; Wikipedia Food Contaminant, 2016) but such a scientific micro-biological examination is beyond the scope of this article. Finally, foodborne illness, also known as foodborne disease or food poisoning, is any illness resulting from contaminated food (Wikipedia, 2016). States also have food adulteration statutes (Cousineau, 2010) but such an examination is also beyond the purview of this article.

3. LIMITATIONS

This article has certain limitations. First, the article primarily deals with the three conventional legal doctrines as designated in the title and briefly addressed in the introduction, all of which are based on state law. Negligence and strict liability are, as noted torts, based on the common law of the states; and warranty law is based on the Uniform Commercial Code, which is a form state statutory law. Accordingly, the areas of the law examined herein are highly dependent on the law of the several states, which of course can vary; and, moreover, there actually may be contractions in interpretation on the appellate level in the states, which ultimately the Supreme Court of the state will have to resolve. So, for a particular lawsuit reference must be made to the law of the state having jurisdiction or if a federal "diversity" case (that is, the parties are from different states and the case is heard in federal court) to the law of the state where the injury or harm occurred (Cavico and Mujtaba, 2014).There is also a vast array of detailed federal law dealing with food safety, most prominently regulatory law emanating from the

federal Food and Drug Administration, especially since the agency was further empowered to regulate by the the Food Safety Modernization Act of 2011 which aims to prevent food contamination. These regulatory rules will not be extensively covered; however, a failure to comply with government statutory or regulatory standards does impact negligence liability, as will be seen and explained. Secondly, the article only deals with food and beverages that are contaminated in the traditional sense of being unwholesome or having foreign objects therein. Accordingly, the article will not extensively examine the growing area of the law dealing with the legal liability when food or beverages lack "warnings" as to calorie counts, fats, cholesterol, and sugar, among other perceived harmful substances. Similarly, the authors will not extensively cover the area of law dealing with the alleged "defectiveness" of food or beverages because they were not designed better to be more healthful. The authors will mention these areas, but save the health "warnings" (or lack thereof) and "design defects" aspect of food and beverage law for other future academic efforts. As per the title of this article the focal point is the liability of restaurants. The legal liability of food manufacturers, supermarkets, and grocers will be covered in future articles by the authors, though some mention of the liability of these other parties on the food chain will be made in the article. Finally, this article will not deal with the liability of the cruise lines since that examination would be in the very specialized areas of admiralty law and international treaties.

4. LEGAL ANALYSIS

The injured party can sue for any or all of these legal theories to be examined herein as well as any others supported by the facts and the law. The legal theories will be separate parts or "counts" of a lawsuit. As such, if one or more is dismissed by the court or ruled against by a jury the plaintiff may be able to sustain his or her case on another "count." For example, in Goodman v. Wenco Foods Inc. (1992) the Supreme Court of North Carolina dismissed the negligence claim but allowed the merchantability claim based on the Uniform Commercial Code to go to the jury. Similarly, in the New Jersey Supreme Court case of Hollinger v. Shoppers Paradise of New Jersey Inc. (1975) involving a consumer who contracted trichinosis from eating pork chops, the court ruled that though there was no evidence of negligence in the handling of the meat, the case nonetheless could proceed on the theories of the implied warranty of merchantability and strict liability in tort as the latter two theories do not require proof of negligence by the defendant.

A. The Tort of Negligence

1. Generally

Negligence is a form of conduct, but conduct that can give rise to liability under the common law based on the tort, or civil wrong, of negligence. The traditional elements or components of the tort of negligence are as follows: 1) the existence of a duty, imposed by law, requiring persons to conform to a certain standard of conduct, to wit, the "reasonable person" standard; 2) a failure on a person's part to conform to the aforementioned standard, that is, a breach of the duty; 3) causation, that is, a reasonably close nexus or connection between the conduct and the resulting harm, consisting in causation-in-fact as well as "legal" cause, which latter cause is also referred to as "proximate cause"; and 4) an actual loss, harm, or damage resulting from the conduct (Keeton *et al.*, 1984; Clarkson *et al.*, 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016). The burden of proof and persuasion are on the plaintiff bringing the lawsuit to demonstrate that the elements of the tort are present (Gant v. Lucy Ho's Bamboo Garden, 1984). Although the tort of negligence in the United States is based on state law, the fundamental elements of the tort, originally stemming from the old common law of England, as well as the elements of the tort as applied in the

context herein, are generally consistent among the several states. In the next section of the article these elements will be explicated both generally and in the context of food and beverage liability.

2. Elements

a. Duty

The first requirement to a negligence cause of action is the duty element. The duty, imposed by the law, is one of due care. The duty to conform one's conduct to the conduct of a "reasonable person" is the essence of negligence law. As explained by Keeton *et al.* (1984):

> The whole theory of negligence presupposes some uniform standard of behavior….The standard of conduct which the community demands must be an external and objective one, rather than the individual judgment, good or bad, of the particular actor; and it must be, so far as possible, the same for all persons since the law can have no favorites….The courts have dealt with this very difficult problem by creating a fictitious person….Sometimes he is described as a reasonable person, or a person of ordinary prudence, or a person of reasonable prudence (pp. 173-74).

A jury typically is the lay body of citizens which determines if the duty to act as a reasonably prudent person was violated or breached. As further explained by Keeton *et al.* (1984): "The conduct of the reasonable person will vary with the situation with which he is confronted. The jury must therefore be instructed to take the circumstances into account; negligence is a failure to do what a reasonable person would do 'under the same or similar circumstances."

b. Breach of Duty

Once a legal duty has been established by the court (that is, the judge, who decides issues of law) then, typically, unless waived, a jury (which decides issues of fact) must be empaneled to determine the factual issue of whether the defendant has breached or contravened the duty. A breach of duty occurs when a defendant fails to exercise due care and thus fails to act as a reasonable person (Keeton *et al.*, 1984; Clarkson *et al.*, 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016). The burden of persuasion in demonstrating a breach to the jury is on the plaintiff bringing the lawsuit; and the standard of proof that the jury will use is the one characteristic for a civil case, such as negligence, the "preponderance of the evidence," standard (colloquially referred to as "50% plus 1" of the evidence) (Keeton *et al.*, 1984).

However, conversely, it needs to be pointed out that evidence of a lack of due care will defeat a negligence claim. To illustrate, *CNN.com* reported on a situation where a man found the remnants of a frog or toad in his can of Diet Pepsi after he had consumed some of the beverage and became sick. He called the Food and Drug Administration (FDA) as well as poison control. The FDA investigated the local Pepsi bottling plant, but "…did not find any adverse conditions or association to this problem," and thus the agency had "not determined when or how the contamination occurred," and was "simply unable to determine when or how the specimen entered the package" (Grinberg, 2009). Moreover, evidence of the presence of due care, for example, that a defendant producer or seller met or exceeded government standards, may defeat a negligence claim since there would be no breach of the duty of care. For example, in Goodman v. Wenco Foods Inc. (1992) evidence that the defendant hamburger seller's ground beef processing standards exceeded U.S.D.A. requirements was sufficient for the court to dismiss a negligence claim. Once a jury determines that the defendant acted in an unreasonable manner, and consequently the duty of care has been breached, the next issue for the jury to determine is the causation element to a negligence lawsuit.

c. Causation – Factual and Proximate

1. Factual Causation

Causation is an essential element to a lawsuit for negligence; and there are two types of causation. One is called "factual causation" (or at times "actual" or "cause-in-fact") and the other is called "legal causation" or (perhaps better because less confusing) "proximate causation." Factual causation is simply a question of scientific fact, that is, as a matter of science, and regardless of how long, attenuated, or convoluted the causation chain, did careless act "A" cause ultimate harm "Z"? If the answer is "yes," then factual causation is present (Keeton *et al.*, 1984; Clarkson *et al.*, 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016). Causation can be established by direct evidence, circumstantial evidence, expert testimony, lay testimony, or some combination thereof (Southern States Coop v. Doggett, 1982; McCarley v. West Quality Food Service, 1998). The standard of proof for factual causation is the usual civil "preponderance of the evidence" standard; that is, the evidence presented by the injured plaintiff must show that it was more likely than not that the allegedly harmful food caused the plaintiff's injury Jackson v. Winn Dixie Stores Inc. (1983). Of course, the foregoing comments are a bit simplistic statements since in the "real world" factual causation can be quite complicated as when there is more than one cause or multiple causes of harm or where there are possible intervening, supervening, and/or superseding causes. For example, in the case of Rouse v. George *et al.* (1976) the court ruled that the injured plaintiffs failed to prove that the consumption of the defendant packer's luncheon meat, which allegedly contained a sliver of glass, was the cause-in-fact of their illness principally because their illness occurred several hours after they ate the food. Similarly, in the case of Brown v. General Foods Corp (1978) the medical evidence presented by the plaintiff was not sufficient to prove by a preponderance of the evidence that the plaintiff's severe tenderness to the big toe area of the right foot was caused by the ingestion of penicillin fungus which allegedly was growing on a moldy banana peel at the bottom of a box of grape nuts cereal. To compare, in the case of Miller v. Atlantic Bottling Corp (1972) the fact that the showing of harmful symptoms followed shortly after the consumption of the contaminated food was sufficient for the court to allow the case to go to the jury on the issue of a causal connection.

2. Legal or Proximate Causation

Even if factual causation is determined to be present by the jury, the second causation element – proximate causation – must also be present. Proximate causation is a very interesting and unusual legal doctrine indeed in that it protects careless defendants. The application of the doctrine is within the province of the jury. Even if a defendant acted carelessly and unreasonably and caused harm the defendant is not liable for the all the harmful consequences of his or her careless action or omission; rather, pursuant to the proximate causation doctrine a defendant is only liable for the reasonably foreseeable adverse consequences of his or her wrongful act; and as such the careless defendant is not liable for any unforeseeable, unusual, or remote harmful consequences. Thus, if a causation chain is very long and attenuated the jury is allowed to "cut off" the causation chain, and thus exonerate the defendant from those consequences which the jury has deemed unforeseeable (Keeton *et al.*, 1984; Clarkson *et al.*, 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016). The rationale for the doctrine "is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered" (Keeton *et al.*, 1984).

Once again, the typical civil "preponderance of the evidence" standard is used to determine if there is a causal connection or relationship between the careless act and the ultimate harm (Way v. Tampa Coca Cola Bottling Co., 1972). Usually, expert testimony in the form of a medical expert will be necessary to establish the causal connection between the illness or injury and the consumption of certain food or beverage, unless the causal connection would be clearly apparent to a jury composed of lay persons based on the circumstances of the case. A Georgia appeals case

illustrates both types of causation. In Worthy v. The Beautiful Restaurant (2001) the plaintiff, who was six months pregnant, had eaten contaminated eggs at the defendant's restaurant. She began experiencing abdominal pain, vomiting, and diarrhea. Two weeks later she saw a doctor and the following day was admitted to the hospital, where it was ascertained that her fetal membranes had ruptured prematurely; and seven days later her son was born with several birth defects. The plaintiff, however, was also diagnosed with a sexually transmitted disease and a urinary tract infection. Accordingly, the issues arose as to what was the factual cause of the harm to her and to her child; and, even if the eggs were deemed to be the factual cause of the harm to her and to the child, were the bad eggs the proximate cause of the harm. That is, was it reasonably foreseeable under the proximate cause doctrine that her illness and the rupture of her fetal membranes causing harm to her child were a reasonably foreseeable consequence of eating "bad" eggs? The court allowed those issues as well as the other aspects of negligence to go to a jury for resolution Worthy v. The Beautiful Restaurant (2001).

d. Damages

The final element in a cause of action for negligence is the presence of damages. An actual loss or harm to the person or interests of the person is required. Nominal, that is, token, damages are insufficient as are damages for the threat of any future harm. Actual damages can include harm to the person, medical costs and expenses, lost wages, damage to his or her property – real or personal, or economic harm. Moreover, since negligence is a tort, as per the common law, damages can include damages for emotional distress and "pain and suffering" at the discretion of the jury. Finally, if the negligence is deemed by the jury to be "gross," that is, flagrant, or reckless, then the jury can impose at its discretion punitive damages as punishment and as a deterrent (Keeton *et al.*, 1984; Clarkson *et al.*, 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016).

One problem for an injured consumer who wants to sue for emotional distress damages based on negligent conduct is the traditional "impact" rule of negligence law which maintains that one has to be physically impacted, at least touched, in order to sustain an emotional damage recovery for the negligent conduct (Cavico and Mujtaba, 2014; Cheeseman, 2016). This rule could be a problem in a food or beverage negligence case in some states when the consumer does not ingest a portion of the contaminated food or is not harmed by the object in the food. For example, in Doyle v. Pillsbury (1985) the plaintiff consumer alleged that she opened a can of peas, saw an insect floating in the can, was frightened, fell backwards over her chair, and suffered emotional distress; however, the Florida Supreme Court denied recovery because the plaintiff did not consume the adulterated food and thus she was not "impacted." Ingestion of the food, therefore, was required by the court. Similarly, if a customer sees hair in his or her food during a restaurant meal but does not eat the food, the customer may be "grossed out" and thus loudly complain to the staff and management, but the customer likely will not be able to sue for emotional distress because of the lack of an impact. However, if the consumer does ingest the food or beverage, for example, tasting a flat soda and then seeing an apparent used condom in it, the consumer, who became nauseated and went to a health facility to be vaccinated, and then was tested twice for HIV-AIDS, could sue for the emotional harm caused, ruled the Florida Supreme Court (Hagan v. Coca-Cola Bottling Co., 2001). Note, though, that some courts have attempted to liberalize the older "impact" rule in food cases by saying that the consumer had to either ingest the food (i.e., the "impact") *or* suffer objective physical systems in response to the foreign substance (Way v. Tampa Coca Cola Bottling Co., 1972).

3. The Doctrine of *Res Ipsa Loquitur*

When an injured plaintiff lacks direct evidence that the defendant breached the duty of care, the plaintiff may be able to use the doctrine of *res ipsa loquitur* ("the thing speaks for itself") to create an inference or presumption of negligence. This presumption is a rebuttable one, it must be emphasized. The injured plaintiff must show that the defendant had control of the situation that caused the harm to the plaintiff. The plaintiff also will still have to show that it was more likely than not that the defendant caused the plaintiff's injury (Keeton *et al*., 1984; Clarkson *et al*., 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016). Moreover, the plaintiff will still have to demonstrate the causation and damages elements of a negligence lawsuit. A favorable granting of a *res ipsa loquitur* request will allow the injured consumer to proceed with circumstantial evidence, primarily the fact of the injury itself and the unusualness of its occurrence (Keeton *et al*., 1984; Clarkson *et al*., 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016).

Courts typically will require a three-part test to determine if *res ipsa loquitur* is applicable to a case, to wit: 1) the injury or harm was caused by an agency or instrumentality under the exclusive control of the defendant; 2) the injury or harm must be of a type that ordinarily does not occur unless someone was negligent; and 3) the injury or harm must not have been due to any voluntary act or contributing fault of the injured plaintiff (Keeton *et al*., 1984; Clarkson *et al*., 2012; Benton, 2012-2013; Cavico and Mujtaba, 2014; Lipp and Hafer, 2014). For example, in Ford v. Miller Meat Company (1994) the injured plaintiff brought a lawsuit against a supermarket and meat supplier for negligence utilizing *res ipsa loquitur* when she broke a tooth when she bit into a bone fragment in ground beef she had purchased. Similarly, in Schafer v. JLC Food Systems (2005) the injured plaintiff utilized *res ipsa loquitur* to recover for a throat injury caused by a defective pumpkin muffin.

As Benton (2012-2013) points out, the "exclusive control" element could present a huge challenge to the injured consumer in foodborne illness cases since based on a particular state's law the plaintiff may have to exclude all other reasonable possibilities of his or her illness. That is, evidence is required for a jury to make an inference that the contamination or other unsafe aspect of the food or beverage product came from a particular defendant's lack of due care (Benton, 2012-2013; Lipp and Hafer, 2014). For example, in Burnett v. Essex Insurance Company (2000) the plaintiffs who suffered abdominal problems allegedly from bacteria in food did not prevail because their physician could not eliminate other possible causes of illness, such as the local drinking water or that one of the plaintiffs was susceptible to gastric disorders. Similarly, in Hairston v. Burger King Corporation (2000) the plaintiff also failed to recover because she had eaten previous meals, and her own medical expert testified that the illness could have been caused by something she ate an hour or even a week before eating the food at the defendant's fast-food restaurant and becoming ill. However, in other more "plaintiff-friendly" jurisdictions an injured or sick plaintiff does not have to exclude every other possible cause of his or her injury or illness; rather, a court will allow the case to go to the jury to determine if the defendant's negligence was the most reasonable cause or reasonably certain cause of the plaintiff's injury or illness (See, for example, (Gant v. Lucy Ho's Bamboo Garden, 1984; Benton, 2012-2013)).

4. Negligence *Per Se*

A duty of due care may also be specifically created by a statute or government regulation. As such, the violation of a statute with such a duty which contravention causes injury to a party is called "negligence *per se*." The injured plaintiff would have to prove that such a statute existed, it was promulgated to protect against the type of harm suffered, and the injured plaintiff was within a class of people to be protected by the statute (Keeton *et al*., 1984; Clarkson *et al*., 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016). For example, in the New Jersey Supreme Court

case of Koster v. Scotch Associates (1993) the court ruled that the restaurant furnished food to the plaintiff, who suffered food poisoning, in violation of the state's adulterated food statute and thus the violation of the statute itself was an act of negligence. Note, however, that although violating a statute may be *prima facie* evidence of negligence the injury must have a direct, factual, and proximate connection to the violation (Parra v. Tarasco Inc., 1992). For example, in the case of Coward v. Borden Foods (1976) the fact that there was proof of a violation of the Food and Drug Act could constitute negligence *per se* if the violation factually and proximately caused the injury to the plaintiff.

There are, obviously, many statutes and regulations regarding food and beverage safety. To cite one enactment, in 2011, President Obama signed the Food Safety and Modernization Act (FSMA), which Congressional statute seeks to improve the nation's food safety by empowering the Food and Drug Administration (FDA) to further and more effectively regulate food and beverages by promulgating, overseeing, and enforcing food safety regulations (Benton, 2012-2013). One important provision of the FSMA grants the FDA the authority to recall food products if the agency determines that there is a "reasonable probability" that an article of food or beverage is adulterated or mislabeled and the use or exposure will cause adverse health consequences to humans or animals (Benton, 2012-2013). The FMSA does not provide a private cause of action for damages based on an FDA food recall. However, Benton (2012-2013) points out that critics of the statute are concerned that "…'reasonable probability' is not a stringent enough standard and that when combined with a mandatory recall will be seen as proof that food is dangerous, encouraging the filing of successful lawsuits." That is, the fact of the food recall may be argued as evidence that the standard of care was breached for a negligence lawsuit, the food is not merchantable for a warranty lawsuit, and/or the food is "defective" for a products liability lawsuit.

5. Defenses

Contributory negligence and comparative negligence are defenses to a negligence lawsuit which are based on the law of each state (Keeton *et al.*, 1984; Clarkson *et al.*, 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016). The former holds that a plaintiff who is even partially responsible for his or her own injury cannot recover anything from a defendant; and in the latter situation a jury is allowed to apportion the fault to each party and then to deduct that percentage of fault from the plaintiff's recovery (Keeton *et al.*, 1984; Clarkson *et al.*, 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016). Food and beverage examples would be when the plaintiff caused his or her own illness through his or her own negligent conduct by the careless storage or preparation of a food or beverage product. One illustration of an assertion of comparative negligence is the Florida Court of Appeals case of Coulterv v. American Bakeries Company (1988) where the consumer, who had an abscessed tooth, dissolved a donut in milk, and while drinking the milk through a straw, had a piece of wire which was in the donut lodged in her throat; but the court ruled that she was not comparatively negligent under the circumstances for not chewing the donut.

Another example of a defense would be assumption of the risk, where the plaintiff knowingly and voluntarily assumes a known risk or danger that a reasonable person would not. Assumption of the risk is a complete defense to a negligence lawsuit (Keeton *et al.*, 1984; Clarkson *et al.*, 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016). So, for example, if one continues to eat food with known foreign fragments in it and is injured thereby it can be said that one assumed the risk of injury. Segal (2006) even posits that assumption of the risk could be used in eating improperly, to wit: "Eating in excess or consuming food that is high in fat can obviously cause health problems for consumers, especially children who are part of the fast-food revolution."

6. Recent Negligence Cases

Turning one's focus to recent restaurant liability based on negligence claims, one sees a variety of cases that focus on presence or absence of the four elements of common law negligence claims. In general, courts will allow negligence claims to go to a jury if there are disputed issues of fact as to the parties' actions being reasonable or not, when preparing or consuming food at a restaurant. In the case of Amiano v. Greenwich Village Fish Company Inc. (2016) the plaintiff customer claimed to have been injured by a piece of fish bone left in her flounder, after she had requested that the whole flounder be filleted. The plaintiff contended that she attempted to chew a piece of fish and immediately felt a large fishbone in her mouth, which she then removed. She alleged that the bone was approximately 2 inches in length and 1/4 of an inch thick. She then continued to consume the fish and attempted to swallow once again and felt another large bone get stuck in her throat. This second bone was much larger than the first and it perforated her esophagus and it had to be surgically removed. The restaurant defendant provided no evidence affirming their claim that the fillet was adequately deboned, or that the bone Plaintiff swallowed was just a pinbone. Therefore, the restaurant's motion for summary judgment was denied since there remained issues of fact as to whether the flounder was filleted properly, whether the plaintiff in fact choked on a pinbone or a larger bone, and whether the size of the bone that injured Plaintiff's throat is a bone that could be reasonably anticipated to be present in filleted fish. The court felt it was up to a jury to determine these facts and the defendant's comparative negligence claim that the plaintiff did not take care in eating the flounder.

Likewise, in the case of Dellatorre v. Buca Inc. (2017) a customer ordered the "Linguine Frutti di Mare," which is a pasta dish that the menu described as having "shrimp, baby clams, mussels and calamari in spicy red clam sauce" and had a picture of the dish showing linguine surrounded by approximately twenty fully-intact mussel shells. The customer consumed the food item and near the end of his meal he felt a knife-like cutting sensation down his throat and was rushed to the hospital for an immediate operation as he had swallowed a broken mussel shell, about one-and-a-half to two inches long. The appeals court declined to affirm the trial court's summary judgment order in favor of the restaurant, and explained its rationale as follows:

> Which party broke the mussel shell and if it was submerged in the pasta when served are dispositive factual issues with respect to determining if Buca [Restaurant/Defendant] was negligent. If Appellant [Customer/Plaintiff] broke the shell after it was served to him and it was not served submerged (and thus not visible) in the pasta, it would be difficult to conclude that Buca was negligent for serving this order of Linguine Frutti di Mare -- a dish known to contain mussel shells. However, if Buca did in fact serve Appellant the broken mussel shell and/or it was not visible when the entrée was presented to Appellant, then the jury could find that no patron would reasonably expect to so find a broken shell in this dish….Although the trial court here applied the correct reasonable expectation test, this case is no exception to the general rule that most cases presenting this scenario require jury trials. A Buca patron would reasonably expect whole mussel shells with the pasta. After all, the menu explained and showed that the dish came with fully intact mussels, arrayed in a ring on top of the pasta. The determinative questions at issue in this case are whether Appellant was served a broken mussel shell and whether it was submerged ("hidden") in the pasta (Dellatorre v. Buca Inc., 2017).

Since in Dellatorre v. Buca Inc. (2017) there were material facts in dispute the appeals court ruled that the lower court's dismissal of the lawsuit by means of summary judgment was improper; and a jury now would have to be impaneled to decide the key factual issues.

In Martins v. Royal Caribbean Cruises Ltd. (2016) the parents of the decedent 17 year old cruise passenger aboard the Explorer of the Seas, filed a wrongful death action sounding in negligence alleging that the ingestion of

bacteria-ridden food onboard the cruise ship was the only food eaten 12-72 hours immediately prior to her death. Dueling experts could not agree as to if the ingestion of a foodborne pathogen in the 12-72 hours before the onset of her symptoms, the time when she was on the cruise, was the cause of the illness. Therefore, the court denied the cruise ship company's summary judgment motion on the plaintiff's negligence count stating that the jury was in the best position to weigh the expert testimony as to causation and the credibility of the medical experts involved. Similarly, in Arencibia v. Joe's Place of the Bronx (2015) four restaurant patrons came down with symptoms of salmonella poisoning within 6 to 36 hours of ingesting the food, which is well within the incubations period for salmonella infection. The restaurant presented evidence that the food borne illness could have come from sushi the plaintiffs ate near the same time-period, which food was served by another vendor, and not caused by the food items prepared by the restaurant. However, the testimony of the plaintiffs together with the affirmations of the plaintiff's expert witness (a doctor) and the information regarding the violations found by the Department of Health at Joe's Restaurant both before and shortly after plaintiffs' salmonella poisoning, including the restaurant owner's own admissions that his restaurant was shut down by the Department of Health as a result of violations, raised issues of fact as to whether the source of plaintiffs' salmonella poisoning resulted from food they consumed from defendant's restaurant. Therefore, the court denied the defendant restaurant's summary judgment motion so that the jury could be the trier of the disputed facts as to the plaintiff's negligence claim.

This same logic prevailed when the court in Weiner v. Dinex Group LLC (2014) denied both parties' summary judgment motions as there was competing evidence as to what caused the aspiration pneumonia that afflicted the plaintiff mere hours after eating a chickpea soup, skate, and a sorbet at the defendant's restaurant. In that case, the court pointed out that the plaintiff's medical doctor expert opined that there was a reasonable degree of medical probability that the chickpea soup caused the illness. However, the balance of the evidence showed that no other customers were stricken with the disease after eating the same soup on the same day and the restaurant had not received any recent health code violations. Further, the hospital where the plaintiff was taken for treatment did not test his vomit or take any stool samples nor did it test the contents of his stomach and the doctors at the hospital did not tell the plaintiff that his lab results showed the existence of bacteria or other pathogens in his body. Thus, as to the plaintiff's negligence count along with the multitude of plaintiff's other theories of recovery, the jury was best to conclude as to the cause of illness that had befallen the plaintiff. The jury was also the appropriate trier of fact in the case of Sims v. Dixie Restaurants Inc. (2012) where the judge denied the restaurant's motion for summary judgment. In that case, within a few hours after the patron ate at the restaurant, he was rushed to a hospital's emergency room experiencing severe nausea, vomiting, and diarrhea and he died four days later. To prove the causation element, the plaintiff relied upon the autopsy report which concluded the death was caused by septic shock and food poisoning was the most likely cause of the decedent's gastroenteritis. Further, discovery yielded evidence showed "that Dixie Café [defendant] did not follow basic food protocol for sanitizing thermometers, cleaning and sanitizing tea urns, maintaining proper temperatures for all cold food items, properly cooling cooked food for storage, maintaining cooled food at the proper temperature in storage, protecting against cross contamination, and recognizing high risk food items" Sims v. Dixie Restaurants Inc. (2012). There was enough circumstantial evidence to create a genuine dispute of material fact as to whether the served items contained deleterious or unwholesome food items, thus the court felt that the jury was best to decide the cause of death when deliberating the negligence action against the restaurant.

Plaintiffs continue to carry the burden of proof in establishing all the elements of negligence when claiming liability against restaurateur under that theory of recovery. In the case of McGinty v. Grand Casinos of Miss. Inc. (2014) the plaintiffs were on a casino trip and had consumed food and alcohol before their final morning breakfast at

the casino's restaurant. At the casino's restaurant, the couple ordered "Mama's Eggs and Chops" which included two grilled pork chops. The plaintiff took a bite of the pork chops and "didn't like it", so his wife finished the remainder. They departed on an airplane and about an hour into the flight, they began vomiting profusely and were eventually carried off the flight on a stretcher. Ultimately, they were diagnosed with food poising and they sued the casino for negligence in the preparation and severing of the food items they consumed for breakfast. The trial court granted the defendant restaurant's summary judgment motion based on the fact that the negligence claim was solely based on circumstantial evidence, which evidence failed to establish the breach of duty by the restaurant as well as the causation element of the plaintiff's negligence claim. On appeal, the appellate court agreed that there was no evidence to link the food poising to the certain breakfast foods served by the casino to the plaintiffs. The appeals court held:

> We cannot make "inference upon inference" that the food or drink, which allegedly made the McGintys [plaintiffs] sick, was tainted as a result of the casino's negligence. Merely showing that the McGintys ate pork chops at the casino café, and they both became sick, is insufficient to establish negligence. Any other outcome would make the restaurant an insurer. Therefore, the McGintys' negligence claim fails as a matter of law (McGinty v. Grand Casinos of Miss. Inc., 2014).

A similar result occurred in the case of Doss v. NPC International Inc. (2011). In that case the United States District Court for the Northern District of Mississippi granted the defendant restaurant's [Pizza Hut's] summary-judgment motion on the negligence claim by nineteen individuals from a church group who became ill within one hour of eating chicken wings and pizza at the restaurant. The group had been fasting and had eaten nothing since the midnight before. The court based its holding, in part, on the fact that no expert testimony regarding causation was provided and the plaintiffs' treating physician. The medical records showed there was no conclusive diagnosis of food poisoning for any of the nineteen plaintiffs so the court held that it would be too speculative to find negligence on the part of the pizza parlor. The Federal Fifth Circuit Court of Appeals, in the case of Doss v. NPC International Inc. (2012) affirmed this summary judgment ruling by finding no causation between the sickness and the alleged improperly cooked pizza and chicken wings. That appellate court cited this fatal flaw in the plaintiffs' case as follows:

> Most importantly, the appellants failed to present any scientific or medical evidence linking their alleged symptoms to the chicken. To the contrary, the summary judgment evidence overwhelmingly indicated that such a link was lacking. The MSDH report, for example, explained that their tests did not reveal the presence of consistent types of bacteria in the appellants' stool samples and that such consistency would have been expected in a food poisoning case. Similarly, the MSDH also reported that the vast majority of non-church group patrons of Pizza Hut on January 18, 2009 did not get sick, which is inconsistent with typical food poisoning cases. Critically, the MSDH's report also concluded that it was unlikely the chicken wings caused the appellants' alleged symptoms because the "bacteria that produce toxins that can sometimes cause gastrointestinal illness with a short incubation period (S. aureus and B. cereus) are not the typical bacteria found in raw chicken (Doss v. NPC International Inc., 2012).

This was the same result in the case of Ochoa v. State of New York (2015) where a prisoner's *res ipsa loquitur* assertion, which was more of a negligence claim against the prison, failed. The inmate offered testimony that he ate lunch and dinner at the prison where he was incarcerated at, then rushed to the hospital where he was treated for five days suffering from vomiting and diarrhea. His medical diagnosis entered in his records was "colitis - acute" and there was a notation that he had a history of diverticulitis, but no mention of food poisoning was referenced in his medical charts or records. The court heard testimony of how the prison's kitchen prepared meals and guarded

against food borne illnesses and ultimately ruled that the plaintiff inmate had "failed to satisfy his burden of proving by a preponderance of the evidence that the food he consumed was contaminated (or otherwise defective) and that his complained-of illness was causally related thereto" (Ochoa v. State of New York, 2015).

Mere speculation as to the cause of the alleged food poisoning will not suffice to prove a negligence claim against a restaurateur as was the holding in the case of Gapsky v. RTM Acquisition Co. d/b/a Arby's Restaurant (2014). In that case, the plaintiff customer alleged that between 3 and 4 p.m., she purchased and consumed a chicken sandwich from Arby's restaurant and at approximately 5 a.m. the following morning, she sought medical attention at the hospital and was hospitalized for five days and diagnosed with salmonella poisoning, gastroenteritis, colitis, hypopotassemia, and iron deficiency anemia. However, there was no evidence that the chicken sandwich caused the illness since there was no indication that the treating physician did anything other than diagnose and treat the plaintiff's symptoms. The court felt that "the notes do not reveal that the treating physician ever tested the chicken sandwich for the presence of salmonella or attempted to evaluate the cause of Gapsky's [plaintiff's] ailments by any other means. Without any ancillary evidence that the physician undertook to ascertain the cause of Gapsky's salmonella poisoning, we cannot agree that the physician notes constitute a causation opinion. Subsequently, we do not find the office notes alone sufficient to establish either causation or a product defect" (Gapsky v. RTM Acquisition Co. d/b/a Arby's Restaurant, 2014).

One court has allowed health inspections of the subject restaurant into evidence to help the plaintiff prove their claim of food poisoning against an establishment. In the case of McKinney v. Mac Acquisition LLC (2014) the plaintiff customer alleged that within a day after eating at Romano's Macaroni Grill she suffered from symptoms of nausea, vomiting, and diarrhea and eventually hospitalized for five days for salmonella poisoning. Her meal at the restaurant consisted of Caesar salad and chicken cannelloni. She also claimed that in the two days prior to eating that meal, she did not eat any poultry and her meals on those prior days consisted of fish and possibly a salad prepared by her boyfriend. The defendant restaurant moved the federal district court to exclude the Louisiana Department of Health and Hospitals Reports and the Food Complaint Report which had findings of multiple health code violations at the establishment. The restaurant claimed that these reports were irrelevant because they were written either more than one year before, or more than one year after, the plaintiff's alleged salmonella poisoning. The court rejected this motion and in doing so explained that:

> Although none of these reports documents an inspection on the day of McKinney's meal, the reports document the condition of Romano Macaroni Grill over a period of time, overlapping the time in which McKinney dined at the restaurant. Inspections were conducted during a relevant period. Whether McKinney contracted a food-borne illness from her meal at Romano's Macaroni Grill is the central issue in this case. The reports bear on that question--whether McKinney could have contracted salmonella from Romano's Macaroni Grill--and are therefore relevant under Rule 401 of the Federal Rules of Evidence (McKinney v. Mac Acquisition LLC, 2014).

Excessive temperature of food items served to customers for immediate consumption can also be a source of negligence liability to a restaurateur. In the case of Khanimov v. McDonald's Corporation (2014) the court reversed the summary judgment in favor of the restaurant franchisee operator on the plaintiff's negligence claim since the temperature of the spilled coffee which scolded the plaintiff, was in factual dispute. In doing so, the court reasoned that "Under New York law, a defendant may properly be held liable for the personal injuries caused by the service of a beverage that, because of its excessive temperature, was unreasonably dangerous for its intended use, and the drinking or other use of which presented a danger that was not reasonably contemplated by the consumer" (Khanimov v. McDonald's Corporation, 2014).

Some courts have even allowed for emotional distress damages in negligence actions, even when the customer fails to consume a food item itself. For example, in the case of Bylsma v. Burger King Corporation (2012) the federal court certified that very same question to the Washington State Supreme Court. In *Bylsama*, a deputy sheriff pulled into the Burger King drive though on March 24, 2009 in his marked patrol unit at about 1:50 a.m. He noticed one individual who he knew had a criminal record working at the location in Vancouver, Washington. Ultimately the deputy received his food, pulled over, opened the hamburger to reveal a gooey substance on the meat patty and thus did not eat the hamburger. The foreign substance was eventually tested which revealed a glob of saliva later traced by DNA back to the worker. Deputy Bylsma asserted claims for product liability, negligence, and vicarious liability against the restaurant chain. The claims were all dismissed by a lower federal district court, holding that the Washington Product Liability Act ("WPLA") did not permit 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. In Bylsma v. Burger King Corporation (2013) the Washington State Supreme Court clarified that issue and stated:

> Common sense tells us that food consumption is a personal matter and contaminated food is closely associated with disgust and other kinds of emotional turmoil. Thus, when a food manufacturer serves a contaminated food product, it is well within the scope of foreseeable harmful consequences that the individual served will suffer emotional distress. The courts of this state recognize damages for such emotional distress, and thus, such damages, if proved, are recoverable under the WPLA. We answer the certified question in the affirmative. The WPLA permits relief for emotional distress damages, in the absence of physical injury, caused to the direct purchaser by being served and touching, but not consuming, a contaminated food product, if the emotional distress is a reasonable response and manifest by objective symptomatology (p. 1171).

Thus, the Federal Ninth Circuit Court of Appeals in Bylsma v. Burger King Corporation (2013) reversed and remanded the lower federal district court's dismissal of the plaintiff's lawsuit after the Washington Supreme Court answered the certified question which deemed actionable the deputy's claim of injuries based on purely emotional distress stemming from the non-consumed food.

Restaurateurs' exposure to negligence claims can also stem from the food condiment containers themselves. A catchup bottle was the central focus of one negligence and products liability claim by a restaurant patron in the case of Belles v. Giovanni's Pizza (2014) decided by the Common Pleas Court of Buck County Pennsylvania. In that case, the plaintiff filed a multicount complaint against the restaurant for the severe injuries arising out of a hand laceration when a ketchup bottle broke while being opened by the customer. As to the negligence claim, the plaintiff testified that, he and his wife ordered a cheesesteak and French fries at the restaurant and he asked the waitress to bring a bottle of ketchup, which she placed in his hand. The plaintiff alleged that he tried to remove the cap from the bottle with "his fingers first," but it was too difficult, and when he applied greater force "the ketchup bottle broke and the blood just poured right out." Mr. Belle had to undergo surgery to repair a ruptured tendon in his thumb. Although the plaintiffs were able to prove that the bottles were refilled at times by the restaurant staff, there was no evidence that the bottle was cracked or otherwise mishandled by the restaurant and thus the plaintiff's negligence claim failed. The court did acknowledge the legal principal deeply rooted in Pennsylvania case law established by the Superior Court of Pennsylvania in the case of Campisi v. Acme Markets Inc. (2006) that "[t]he duty owed to a business invitee is the highest duty owed to any entrant upon land [and] [t]he landowner is under an affirmative duty to protect a business visitor not only against known dangers but also against those which might be discovered with reasonable care," which applied to the restaurant owner in this case who owed Mr. Belle the

highest degree of duty of care as a business invitee. However, in reaching judgment in favor of the restaurant owner, the court explained that:

> The evidence presented at trial failed to establish that Giovanni's had deviated in any way from its duty of care to the Belles; in fact, the testimony of all of the witnesses at trial strongly suggested that Giovanni's did not breach any duty. Each witness testified that they either did not observe any flaw in the ketchup bottle or had inspected the ketchup bottles for cracks and chips or other inappropriate conditions prior to providing them to the customers. Each witness also testified that the way in which the bottle broke was an extremely unusual occurrence, which they had never observed before…..Therefore, cognizant of the Superior Court's instruction that "[n]either the mere existence of a harmful condition in a store nor the mere happening of an accident due to such a condition evidences a breach of the proprietor's duty of care or raises a presumption of negligence," this Court could not conclude that Giovanni's had breached its duty of care to the Belles, since such a conclusion would by necessity be based upon speculation or conjecture as to how the bottle broke (Campisi v. Acme Markets Inc., 2006).

One restaurant escaped a finding of negligence for its failure to properly supervise its broil cook; and it also avoided a related count based on *respondeat superior* in the case of Hansen v. Texas Roadhouse Inc. (2012). The court explained the set of concerning facts as follows:

> Hansen [Plaintiff/Customer], who was dining at the restaurant, felt his steak was overcooked, and the assistant service manager convinced Hansen to agree to a complimentary replacement. Kropp [broil cook] testified that after he cooked the replacement steak, he went to the refrigerated meat room and placed hair from his face on the steak. Kropp returned the steak to the line to be served. Kropp said he told his coworker, Michael Perkins, "something;" Perkins testified that Kropp "poked a hole in the steak ... and said 'these are my pubes.'" Perkins made no attempt to stop the steak from being served "A while" after he had seen Kropp point out the hair on the steak, Perkins reported the incident to the kitchen manager, who then immediately reported the matter to the service manager, Nicole Livermore. Livermore unsuccessfully attempted to contact the general manager. Livermore believed the incident had occurred hours before, did not think it possible to identify the recipient of the steak, and did not make any efforts to locate Hansen. Hansen paid for the meal with a debit card and took the replacement steak home in a to-go container; he did not eat it until the next morning. After eating two or three bites, Hansen noticed a hair on his fork and a slit in the steak. Hansen did not consume any hair. He took the steak to the West Bend Police Department and filed an incident report. Kropp was subsequently convicted of placing foreign objects in an edible, contrary to *Wis. Stat. § 941.325 (2009-10)* (Hansen v. Texas Roadhouse Inc., 2012).

The jury ultimately rejected the plaintiff's negligent supervision and *respondeat superior* claims and found that the wrongful act of broil cook was a cause of customer's injury. While the jury found Texas Roadhouse negligent in the supervision of their cook, it did not find that this negligence caused Kropp's actions. However, the jury found Texas Roadhouse liable only under the remaining third cause of action alleging breach of implied warranty which will be discussed in the next section that outlines warranty law and cases.

B. Warranty Law and the Uniform Commercial Code

1. Article 2 of the Uniform Commercial Code

Warranty law is based on the Uniform Commercial Code (UCC) which is a statutory law adopted by all the states in a (more-or-less) uniform manner. A warranty is a guaranty that a seller makes about its goods when making a sale. Generally, the warranty means that the goods will operate in a certain way or conform to a certain

standard. By making the warranty the seller agrees to compensate the buyer for any loss or damages suffered if the goods are not as warranted. Warranties can be express, that is, by affirmative words, action, or conduct of the seller, or implied, that is, implied by the law (the UCC). There are warranties of title and warranties of quality (Clarkson *et al*., 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016). For the purposes of this article the authors will examine the three UCC implied warranties of quality – the implied warranty of merchantability, the implied warranty of wholesomeness, and the implied warranty of fitness for a particular purpose. First however, the sale of a good requirement, which is an indispensable feature of the UCC, must be explicated.

2. The Sale of a Good Requirement

Warranty law, as noted, is based on the UCC, which is premised on the sale of a "good." There thus must be the sale of a good for UCC warranty law to be applied. Goods are tangible, physical, personal property. Food and beverages certainly are goods. Employment relationships and the provision of services of course may be based on contracts but they are not "goods" and thus no implied warranties would arise. There may be breach of contract lawsuits as well as negligence lawsuits in employment and service situations, but not UCC breach of warranty lawsuits (Clarkson *et al*., 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016). Restaurants, it is important to note, and as will be seen, can be held liable for harms caused by adulterated or contaminated food under warranty law. The courts consistently have construed the consumer's purchase of a restaurant meal to be the purchase of a "good" and not the providing of a service, and thus UCC warranties attach to restaurant meals (Cliett v. Lauderdale Biltmore Corporation, 1949).

3. Implied Warranties - Generally

As noted, the law by virtue of the UCC implies certain warranties just because a sale of goods is made. It is important to point out that these warranties are imposed by the law regardless of the seller's intentions and regardless of the fact that the seller has not made any representations, statements, or promises regarding the goods. Unless the warranties are disclaimed by the seller they arise by operation of the UCC in every sale of a good (Cavico and Mujtaba, 2014; Cheeseman, 2016). However, as to the warranty liability of cruise line companies, it should be noted that this area of the law is governed primarily by admiralty law; and as such one federal district court stated that it was unwilling to imply a UCC warranty of merchantability against a cruise line being sued by a passenger who contracted food poisoning requiring surgery since the admiralty courts would have primary jurisdiction (Bird v. Celebrity Cruise Lines, 2005).

4. The Implied Warranty of Merchantability

The Uniform Commercial Code in Section 2-314 maintains that a warranty that goods sold by merchant must be "merchantable" will be imposed in a contract for the sale of the goods. In order to be of "merchantable" quality the UCC specifies several criteria, to wit: the goods must be fit for the ordinary purposes for which the goods are used; the goods must meet normal commercial standards; the goods must do their ordinary job safely; the goods must be of the middle range of quality; and the goods must be adequately packaged and labeled (Clarkson *et al*., 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016). It is very important to note that only "merchants" are deemed to make the implied warranty merchantability. The merchant must also be a merchant with respect to the goods sold; as such, sales by merchants out of their field or by private individuals are not governed by the UCC merchantability warranty (Clarkson *et al*., 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016). Restaurants, can be deemed to be merchants. Courts look for guidance in determining the "merchantability" of food and beverages from

applicable government regulatory standards, court precedents, characteristics of the same or similar goods produced by others, and usages in the trade (Eller, 1993). The burden of proof and persuasion is on the injured consumer to prove that the food was not merchantable (Deveraux v. McGarry's Inc., 1970).

5. The Implied Warranty of Wholesomeness

Regarding food and beverage products, the UCC's implied warranty of wholesomeness maintains that food and beverages must be "fit for human consumption." The warranty is imposed by law by virtue of the UCC. If food or beverages are unwholesome, that is, poisonous, noxious, contaminated, adulterated, or otherwise unfit for human consumption, the products are of course not "merchantable." The warranty applies to retailer supermarkets and grocers whether the items are selected by the grocer for the customer or selected by the customer from the shelf or when the products come prepackaged in sealed containers. The warranty is also implied against restaurants regardless of whether the food is sold for consumption on-or-off the premises (Clarkson *et al*., 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016). The warranty also applies fast-food restaurants, coffee shops, bars, vending machines, and other sellers of food and beverages (Cheeseman, 2016). The courts have held that a person who purchases a restaurant meal and is injured due to the consumption of the food can bring a suit for breach of warranty since the customer is buying a good. For example, for some time now, the Florida Supreme Court and appellate courts so ruled, explaining that the meal is a good because the customer justifiably relies on the judgment and skill of the restaurant owner who is in the best position to determine before and during the period of preparation whether the food contains harmful substance; and therefore a customer who is injured by contaminated restaurant food can sue under the theory of the implied warranty of fitness for a particular purpose (Cliett v. Lauderdale Biltmore Corporation, 1949; Zabner v. Howard Johnson's, 1967). A problem, however, arises with the wholesomeness warranty when there is an object in the food or beverage, which problem area will be covered in the next sub-section to this article.

6. The Foreign/Natural Test v. the Reasonable Expectations Test

The legal and practical problem regarding food and beverages and wholesomeness arises when there is an object in the product that injures the consumer. The courts have used two tests to determine liability for objects in food and/or beverages – the older "foreign/natural" test and the newer "reasonable expectations" of the consumer test (Clarkson *et al*., 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016). The foreign/natural test harkens back to a California Supreme Court decision in 1936, wherein the court said in a case involving a chicken bone fragment in a chicken pie that liability would only be imposed under products liability law if food was impure or noxious or if there was a foreign substance in the food, such as glass, metal, or a creature; but since a chicken bone is "natural" to chicken food there would be no liability for any harm caused (Mix v. Ingersoll Candy Co., 1936).

However, under the "reasonable expectations" test, first, if the object in the food or beverage is "foreign" there is legal liability as there was under the foreign/natural test. However, in a major change to this area of wholesomeness warranty law, if the object is "natural," recovery by the injured plaintiff would be permitted if he or she could demonstrate that the object or substance in the food or beverage was one that a reasonable consumer would not expect or anticipate (Goodman v. Wenco Foods Inc., 1992; Clarkson *et al*., 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016). Eller (1993) explains the rationale for the "reasonable expectations" test, to wit: "…If a consumer does not reasonably expect the substance to be present in the food, he cannot take precautions to avoid being injured by it; the food is thus unfit for consumption because it cannot be eaten without risk of injury." The North Carolina Supreme Court in the 1992 decision of Goodman v. Wenco Foods Inc. (1992) which involved a

consumer suffering severe dental injuries by biting into a hamburger sold by a fast-food establishment due to a "natural" meat bone fragment in the food, overruled the appeals court which applied the foreign/natural test to deny recovery; rather, the state Supreme Court adopted the "reasonable expectations" test, thereby allowing the case to go to a jury. Also, in Jackson v. Nestle-Beich Inc. (1992) the Supreme Court of Illinois, in a case involving a pecan shell in chocolate-covered pecan candy, rejected the "foreign-natural" test and thus changed that state's law to the "reasonable expectations" test. Similarly, in Zabner v. Howard Johnson's (1967) a case that involved a restaurant patron who was injured in her teeth and gums when she ate a walnut shell that was in her ice cream, the Florida appeals court ruled that whether the ice cream was fit for human consumption was based on what the customer would reasonably expect to find in the food served, and not what might be natural to the ingredients of the food. Another example is the Texas appeals case of Jim Dandy Fast Foods and Inc. v. Carpenter (1976) which cited an older Massachusetts case, where the courts held that an injured plaintiff could potentially recover because he was injured by a chicken bone in a chicken sandwich because the reasonableness of the consumer's expectations is for the jury.

To compare, in the state Supreme Court 1964 decision by the Massachusetts Supreme Court in Webster v. Blue Ship Tea Room (1964) the court held that a reasonable consumer should expect fish bones in a bowl of New England fish chowder, and thus there was no breach of the merchantability warranty. Similarly, a Florida appeals court ruled that it was reasonable to expect an occasional piece of clam shell in a bowl of clam chowder and thus the manufacturer of the chowder and the supermarket which sold it were not liable (Koperwas v. Publix Supermarkets Inc., 1988).

> Other examples of both tests are provided by Cheeseman (2016) to wit:
>
> Under the foreign substance test, "…the implied warranty would be breached if a person were injured by eating a nail in a cherry pie. This is because a nail is a foreign object in cherry pie. The implied warranty would not be breached if a person were injured by eating a cherry pit in the pie. This is because the cherry pit is not a foreign object in the cherry pie….Under the (consumer expectation test), the implied warranty would be breached if a person would be injured by a chicken bone while eating a chicken salad sandwich. This is because the consumer would expect that the food processor would have removed all bones from the chicken. Under this test the implied warranty would not be breached if a person were injured by a chicken bone while eating fried chicken. This is because a consumer would expect to find bones in fried chicken (p. 361).

As to which test is applied in a particular jurisdiction one would need to make reference to pertinent state law. However, Bassett *et al.* (2009) in examining Texas law, conclude that "…the trend appears to be that if a case were in a gray area, the courts would tend to choose the reasonable expectation test, which involves determining what is reasonably expected by the consumer in the food served. However, as it has been in the past, if the foreign object is clearly 'foreign,' formal adoption of any one doctrine would not be necessary, because liability would attach due to the product being unfit for human consumption." Finally, it must be pointed out that the ultimate decision-maker as to the reasonableness of the consumer's expectations typically would be a jury.

7. The Implied Warranty of Fitness for a Particular Purpose

The implied warranty of fitness for a particular purpose arises when a seller is aware of a particular use of goods by a buyer and the buyer relies on the seller's knowledge and judgment to select suitable goods. One need not be a merchant to have this warranty arise; rather the seller must know of the buyer's special requirements and that the buyer is relying on the seller to fulfill these requirements (Clarkson *et al.*, 2012; Cavico and Mujtaba, 2014;

Cheeseman, 2016). However, if the sale is made according to the buyer's specifications, for example, perhaps, specialized food items ordered by the buyer to the buyer's specifications, the warranty does not arise because the buyer cannot claim reliance on the seller's selection of the goods (Clarkson *et al.*, 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016).

8. The Privity and Notice Requirements

The concept of privity is a difficult area of warranty law, especially for the injured consumer. Originally, pursuant to the UCC privity meant the requirement that an actual contractual relationship existed between the seller and buyer of the goods. Consequently, only the actual buyer could sue for breach of warranty and he or she could sue only the immediate seller of the goods. Today the privity doctrine has been modified or abolished in many states (Clarkson *et al.*, 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016). For example, New York has abandoned the privity rule in the case of a restaurant serving unwholesome food (England v. Sanford, 1990). An examination of privity is beyond the scope of this article. Nonetheless, the authors warn that depending on state law privity may emerge as an impediment to UCC warranty recovery. Notice is another technical requirement of the UCC, and yet another problem for the injured consumer, since the UCC holds that in order to recover for breach of warranty the buyer must give the seller notice of the breach within a reasonable time after the breach has been discovered (Clarkson *et al.*, 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016). Like privity, the states have made modifications to this strict notice requirement; and again, any detailed examination is beyond the purposes of this article; but, nevertheless, the authors also extend the same warning to be aware of any privity and notice requirements still in existence in one's state's laws.

9. Disclaimers

Another major problem for consumers with warranty law is that the UCC permits sellers of goods to exclude implied warranties from the sales transaction. By means of a disclaimer the seller can lawfully exclude warranties from the sales transaction. Of course, the consumer can still sue for negligence and, as will be seen, for strict liability. For a disclaimer to be operative the UCC says that it must be "conspicuous," that is, a reasonable person should be aware of it, thereby obviating any "fine-print" disclaimers. Also, for a seller to disclaim merchantability the exact word "merchantability" must be used; and to disclaim fitness the disclaimer must be in writing. Finally, "catch-all" disclaimers, such as buyer takes the goods "as-is," in their "present condition," or "as they stand" will exclude all implied warranties, presuming these disclaimers are conspicuous (Clarkson *et al.*, 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016).

10. Damages

If the injured consumer can show a sale, a warranty, the goods do not conform to the warranty, and the plaintiff consumer was injured he or she can sue for breach of warranty and recover the following damages: any loss of value in the goods, consequential damages (that is, other damages reasonably foreseeable from the breach of warranty), personal injury damages, including pain and suffering, property damages, and any other incidental damages (such as storage or inspection fees) (Clarkson *et al.*, 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016).

11. Recent Warranty Cases

Restaurant operators have faced many warranty claims by their patrons in recent years as well. It is not surprising that appeals courts are reluctant to overturn a jury verdict as to breach of warranty claims that allege

breach of an implied warranty when facts are in dispute and best weighed by a jury. In the case of Luna v. American Airlines Inc. (2014) a passenger on an airline flight sued for breach of implied warranty when consuming an inflight meal served by the airline and prepared by LSG Sky Chefs. Throughout litigation, the parties disputed the nature of what was discovered in her chicken dinner. She alleged that the foreign matter was either "some insects" or a lizard. The American Airlines flight crew on the other hand, had consistently testified that it was a piece of chicken skin with a few feathers attached. The court ultimately upheld the jury finding that there was no breach of warranty in this case by stating "... we are bound by the jury's reasonable conclusion that appellant failed to establish by a preponderance of the evidence that the meal served to her was not "fit for human consumption" (Luna v. American Airlines Inc., 2014).

Overheating food items by restaurants and cafeteria style service providers can also be a basis for a breach of warranty claim asserted by the customer. Lee v. City of New York (2012) was an action to recover damages for personal injuries allegedly sustained by the infant plaintiff on December 5, 2012. The case was allowed to proceed forward on a breach of warranty claim. The injury to the child was a result of the child being severely burned when a fellow student accidentally knocked over the infant plaintiff's lunch tray causing the hot "meat sauce" that was being served to fall on her thighs during the lunch period at Public School 29, in the County of Queens, City and State of New York. In granting the plaintiff's summary judgment motion relative to their breach of implied warranty claim under the Uniform Commercial Code (UCC), the court held that:

> Under New York Law, the breach of implied warranty theory allows for the imposition of liability on a defendant for personal injuries caused by the service of a food product that, because of its excessive temperature, was unreasonably dangerous for its intended use and the use of which presented a danger that was not reasonably contemplated by the consumer….Moreover, this rule applies with particular force to cases where a consumer is particularly vulnerable to a possible burn injury due to disability …. Here, defendant's duty to ensure that the food being served was not excessively hot is partially shaped by the fact that food spills in a school cafeteria are incredibly common and foreseeable. As such, the act of the infant plaintiff's classmate in spilling the food does not relieve defendant of liability for serving excessively hot food (Lee v. City of New York, 2012).

In the previously addressed case of Hansen v. Texas Roadhouse Inc. (2012) the restaurant escaped liability for negligent supervision of its cook, but not the liability stemming from the plaintiff's additional claim alleging breach of implied warranty of fitness for human consumption, when the restaurant employee purposefully placed strands of his hair on a replacement steak after the customer complained that the first served steak to him was improperly cooked. Thus, intentional placement of foreign objects in cooked food by a restaurant employee can be a basis for breach of warranty action.

To prevail in a claim of breach of implied warranty for human consumption, the plaintiff must be prepared to prove the breach by the restaurateur caused the damages to the consumer. This is often an issue of fact which a jury is best to render judgment upon. In the case of Williams v. O'Charley's Inc. (2012) the plaintiff ate grilled chicken, rice, and a baked potato. The chicken had a bad aftertaste, stuck to the plate, and was dry. No other member of plaintiff's dining party ate chicken. Early the next morning, the plaintiff was suffering from severe diarrhea and vomiting and was thereafter hospitalized for seven days for food poisoning. A jury returned a verdict in favor of defendant restaurant on the negligence claim, but in favor of plaintiff customer on the claim for breach of an implied warranty of merchantability, and awarded $140,000 in damages for personal injuries. On appeal the court upheld the verdict as proper since causation could be established in light of the fact that the only meal the plaintiff ate all day immediately before becoming sick, was the food from the restaurant. Further, a medical doctor testified that,

based on his "understanding to a reasonable degree of medical certainty," it was more likely than not that defendant's food was the cause of plaintiff's injuries. The doctor formed this opinion after observing plaintiff, conducting tests and procedures, and ruling out other anatomic, physical, and medical causes.

However, in the aforementioned (McGinty v. Grand Casinos of Miss. Inc., 2014) case, the casino restraint patrons failed to prove this nexus or connection in their breach of implied warranty count against the defendant restaurant. The same logic prevailed in favor of the defendant McDonald's franchisee's summary judgment motion in Charles v. Arcos Dorados USVI (2016) where the plaintiff customer ordered and consumed a fish filet sandwich that did not taste very good to her. After leaving the restaurant she developed itching, swelling, and blisters in her mouth, followed by itching about her whole body including itching in her vaginal area. The plaintiff sued for breach of the warranty of fitness for a particular purpose, which warranty the court recast as a breach of warranty of merchantability. The court ultimately held that the warranty claim failed due to the absence of evidence available to carry the plaintiff's burden of proof. Specifically, the court analyzed the lack of evidence with particularity and stated that:

> …close examination of the record reveals that Plaintiff has offered little evidence to support this strained inference of causation; and she has offered no evidence from which a reasonable juror could rule out plausible alternative explanations and infer that Plaintiff's consumption of the fish sandwich was not merely a possible, but rather the probable cause of Plaintiff's injuries. While Plaintiff's daughter also became ill after eating her sandwich, she did not notice anything unusual about the taste of the sandwich and experienced entirely different symptoms. Additionally, neither Plaintiff nor her daughter sought medical attention upon developing symptoms, although Plaintiff did visit her doctor three days later on February 19, 2013. Medical records of that visit make no mention of food poisoning or foodborne illness, and offer no diagnosis or explanation of the cause of Plaintiff's symptoms, noting only that Plaintiff complained of "itching and swelling after eating a fish sandwich." Medical records also indicate that Plaintiff has known allergies to Tylenol and Codeine. Thus, while Plaintiff presents enough information from which a reasonable person could infer that the fish sandwich was a possible cause of Plaintiff's symptoms, she fails to provide sufficient support for an inference that the sandwich was the probable cause of Plaintiff's symptoms. Therefore, Plaintiff cannot, as a matter of law, prove by a preponderance of the evidence that her consumption of the sandwich was the proximate cause of her injuries and Defendant is entitled to summary judgment (Charles v. Arcos Dorados USVI, 2016).

The "reasonable expectations" doctrine continues to be a valid defense to breach of warranty claims against restaurants for injuries sustained by their customers who encounter naturally occurring substances in food items. In the aforementioned case of Amiano v. Greenwich Village Fish Company Inc (2016) the appeals court dismissed the customer's various breach of warranty claims by explaining:

> The 'reasonable expectation' doctrine provides a plaintiff can recover for breach of implied warranty of fitness if it is found that the natural substance was not reasonably anticipated to be in the food, as served….A plaintiff has no right to expect a perfect piece of fish, as everyone knows that tiny bones may remain in even the best fillets of fish. …. A fish bone is one that is reasonably anticipated to be present in fish, even if the fish is filleted. The flounder served to Plaintiff was not spoiled, and did not contain a substance not reasonably anticipated to be present thereby warranting dismissal of an action for breach of implied warranty of fitness. Therefore, the breach of implied warranty of fitness cause of action must be dismissed. To establish a cause of action alleging a breach of an express warranty, there has to be evidence that such warranty was created by 'affirmation of fact or promise,' 'description' or 'sample or model...made

> part of the basis of the bargain.'…Defendants argue that no such warranty existed, that there is no evidence on the menu or otherwise that the fish will be completely free from any bones, and the Plaintiff fails to provide evidence to the contrary. Therefore, the cause of action for breach of an express warranty is hereby dismissed (Amiano v. Greenwich Village Fish Company Inc, 2016).

There are times when warranty claims are precluded from being a vehicle for plaintiffs that have succumbed to food poisoning by eating prepared restaurant food. For example, in Berger v. Celebrity Cruise Lines Inc. (2015) the plaintiff suffered food poisoning on his cruise and sued in part for breach of implied warranty. The Federal Court for the Southern District of Florida summarily dismissed this warranty claim by explaining that personal injury claims by passengers on cruise ships are subject to federal maritime law which does not recognize claims of breach of implied warranty of fitness and/or merchantability. Further, in Capps v. Bristol Bar (2012) the court held that patrons, who were not in privity with the restaurant directly, could not sue for breach of warranty claims when they fell ill from apparent food poisoning. In that case, almost an entire wedding party and other attendees became ill within 12 to 48 hours after eating food items during the wedding rehearsal dinner paid for by others. The court held that since the plaintiffs did not allege that they engaged in a buyer-seller relationship with defendant or purchased any food product from defendant, the required privity relationship for breach of warranty claims was absent. Therefore, their breach of warranty claims failed as not legally actionable against the restaurant who was not in privity of the plaintiffs, but the plaintiffs' negligence claims could proceed forward based on strong circumstantial evidence. The next section of this work will highlight the law and recent cases involving strict liability claims against restaurants.

C. Strict Liability in Tort

1. Definition and Core Principles

In addition to negligence law and warranty law products liability law encompasses a relatively new, significant, frequently asserted, and very pro-consumer doctrine – strict liability in tort for defective products. Strict liability comes from the *Restatement (Second) of Torts*, Section 402A. A "Restatement" is a compendium of law developed by legal scholars offered to the courts for adoption. Restatements are regarded as authoritative legal authority; but they are not case law precedents. So, as a case precedent, the strict liability doctrine was first enunciated by the California Supreme Court in the famous 1963 case of *Greenman v. Yuba Power* products. It is thus a state common law doctrine which has been adopted by all the states in the United States (Clarkson *et al.*, 2012; Cheeseman, 2016). Pursuant to strict liability one who sells a product in a defective condition unreasonably dangerous to the consumer or user is liable if 1) the seller is engaged in the business of selling such a product; and if 2) the product is expected to and does reach the consumer or user without substantial change in the condition which it is sold (Keeton *et al.*, 1984; Clarkson *et al.*, 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016). Strict liability is thus "strict," that is, fault is imputed to the seller even though the seller has exercised all possible care in the preparation and sale of the product. As such, an absence of negligence will not preclude liability (Clarkson *et al.*, 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016). Moreover, strict liability applies even though the consumer or user has not purchased the product from, or entered into any contract with, the seller (Clarkson *et al.*, 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016). As emphasized, strict liability as fashioned by the California Supreme Court is a very pro-consumer doctrine that has many advantages to the injured user or consumer, to wit: 1) there is no need to prove that a defect in the product that caused harm was caused by the negligence of the seller; 2) there is no need to prove that any warranty existed; 3) the injured party need only prove that the goods were dangerously defective when the goods left the seller's hands and the defect caused the injury; 4) any privity and notice requirements under warranty

law are eliminated; 5) similarly disclaimers are not effective; and, finally, not only the manufacturer, but also wholesalers, distributors, retailers, and any vendors of food are liable (Bassett *et al.*, 2009; Clarkson *et al.*, 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016). Moreover, the parties "below" the manufacturer on the marking chain are liable even if the product came to them in sealed package or container from the manufacturer (Cavico and Mujtaba, 2014; Cheeseman, 2016). Moreover, Section 4012A of the Restatement Second of Torts (1979) in Comment i maintains that a seller of a good is strictly liable for any condition not contemplated by the ultimate consumer that renders the product unreasonably dangerous to the consumer, thereby creating, in essence, a "reasonable expectations" test in strict liability law which of course can be applied to food (Getz, 1994; Cousineau, 2010). Finally, there is a Restatement Restatement Third of Torts: Products Liability (1997) which provides some food liability examples in the context of strict liability, as will be seen.

Like warranty liability, restaurants are held liable under strict liability for the injuries and damages to the consumer from serving adulterated, contaminated, or impure foods and beverages (Foley v. Weaver Drugs, 1965). The restaurant is in a superior position compared to the consumer to know the latent or hidden dangers in food products; and vital matters of public health and safety are at stake in the condition of food and beverages sold by restaurants to the consumer (Foley v. Weaver Drugs, 1965).

The objectives of strict liability are to promote safety, to make sure the injured party is compensated for his or her injuries, and to motivate the sellers of products to obtain insurance (Clarkson *et al.*, 2012; Cheeseman, 2016). Therefore, restaurants and other parties on the food chain would be advised to purchase food safety liability insurance (Cogan, 2016). Yet, despite the pro-consumer bias to the doctrine, strict liability is not an absolute liability type of law. For there to be liability the product must be defective and unreasonably dangerous. However, most courts will assume the "unreasonably dangerous" aspect of the doctrine if the product is defective (Clarkson *et al.*, 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016). Accordingly, finding the "defect" in the product is the key to liability. A product can be defective in three ways: 1) it is flawed; 2) it lacks an adequate warning; or 3) the product is defectively designed.

2. Nature of a "Defect"

a. Flawed Products

The failure of a manufacturer to adhere to its own manufacturing standards will result in a product being deemed "flawed" and thus defective (Keeton *et al.*, 1984; Clarkson *et al.*, 2012; Cheeseman, 2016). As emphasized, this is not a negligence action; no evidence is required as to how and why the standards were not complied with; rather, the injured party "simply" compares the product (or what is left of it) to the manufacturer's own standards for that product; and if the latter were not followed the product is flawed (Keeton *et al.*, 1984; Clarkson *et al.*, 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016). Of course, expert testimony will likely be required for that comparison. Accordingly, in a food or beverage case involving an adulterated or contaminated product or an object in a product the injured consumer would have to show that the manufacturer violated its own rules, regulations, standards, and/or procedures in making, storing, preparing, or serving the product. For example, in the case of Wachtel v. Rosol (1970) an egg salad sandwich was deemed defective and unreasonably dangerous because it contained salmonella.

b. Failure to Warn

A product can be defective if it lacks a warning so that the consumer is aware of a danger in the product (Keeton *et al.*, 1984; Clarkson *et al.*, 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016). However, there is no legal

obligation to warn of dangers which a reasonable and rational consumer should be aware of, for example, that alcohol even in a caffeinated beverage product is dangerous if over-consumed (Cook v. MillerCoors, 2011). A failure to warn case illustration is the California Supreme Court decision in Livingston v. Marie Callender's Inc. (1999) where the court ruled that a restaurant is potentially liable for the failure to warn of an ingredient in the food to which a substantial number of the population are allergic, for example, MSG. Of course, the famous ("infamous" perhaps) failure to warn case (legal "saga" perhaps) is not an adulterated or contaminated food or beverage case. Rather, it was the McDonald's failure to warn of very hot coffee case; and there was at one point a decision in favor of the injured plaintiff who was granted by the jury a $200,000 compensatory damages award and a $2.7 million jury punitive award; but the decision was appealed by both sides resulting in a confidential financial settlement (Segal, 2006).

c. Design Defects

A product is defective if it is defectively designed. Note that the product is not necessarily flawed; it is doing what it is supposed to do; and the warnings are adequate. Nonetheless, under strict liability law the issue is whether the design of the product is defective. In order to determine if a product is defectively designed the courts apply three tests: 1) the state-of-the-art, 2) practical feasibility, and 3) economic feasibility. Regarding the first test, the courts would instruct a jury to go back in time to when the product was made (and not at the time of the lawsuit) and ask, based on the level of science, technology, and engineering then in existence, whether the product could be made more safe. As to the second test the issue is whether the product could be made more safe and still function as a product of that type. For example, a knife could be made very safe but it would be useless as it would not cut! Lastly, could the product be made safer from an economic feasibility perspective? That is, could the product be made more safe and still be affordable, perhaps as an "economy product." Lipp and Hafer (2014) provide an example of a possible design defect from the Restatement (Third) of Torts: Products Liability, to wit: when the recipe for potato chips contains a dangerous chemical preservative for which there is an alternate preservative. The object of strict liability is to advance safety and not to bankrupt the manufacturer. Any one of the aforementioned types of defects will be sufficient to trigger strict liability (Keeton *et al.*, 1984; Clarkson *et al.*, 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016). Food and beverages are certainly counted as products for strict liability analysis. As a result of consumer activism, and also as a possible concern about products liability lawsuits, many companies, for example KFC and Dunkin' Donuts, have made their products healthier and safer by eliminating trans-fats (Caruso, 2006; Jewell, 2007).

3. Defenses

The main defenses to strict liability are the aforementioned assumption of the risk doctrine, disregarding instructions, and the misuse and/or abuse of a product (Clarkson *et al.*, 2012; Cavico and Mujtaba, 2014; Cheeseman, 2016).

4. Recent Strict Liability Cases

Strict liability theories have been used by patrons of restaurants to recover for their injuries related to food poisoning against the restaurant that served them the unfit edible. In such cases, courts often look to the public purpose of strict liability state laws to guard against expanding the frequently automatic civil liability exposure to restaurateurs under the theory of products liability. For example, in the aforementioned case of Belles v. Giovanni's Pizza (2014) Mr. Belles, the plaintiff who was lacerated by the ketchup bottle, had also alleged in his multi-count

complaint a products liability claim against the defendant, Giovanni's Pizza. The court analyzed the reason why product's liability theories exist as vehicles to sue restaurants by reflecting on the comments of Restatement (Second) of Torts § 402A. In particular, the court explained:

> The import of these comments strongly suggests that the phrase in Comment f of § 402A, that the rule "applies to ... the operator of a restaurant," was included to ensure that restaurateurs could be held liable under a strict liability theory for preparation and sale of "corrupt food and drink" to customers and patrons. In addition, the comments also suggest that a necessary requirement of a products liability action is that the defendant be a "manufacturer or any other member of the distributive chain that sold" the defective product (Belles v. Giovanni's Pizza, 2014).

The court again ruled against the Belles' product liability count in their lawsuit against Giovanni's Pizza by explaining:

> We note parenthetically that although Comment f of *Restatement (Second) of Torts* § 402A, …. states that "[t]he rule stated in this Section applies to any person engaged in the business of selling products for use or consumption [and] [i]t therefore applies to ... the operator of a restaurant,"…. In the instant matter, there was no evidence to suggest that Giovanni's charged the Belles for, or profited from, the provision of the ketchup. It was clear, however, that Giovanni's was not the manufacturer or seller of the ketchup or of the allegedly defective ketchup bottle, but was, as noted, the final purchaser of the ketchup bottle which contained the condiment that it supplied to the Belles. Consequently, Giovanni's cannot be held responsible under a products liability cause of action in this instance, and Appellants' allegation of error is without merit (Belles v. Giovanni's Pizza, 2014).

As noted in the aforementioned *Bylsama* trilogy of cases, some states have held that a product's liability claim can proceed forward even if the restaurant patron does not eat the food item since the customer's damage claim could be based solely upon emotional distress.

Courts have also been reluctant to establish bright line rules of when served food is "per se" defective to support a products liability claim. In Horan v. Dilbet Inc. (2015) the plaintiff ordered and consumed the restaurant's "Jersey Shore Sampler" which contained clams. The plaintiff sued after consuming three raw clams that ultimately resulted in the plaintiff being rushed to the hospital and diagnosed with *Vibrio vulnificus* ("Vibrio") sepsis infection and fasciitis which caused amputation of her left leg and several surgeries to her arm. The Plaintiff suffered a preexisting medical condition of hemochromatosis, that predisposed her to be highly susceptible to an invasive Vibrio infection, so she should have avoided consuming raw shellfish so as to avoid this naturally-occurring bacteria in high levels found in oysters and clams. Vibrio is only dangerous in raw shellfish since, if the oysters or clams are cooked, there is a limited risk of exposure to the bacteria. However, the experts also agree that there is no way a restaurant can completely eliminate the risk of infection even through strict adherence to sanitation regulations. The plaintiff was seeking a ruling that the shell fish containing Vibrio was "per se" evidence of defective food served to customers. The court rejected this by holding that "*raw clams containing Vibrio are not per se defective products because they are* "reasonably fit, suitable or safe" for consumption by an ordinary consumer" (Horan v. Dilbet Inc., 2015).

The *Dilbert* court heavily relied upon a similar case from Bergeron v. Pacific Food Inc. (2011) in which a restaurant patron consumed raw oysters that were contaminated with Vibrio, and the patron died as a result of the contamination. The customer's estate brought an action pursuant to the Connecticut Products Liability Act ("CPLA"), arguing that the raw oysters were defective, and pursuing several theories under the CPLA including strict liability, negligence, breach of warranty, failure to warn, and misrepresentation. That court found sufficient

evidence establishing that raw oysters contaminated with Vibrio are not unreasonably dangerous beyond that which would be contemplated by the ordinary consumer who purchases it. Since Vibrio is a naturally-occurring bacteria and medical experts generally agree that most people can consume raw shellfish without medical problems, regardless of their liver condition, but a person's liver dysfunction results in a higher risk of serious illness or death. Therefore, the *Bergeron* court found no material issue of fact as to whether an oyster containing Vibrio is dangerous beyond the contemplation of an ordinary consumer, and ruled that it was not.

The CPLA also requires the plaintiff to carry their burden of proof that the food item was defective and mere speculation will not suffice. In the case of Dunning v. National Railroad Passenger Corp. a/k/a/ AMTRAK (2014) the court held that the Amtrak's passenger's CPLA product liability claim failed since there was insufficient proof that the hamburger served on the train to the plaintiff caused her nausea and chest pains, because all the medical reports created at the time of the incident just recited the passenger's claim that she fell ill thirty minutes after partially consuming the cheeseburger. Amtrak's medical doctor expert at trial discredited the claim that the cheeseburger was the cause of the passenger's illness, since the time between ingestion of the alleged tainted food and the typical onset of symptoms is usually hours to days for food-borne bacterial pathogens. The expert thus concluded that the nature of the food she consumed on the train and her symptoms were inconsistent with that associated with pathogens with shorter incubation periods. There was additional evidence that the plaintiff had a history of gastrointestinal disturbance and that her white blood cell count at the time she received medical treatment was consistent with a viral infection, not a food-borne bacterial illness. Therefore, the court ultimately held that there was no material issue of fact that existed as to the causation of illness which was likely a viral infection and not a tainted hamburger.

Interestingly, after the forgoing cases involving the CPLA were rendered, the CPLA was interpreted to be the exclusive actionable claim for food poisoning cases if plead in conjunction with other theories of recovery like negligence or breach of warranty counts. In case of Cormier v. Friendly's Restaurants (2015) the plaintiff alleged that she was served 'defective food' by the restaurant and sued for alleged negligence, strict liability and breach of warranty, and a violation of the CPLA. That court stuck all the counts of the complaint except the CPLA count because the CLPA specifically states that "a product liability claim . . . may be asserted and shall be in lieu of all other claims against product sellers, including actions of negligence, strict liability and warranty for harm caused by a product" (Cormier v. Friendly's Restaurants, 2015). Therefore, the court held that "(b)ecause the plaintiff had elected to bring an action under the CPLA, she is not permitted to pursue counts sounding in negligence, strict liability or breach of warranty (Cormier v. Friendly's Restaurants, 2015).

However, one Florida court has refused to adopt the principle that the existence of Vibrio in oysters was unreasonably dangerous. In Rhodes v. Lazy Flamingo 2 Inc. (2015) the plaintiff who suffered from liver disease and who had a liver transplant, dined at the Lazy Flamingo on Sanibel Island in Florida where he ordered and consumed raw oysters on the half-shell. By then end of the next day, the plaintiff was suffering from diarrhea, dehydration, cramping, fever, and chills and was rushed to the hospital where he was in the intensive care unit for three days. The attending medical staff determined a severe infection due to the Vibrio vulnificus bacterium caused the plaintiff's ' illness. Based on these allegations, the Plaintiff sought damages against the restaurant for negligence per se (Count I), negligence (Count II), strict liability (Count III), and breach of warranty (Count IV). The restaurant defendant (Flamingo) moved to dismiss the complaint arguing in part that the oysters served were not unreasonably dangerous citing (Bergeron v. Pacific Food Inc., 2011). The Florida court refused to adopt the conclusions and presumptions by the *Bergeron* court and others on the topic of Vibrio by explaining:

> Flamingo moves to dismiss these causes of action arguing that Plaintiffs' allegation is conclusory and inadequate. The Court disagrees. Plaintiffs allege that the oysters served to Rhodes were unreasonably dangerous because they were contaminated with Vibrio vulnificus. Further, Plaintiffs point to Section 61C [Florida Administrative Code Section], and allege that it was specifically adopted to warn those consuming raw oysters of the risk of severe Vibrio vulnificus infections. The Court finds that Plaintiffs have provided sufficient factual support to plausibly allege that the oysters consumed by Rhodes were unreasonably dangerous. In the alternative, Flamingo moves to dismiss these causes of action arguing that oysters contaminated with Vibrio vulnificus are not unreasonably dangerous as a matter of law. In support, Flamingo points to Bissinger v. New Country Buffet (2014); Sims v. Dixie Restaurants Inc. (2012) and Bergeron v. Pacific Food Inc. (2011). (Id.). However, these cases are not binding on the Court. Flamingo does not cite, and the Court is unaware of any Florida precedent holding that oysters contaminated with the Vibrio vulnificus bacteria are not unreasonably dangerous as a matter of law. Further, the cases Flamingo cites rule on motions for summary judgment and a motion for judgment as a matter of law following the conclusion of a plaintiff's case at trial. Flamingo has provided no case law in which such a determination was made in the context of a motion to dismiss, where the Court must accept plaintiff's factual allegations as true. Therefore, the Court finds that these cases are not applicable, and Flamingo's motion to dismiss on this basis is denied (Rhodes v. Lazy Flamingo 2 Inc., 2015).

In *Rhodes*, it seemed that the allegation that the restaurant failed to display to its customers the required cautionary language required by Florida regulations was one critical factor in allowing the plaintiff's case to proceed forward. *Florida Administrative Code* Section 61C-4.010(8) states:

> (8) Consumer Advisory. In addition to the consumer advisory provisions of Chapter 3, Food Code, as adopted by reference in Rule 61C-1.001, F.A.C., public food service establishments serving raw oysters shall display, on menus, placards, or other effective means, the following notice: "Consumer Information: There is risk associated with consuming raw oysters. If you have chronic illness of the liver, stomach or blood or have immune disorders, you are at greater risk of serious illness from raw oysters, and should eat oysters fully cooked. If unsure of your risk, consult a physician.

Some state bodies of jurisprudence on strict liability claims stemming from alleged food poisoning are still in development. For example, in the case of Caban v. JR Seafood (2015) the federal district court of Puerto Rico found itself in uncharted territory when it was asked to dismiss the plaintiff customer's strict liability claim against a restaurant. The plaintiff went to Restaurante El Nuevo Amenecer in Coamo, Puerto Rico, and ordered a plate containing shrimp product. While consuming the shrimp, he began to feel a burning and stinging sensation in his mouth and stomach. Minutes later, he began to suffer from: "…diarrhea, vomiting, hypotension, hypokalemia, dizziness, syncope, sensory and motor disturbance, quadraparalysis, acute inflammatory demyelination (myelitis) of the spine, renal failure, acute tubular necrosis, thrombocytopenia, acute gastroenteritis, anemia, leucytosis, acidosis, azotemia and diffuse skin rash over his abdomen and arm" (Caban v. JR Seafood, 2015). Apparently, the shrimp was toxic which caused him to suffer paralytic shellfish poisoning that permanently deteriorated his health resulting in him becoming a quadriplegia bound to a wheelchair. The plaintiff sued a host of defendants, including the restaurant under the theory that the defendants were strictly liable for the product defect. The federal trial court surveyed Puerto Rico case law and concluded that it was unclear if that US territory provides for such a cause of action. There was no local precedent as to the present question before this court which was asked to resolve the issue if strict product liability claims based on "defects" that are products of the forces of nature are actionable in

Puerto Rico? The federal court ultimately certified the following two questions separate to the Puerto Rico Supreme Court as follows:

> Under the principles of product liability, is a supplier/seller strictly liable for the damages caused by human consumption of an extremely poisonous natural toxin found in a shrimp, even if said food product (and its "defect") are not a result of manufacturing or fabrication process? If the previous question is answered in the affirmative, would it make a difference if the "defect" of the food product is readily discoverable scientifically or otherwise (Caban v. JR Seafood, 2015).

The federal district court abstained from ruling on the motion to dismiss as it recognized it was in "no position to decide whether the strict liability principle under Puerto Rico law should rigorously follow the norm set forth in Section 402(A) of the Restatement or if this would constitute a situation in which Puerto Rico civil law deviates from the Restatement. Moreover, if this court were to apply strict liability to this factual scenario, it would have to decide which test the Puerto Rico Supreme Court would use to determine the adequacy of the product and whether the alleged defect complies with the requisite standard" (Caban v. JR Seafood, 2015). The Puerto Rico Supreme court did not respond with a clarification opinion by the time this article was published, leaving open the issue.

In closing the review of recent case law, one must remember that, as to restaurant liability, the governing law will most likely be the situs of the restaurant itself, whether the claim stems from negligence, breach of warranty or products liability. For example, in Howard v. Kerzner Int'l Ltd. (2014) the plaintiff alleged that she suffered personal injuries as a result of eating fish with ciguatoxins while at a restaurant called Mesa Grill during her stay at the Atlantis Resort on Paradise Island in the Bahamas. Ciguatoxins are natural toxins found in tropical fish, which can cause symptoms similar to food poisoning in humans. The fish alleged to have caused the plaintiff's illness were purchased in the Bahamas and were prepared and served by Bahamian employees of Atlantis Resort at the Mesa Grill restaurant owned by a Bahamian company. The plaintiff sued in Florida and the Florida courts applied the "most significant relationship" test delineated in § 145 of the Restatement (Second) of Conflict of Laws which dictated Bahamian Law to apply to all the counts of the complaint that alleged both products liability and breach of warranties. The Florida appeals court held that the express and implied warranties based on Florida statutes could not be applied extraterritorially against Bahamian defendants and that Bahamian law appeared to not recognize strict product liability claims as viable actions. The plaintiff's breach of warranty claim was dismissed with prejudice; and the appeals court allowed the products liability claim to proceed, but only upon further evidence that Bahamian laws recognized such a claim, which the appeals court left up to the lower court to decipher.

Further, international airline passengers who suffer food poisoning claims from airline meals served on the flight will find that their state claims of negligence, breach of warranty or strict liability are preempted by the Convention for the Unification of Certain Rules for International Carriage by Air ("Montreal convention"). The United States is a signatory to this international treaty which limits compensatory damages against airlines and Article 29 of the Montreal Convention expressly provides that "*punitive, exemplary or any other noncompensatory damages shall not be recoverable*" in an action governed by the Convention. In the case of Benamar v. Air France-KLM (2015) the passenger on an Air France flight from Paris to Los Angeles fell ill from eating the inflight served food allegedly contaminated with the bacteria known as "H Pylori," which can be spread through food or water contaminated with human waste. In dismissing all the plaintiff's state law tort claims, warranty claims, and strict product liability counts against the airline carrier, the court explained that Montreal Convention provided the exclusive remedy for international passengers seeking damages against airline carriers and that convention capped monetary awards per passenger. The evolution of the body of jurisprudence defining liability for contaminated food

and beverages pursuant to negligence, warranty, and strict liability claims against restaurants as well as other parties on the food chain continues to progress.

5. PREEMPTION BY STATUTE

Preemption is a legal doctrine that holds that when a federal law occupies a regulatory field by means of extensive and pervasive regulation Congress, in effect, has "spoken" on the matter, and thus the federal law supersedes any conflicting state law (Cavico and Mujtaba, 2014; Mortazavi, 2016). Accordingly, Benton (2012-2013) argues that one way to improve food safety would be to allow the Food Safety Modernization Act to preempt state regulations and state laws regarding food safety, which presumably would include state common law lawsuits for negligence and strict liability as well as state statutory warranty law pursuant to the Uniform Commercial Code. Such a preemption policy, Benton (2012-2013) argues, "could promote economic interests by keeping food manufacturing costs low and thereby allowing consumers to continue purchasing affordable food products."

In conclusion, the legal analysis provided by the authors first explained and illustrated the basic principles underlying the three main legal theories – negligence, warranty, and strict liability – used by injured consumers to bring lawsuits against restaurants for contaminated and unwholesome food and beverage products. Then the authors presented and explicated recent case law decisions against the aforementioned entities based on the three legal theories. However, it needs to be pointed out the courts seem to use the terms "merchantable," "wholesomeness," and "fitness" interchangeably; and, moreover, as noted, a "reasonable consumer expectations" test arises in Section 402A the *Restatement (Second) of Torts* and thus finds its way into strict liability law as well as warranty law, all of which adds to the confusion in this area of food and beverage liability law (Getz, 1994). In the next section of the article the authors will discuss the implications of this legal environment and the preceding legal analysis, first generally and then in the context of the three legal theories.

6. IMPLICATIONS FOR EMPLOYERS AND MANAGEMENT

A. Generally

Today, supermarkets and grocers as well as traditional restaurants are now competing for consumers who want freshly-prepared meals as opposed to conventional "home-cooking" or even standard restaurant meals. The result has been an increase in the amount of these "fresh" offerings as well as their complexity. These more complicated meals require more specialized cooking and serving practices. Consequently, supermarkets, grocers, and restaurants now must deal with heightened food safety issues as the first two entities are now acting like mini-restaurants and the traditional restaurants are now doing much more take-out business. Let us discuss the implications of the legal analysis for employers and managers in the frame of the three major legal theories adduced herein.

First and foremost, one must be aware that restaurants and other entities on the food chain are not guarantors or insurers. That is, the injured must be able to utilize and support from legal, evidentiary, and proof and persuasion grounds one of the three legal theories discussed herein or other legal avenues to obtain redress. For example, pursuant to negligence law "merely" ordinary care and prudence are required. And although there are beneficial legal doctrines, such as *res ipsa loquitur* and negligence *per se*, and although strict liability is "strict," the consumer, regardless of the legal theory being employed, still must be able to demonstrate that his or her foodborne illness was caused by the unwholesome food or beverage. The mere fact of eating certain food or consuming a certain beverage and then getting ill is insufficient; rather, causation – factual and proximate – is required.

B. Pursuant to Negligence Law and Practice

First to be discussed are the implications that arise from negligence law. Pursuant to negligence principles a seller or provider of food has a duty to act as a reasonably prudent person knowledgeable and skilled in the culinary arts and sciences of food selection, storage, preparation, and cooking, including the detection and removal of harmful substances from the food. Knowledge of government safety standards is essential since failure to comply with government standards is evidence of negligence. The *Wall Street Journal* (Newman, 2016) provided two examples of cooking safety standards to illustrate the complexity of this area: first, chicken prepared for a chicken biryani dish on a hot buffet must be cooked at least 165 degrees for a minimum of 15 seconds, then "cooled" two hours to 70 degrees in order to prevent bacteria, like salmonella, for occurring; and second, rice prepared for a cold Mediterranean pilaf salad must be cooked to 135 degrees, then "cooled" for two hours to 70 degrees, and chilled for an additional four hours at 41 degrees in order to prevent spores from growing and thereby contaminating the food. Another example involves oysters, where temperature control is critical. In order to prevent the fast-growing Vibrio vulnificus bacteria from contaminating the oysters they must be cooled within two hours after being taken out of the water to bring their internal temperature down to 55 degrees (Kestin, 2016). Consequently, the failure of an entity on the food marketing chain to comply with industry, government, or its own standards of manufacture, storage, handling, preparation, and serving of food or beverages is evidence of negligence.

Causation, both factual and proximate, is a required element to a negligence claim (as well as warranty and strict liability). Yet demonstrating causation likely will be a challenge for the injured consumer, especially in foodborne illness claims. Cogan (2016) explains the problem, to wit: "…The victim cannot connect the foodborne illness with a particular source, he or she suspects a particular food source but no longer possesses the evidence (i.e., the food is gone and there are no leftovers), no lab tests were conducted to confirm the presence of foodborne pathogen, or the victim simply cannot remember what he or she ate." The source problem is particularly acute when it comes to foodborne illnesses caused by oysters as it is very difficult to tell where the oysters come from and thus who is accountable. As such, there are uncertainties as to where the oysters are harvested, including perhaps closed and prohibited areas; restaurants serve oysters purchased from multiple dealers; mislabeling and relabeling by dealers occurs despite FDA regulations, inspections, and fines; Gulf oysters are substituted for Northeast oysters because the former are cheaper; and "it's not uncommon for oysters to go through two or more dealers before being sold to a restaurant" (Kestin, 2016).

The doctrine of *res ipsa loquitur* was created to benefit injured plaintiffs who could not obtain direct evidence of a lack of due care to satisfy the breach of duty element of a negligence lawsuit. However, Benton (2012-2013) emphasizes that the burden of proof for an injured plaintiff is a "heavy one" in a food situation under *res ipsa loquitur*. Benton (2012-2013) lists several reasons, to wit: 1) Proving that the food became adulterated and contaminated while under the defendant's control is a difficult task "…since the food industry is large and complex, and a product can pass through the hands of many different people or companies before reaching the grocery stores or restaurants." 2) A person with preexisting illnesses, for example, a stomach disorder, would have to show by means of expert medical witness testimony that his or her particular illness resulted from the defendant's food or beverage product and not any other existing medical illness. 3) For a plaintiff who has eaten previous meals the burden will seem "overwhelming" because "…he must also prove that everything else he ate on the same day he consumed the manufacturer's product, or even the same week, did not cause his illness. Accepting the assumption that an average person eats at least three times a day over a seven-day period, there could be at least twenty meals, not counting the manufacturer's product, which the plaintiff faces the challenge of disqualifying as the cause of his illness." 4) Another variable which compounds the problem for the plaintiff is "…whether there is any possibility another agent

might have caused the contamination before the product reached the plaintiff, or whether the plaintiff caused the illness through his own negligent preparation or even storage of a product." 5) Finally, the food system in the U.S. is "complex," meaning that "by the time a food product has reached the supermarket it has traveled countless miles and been handled by several players, from distributors to brokers. Any one of these players might have acted negligently and caused the plaintiff's illness, rather than the manufacturer." Cogan (2016) agrees:

> Undoubtedly, our highly complex food chain contributes to the problem. Foodborne pathogens can infect food at any point in the production and distribution process. Contamination can occur at a farm, during transport, at a processing plant, in a restaurant, in a supermarket, or even in our own homes. Industrialized food production, long supply chains, and market pressures to reduce food production costs all increase the risk of contamination by foodborne pathogens. As food processing or shipping systems have continually grown larger and more efficient, foodborne illnesses have become a national problem (pp. 1504-1505).

Therefore, Benton (2012-2013) concludes as follows: "Thus, while *res ipsa loquitur* may seem to be a viable tool for plaintiffs who would bring a claim against a food manufacturer whose product they suspect made them sick…courts apply a very stringent set of rules that make it difficult for plaintiffs to succeed."

C. Pursuant to Warranty Law and Practice

The second series of implications are those derived from warranty law. The trend in the jurisdictions away from the traditional "foreign/natural" test to determine whether food/beverages are "fit for human consumption" under the UCC to the "reasonable expectations" test gives the injured consumer more leeway in bringing a lawsuit as well as affording a jury (perhaps sympathetic to the injured consumer) the power to answer the "reasonableness" of the consumer's expectations. A consumer would no longer be under some type of duty of care to break apart food, inspect it, seek out and hunt foreign objects, or cut, slice, or pick at food with a knife or fork that was meant to be eaten out of hand. As per the aforementioned decision in Goodman v. Wenco Foods Inc. (1992) a consumer would not reasonably expect to find a bone fragment in a hamburger purchased at a fast-food restaurant. Eller (1993) criticizes the foreign/natural test as being "arbitrary and capricious" and applauds jurisdictions that have adopted the "more principled approach" of "reasonable expectations." The key, therefore, is simply what the "reasonable" consumer would expect in his or her food or beverage.

D. Pursuant to Strict Liability Law and Practice

The third major part to discussion of implications deals with the tort of strict liability. Generally, a food strict liability claim would consist of the following elements: 1) the food is in some way "defective" and thus is unreasonably dangerous to the consumer; 2) the food is expected to and in fact does reach the consumer without any substantial change in its condition; 3) the food caused (factually and proximately) the consumer's illness or injury; 4) the defendant was the "seller" (i.e., on the food-chain); and 5) the consumer sustained damages (Lipp and Hafer, 2014). A product is defective if it is "flawed." As noted, the manufacturer must adhere to its own rules and standards. As such, as Benton (2012-2013) points out: "Thus, there is an incentive for food manufacturers to remain in compliance with their own established standards. Such standards must be reported to the FDA and updated every three years under the FSMA anyway."

Regarding the failure to warn component to strict liability in tort if there is a lack of a warning or an adequate warning (or labels, branding, or instructions) that indicated that the food or beverage product was unsafe or dangerous tort liability of the manufacturer (or any entity on the food marketing chain) could ensue. Lipp and Hafer (2014) in examining Colorado law, provide the example of a required warning when there is an unknown ingredient

that can cause harm, for example, that the dye applied to the skin of oranges contains a well-known allergen. However, as emphasized, warnings are required only when it would be reasonable to do so; and thus there is no liability for failure to warn of widely known risks based on Colorado law, for example, that some consumers may be allergic to strawberries, or that the excessive consumption of alcoholic beverages can be injurious to one's health and safety (Lipp and Hafer, 2014). The Supreme Court of Illinois especially advises that warnings would be most appropriate in a jurisdiction that uses a "reasonable expectations" standard for liability, for example, by warning that pecan shells could be found in chocolate-covered pecan candy (Jackson v. Nestle-Beich Inc., 1992). Nevertheless, Benton (2012-2013) foresees a major practical and legal problem with the utilization of this theory as a means of recovery for the injured consumer, to wit:

> The plaintiff would have to prove that a reasonable person in the manufacturer's position would have provided a warning about the product. However, food manufacturers are not likely to place a product on the market they believe will cause a food-borne illness, and products such as fruits, vegetables, and nuts do not easily lend themselves to the ready discovery of whether they are adulterated in the same way that alcohol is known to be dangerous. In addition, food manufacturers are highly unlikely to put a warning label on such products because such a label would be off-putting to consumers. Consumers want to feel confident when they bit into an apple that it is completely safe. Consumers cannot do this with the thought of a warning label in the back of their mind that they might become sick later. If this were the case, they would likely not buy the product (pp. 46-47).

As to the design defect aspect to this tort, it appears that it is going to be challenging to demonstrate that food and beverages are defectively designed so that they are unreasonably dangerous to the consumer. Yet can food and beverages be made healthier? The answer is likely "yes"? But are food and beverages defectively designed products because they could be made more healthful? The answer is likely "no" due to the requirements for design defect liability under strict liability. In particular, defining what types of food and beverages are healthy or unhealthy or stating which types could be made more healthful is an exceedingly difficult task indeed (Campos, 2015). What are the alternative ingredients to food and beverages? Are they safer alternatives? Benton (2012-2013) adds that "in the case of foods (excluding meat and poultry), there is only one way to grow them, i.e., farming." Moreover, Campos (2015) warns that "nutrition science is beset by contradiction, uncertainty, and complexity. Under the circumstances, the tendency of public health authorities to divide food into 'good' and 'bad' categories, and to prescribe homogeneous dietary patterns to heterogeneous populations, is an example of both intellectual hubris and overweening public policy."

7. RECOMMENDATIONS FOR EMPLOYERS AND MANAGERS

Contaminated food that makes the consumer ill can make restauranteurs and the other entities on the food chain "sick" as well. Restaurants and food businesses as well as their shareholders, employees, and other stakeholders know full well that the slightest outbreak of a foodborne illness can seriously damage the reputation of a food business and consequently result in severe financial harm. Accordingly, based on the discussion of the implications of the preceding legal analysis, the authors' own knowledge and experience, as well as legal and management commentary, we offer the following suggestions to employers and managers to avoid liability.

First, the authors would like to stress one very basic and very important recommendation – Wash Your Hands with soap and hot water for about 12-15 seconds (Mujtaba, 2014). Obviously, restaurant employees and others working with food must be told in strongly, clearly, and regularly to wash their hands while working with and handling food and beverage items. Certain food items also must be rinsed thoroughly, for example, lettuce. Another

very basic recommendation is that when dealing with food to cover one's hair, this includes managers and owners (Mujtaba and Johnson, 2016). In addition to improper hygiene by food handlers, managers must be aware of the main causes of foodborne diseases – improper storage, improper cooking and preparation, especially not heating or refrigerating food properly, cross-contamination, and otherwise inadequate handling of food and its ingredients (Cogan, 2016).

Mishandling food preparation and service is another major area of concern. Many forms of food contamination, especially if caused by bacteria, can be prevented by the proper cooking of food, eating it promptly, or properly refrigerating the food. Thus, another strong suggestion would be for restaurants and other food entities to engage in training of employees as to the current food safety standards for storage, preparation, and serving. Online training is available, for example, with the International Dairy-Deli-Bakery Association which offers food safety courses for food service workers (Newman, 2016). Also, many states, such as Florida, offer food safety workshops for managers. For examples in the 1990s, the second author was a certified Professional Food Manager by the State of Florida when he was working in the retail sector.

Restaurants as well as other entities on the food chain should attempt to identify any weaknesses or gaps that become apparent in the growing, manufacturing, storage, selling, preparation, and serving of food and beverages. Testing and inspections, in-house as well as through independent and certified third parties, must be conducted to ensure compliance with health and safety regulatory standards and to maintain the safety and quality of food and beverage products. Traceability emerges as another important safety factor; that is, an attempt must be made to know the origin of the food and its ingredients, as well as where the food was harvested or processed, so that if there is a problem the origin of the illness can be tracked, identified, and rectified. However, as noted herein, and again as emphasized: "Tracing the source of contamination responsible for a foodborne illness outbreak can be an onerous and complex process" (Bassett *et al.*, 2009). Another suggestion would be to regularly close the kitchens and other cooking facilities for a "deep cleaning," as the cruise lines are now doing to avoid outbreaks of the norovirus. Tyson Foods, for example, has a Food Safety and Laboratory Services Network which conducts 280,000 tests per month at 18 labs across the county, a Food Safety and Quality Insurance Group to ensure regulatory compliance and to evaluate suppliers, and a Sentinel Site program of environmental monitoring that tracks the effectiveness of its sanitation procedures, particularly to detect even low levels of E-coli (Tyson Foods Food Safety and Quality Assurance Department, 2016). Chipolte Mexican Grill, which had to deal with an E-coli outbreak in 2016, now has an extensive, and well publicized, food safety program called Food Safety Advancements (Chipotle Mexican Grill, 2016) which consists of supplier interventions, advanced technology, farmer support and training, enhanced restaurant procedures, food safety certification, and restaurant inspections. The goal of the program is to ensure that the food served is as "safe as possible" (Chipotle Mexican Grill, 2016). Nevertheless, the *Wall Street Journal* (Jargon, 2016) reported that the company's profits plunged 95% in the third quarter of 2016. As per the prior illustrations, any entity on the food chain should have and follow explicit policies and procedures regarding to producing, receiving, storing, preparing, holding, and serving food in order to avoid adverse legal and financial consequences. This type of information will help to evaluate whether a particular seller's food is the source of a person's illness. Moreover, evidence of the existence of food safeguards and following those safeguards will help to negate any negligence accusations (Bassett *et al.*, 2009).

If an incident does occur, the results of tests conducted by government entities – from the FDA to the local health department, of the food entity's facilities, personnel, equipment, and procedures will be important evidence. Of course, the food or beverage itself can be introduced into evidence, if possible. Evidence that other consumers or patrons did or did not become ill when served the same food or beverage is important too. Moreover, whenever

possible create a contemporaneous report about the event as soon as possible thereafter, include documentation of statements made by the party or parties and any witnesses, photographs, and maintain and preserve any items involved in the incident, if feasible. Also, it is necessary to preserve any surveillance as well as any waivers or releases given and signed by the injured party (Corkran *et al*., 2016). Investigate the injured party's social media and networking sites and accounts which are publicly viewable for postings, messages, photographs, or other information that may be pertinent to the incident (Corkran *et al*., 2016). Be very careful to view only public sites so as to avoid any invasion of privacy claims. Remember that a person will not have a "reasonable" expectation of privacy in content on public sites, which is necessary to sustain an invasion of privacy lawsuit (Cavico and Mujtaba, 2016). Also, it is necessary investigate if other consumers complained of foodborne illnesses at the time of the initial consumer complaint since usually for a foodborne illness numerous people will become ill; and thus if no other complaints are ascertained then one must consider other possible causes for the illness besides food contamination or adulteration (Bassett *et al*., 2009). Similarly, if the consumer alleges a foodborne illness after eating a particular type of food or a particular meal determine who else ate the food or meal with the stricken consumer. So, if other people ate the same food or consumed the same meal and only the one stricken consumer became ill and the others did not the question is raised as to whether the food is the cause of the stricken consumer's illness (Bassett *et al*., 2009). Of course, if there is leftover food or containers for food that is possibly contaminated they must be properly stored to determine if they are truly contaminated to determine potential liability but also to try to ascertain the cause of the contamination so that other entities in the food chain as well as consumers can be warned and proactive measures can be taken (Bassett *et al*., 2009). Another suggestion would be to put clear, simple, and prominent "warning" information on food and beverage products wherever feasible, for example, nutrition information, calorie count, and the dangers in misusing an item. Recall the failure to warn element of strict liability and the McDonald's hot coffee case and the "moral of the story" therein: It is cheaper to warn than to be sued for selling a defective product.

Since pursuant to strict liability law a restaurant as well as the manufacturer or any entity on the food-chain is strictly liable for "defective" food or beverage products, regardless if the manufacturers or others exercised due care, we would advise these parties to do the following: first to be cognizant of safety developments to keep up with the state-of-the-art; second, to exercise even greater care; third, to obtain products liability insurance in the form of food safety insurance as well as premises liability insurance, if warranted; and lastly, perhaps, to increase the price of the products to reflect the heightened safety standards and modifications and typically expensive insurance premiums.

8. SUMMARY

Consumers have a legal and ethical right to know and to expect that the food and beverages sold by restaurants as well as other parties in the food chain are in safe, wholesome, and unadulterated condition as well as properly branded and labelled. Restaurants and other entities on the food chain are in a considerably more advantaged position compared to the consumer due to their knowledge and expertise and their role in making, storing, selling, preparing, and serving food. Thus, restaurants as well as other food entities are under legal as well as ethical duties to take special care to try to ensure that the consumer is not harmed by adulterated and contaminated food products. This article has sought to examine three major legal theories of liability – negligence, warranty, and strict liability – in the context of adulterated and contaminated food and beverages sold or provided by restaurants. The authors provided a basic explanation of the principles and elements underpinning these legal theories; and then illustrated their application by reference to and discussion of case law and legal and management commentary.

Based on the legal analysis the authors then discussed the legal implications in these areas for the food entities examined herein. Finally, the authors provided recommendations to restaurant owners, employers, and managers on how to avoid liability under negligence, warranty, and strict liability law for adulterated and contaminated food and beverages. We trust that our legal and practical analysis and discussion herein will help restaurant owners, employers, and managers to fulfill their legal and ethical responsibilities to the restaurant patron and thus to provide high-quality and safe food and beverages to the consumer.

REFERNCES

Amiano v. Greenwich Village Fish Company Inc, 2016. N.Y. Misc. Lexis 3254; 2016 NY Slip Op 31688(U).

Amiano v. Greenwich Village Fish Company Inc., 2016. N.Y. Misc. Lexis 3254; 2016 NY Slip Op 31688(U).

Arencibia v. Joe's Place of the Bronx, N., Inc., 2015. N.Y. Misc. Lexis 2369; 2015 NY Slip Op 31150(U) (N.Y. Supreme Ct. of N.Y., Bronx County 2015).

Bassett, M.H., H.L. DeVault and B.A. Green, 2009. Meeting the Challenges of Foodborne Illness Liability Claims.

Belles v. Giovanni's Pizza, 2014. Pa. Dist. & County. Dec. Lexis 235.

Benamar v. Air France-KLM, 2015. No. 2: 15-CV-02444-CAS (JPRx) (C.D. Cal.).

Benton, D., 2012-2013. The impact of mandatory recalls on negligence and product liability under the food safety and modernization act. San Joaquin Agricultural Law Review, 22: 27-50.

Berger v. Celebrity Cruise Lines Inc., 2015. U.S. Dist. Lexis 18280.

Bergeron v. Pacific Food Inc., 2011. Conn. Super. Lexis 366 (Conn. Super. Ct. Feb. 14, 2011).

Bird v. Celebrity Cruise Lines, 2005. 428 F. Supp.2d 1275 (District Court for the Southern District of Florida).

Bissinger v. New Country Buffet, 2014. Tenn. App. Lexis 331, CCH Prod. Liability Rep. P19404 (Tenn. Ct. App. 2014).

Brown v. General Foods Corp, 1978. 573 P.2d 930 (Arizona Court of Appeals).

Burnett v. Essex Insurance Company, 2000. 773 So.2d 786 (Louisiana Court of Appeals).

Bylsma v. Burger King Corporation, 2012. 676 F.3d 779 (9th Cir.).

Bylsma v. Burger King Corporation, 2013. 706 F.3d 930 (9th Cir. 2013).

Bylsma v. Burger King Corporation, 2013. 293 P.3d 1168 (Wash).

Caban v. JR Seafood, 2015. 132 F. Supp. 3d 274. U.S. Dist. Lexis 121513; CCH Prod. Liab. Rep. P19,697 (District of Puerto Rico 2015).

Caban v. JR Seafood, 2015. 132 F. Supp. 3d 274; 2015 U.S. Dist. Lexis 121513; CCH Prod. Liab. Rep. P19,697 (District of Puerto Rico 2015).

Campisi v. Acme Markets Inc., 2006. PA Super 368, 915 A.2d 117, 119 (Pa. Super. 2006).

Campos, P.F., 2015. Keeping it fresh?: Exploring the relationship between food laws and their impact on public health and safety: Essay: Food policy and cognitive bias. Wake Forest Journal of Law & Policy, 5: 187-192.

Capps v. Bristol Bar, G.I., Grille,, 2012. U.S. Dist. LEXIS 43714, 77 U.C.C. Rep. Serv. 2d (CBC) 232 (W.D. Ky. 2012).

Caruso, D.B., 2006. KFC's recipe soon to be trans-fat free. Sun Sentinel, p. 3D.

Cavico, F.J. and B.G. Mujtaba, 2014. Legal challenges for the global manager and entrepreneur. Dubuque, Iowa: Kendall Hunt Publishing Company.

Cavico, F.J. and B.G. Mujtaba, 2016. The intentional tort of invasion of privacy in the private employment sector: Legal analysis and recommendations for managers. International Journal of Business and Law Research, 4(3): 37-57.

Charles v. Arcos Dorados USVI, I., 2016. V.I. Lexis 113 (Super. Ct. of the Virgin Islands, Div. of St. Croix 2016).

Cheeseman, H., 2016. Business law. 9th Edn., Boston, Massachusetts: Boston, Massachusetts.

Chipotle Mexican Grill, 2016. Our food safety advancements. Retrieved from http://chipote.com/foodsafety [Accessed September 22, 2016].

Clarkson, K.W., R.L. Miller and F.B. Cross, 2012. Business law: Text and cases. 12th Edn., United States: South-Western, Cengage Learning.

Cliett v. Lauderdale Biltmore Corporation, 1949. 39 So.2d 476 (Florida).

Cogan, J.J.A., 2016. The uneasy case for food safety liability insurance. Brooklyn Law Review, 81: 1495-1552.

Cook v. MillerCoors, L., 2011. 829 F. Supp.2d 1208 (District Court of Appeals for the Middle District of Florida 2011).

Corkran, C.T., J.M. Sette and J. Canton, 2016. Shop till you drop: Premises liability in retail and hospitality settings. Conroy-Simberg 28th Annual Claims Management Seminar. pp: 137-56.

Cormier v. Friendly's Restaurants, L., 2015. 2015 Conn. Super. Lexis 1881 (Judicial Dist. Of Waterbury 2015).

Coulterv v. American Bakeries Company, 1988. 530 So.2d 1009 (Florida Court of Appeals).

Cousineau, M., 2010. State food liability case law and statutes. Retrieved from http://cousineaulaw.com/forum/case_law_and_statutes [Accessed September 22, 2016].

Coward v. Borden Foods, 1976. 229 S.E.2d 262 (Puerto Rico Appeals).

Dellatorre v. Buca Inc., 2017. 42 Florida. Law Weekly, D289c (Florida Court of Appeals).

Deveraux v. McGarry's Inc., 1970. 266 A.2d 908 (Supreme Court of Rhode Island 1970).

Doss v. NPC International Inc., 2011. U.S. Dist. Lexis 18251 (N.D. Miss., Feb. 24, 2011).

Doss v. NPC International Inc., 2012. 460 Fed. Appx. 362, 2012 U.S. App. Lexis 2762 (5th Cir. Miss.).

Doyle v. Pillsbury, 1985. 476 S.2d 1271 (Florida Supreme Court 1985).

Dunning v. National Railroad Passenger Corp. a/k/a/ AMTRAK, 2014. U.S. Dist. Lexis 120065 (d. Conn. 2014).

Eller, B., 1993. Tort law - products liability - implied warranties - soods - Goodman v. Wenco Foods, Inc. North Carolina Law Review, 71: 2163-2169.

Encyclopedia of Medical Concepts, 2016. Food Contamination. Retrieved from http://www.reference.md/files/D0005m [Accessed September 22, 2016].

England v. Sanford, 1990. 167 A.D.2d 147 (New York Appellate Division 1990).

Foley v. Weaver Drugs, 1965. 177 So.2d 221 (Florida Supreme Court 1965).

Ford v. Miller Meat Company, 1994. 28 Cal. App.4th 1196 (California Court of Appeals).

Gant v. Lucy Ho's Bamboo Garden, 1984. 460 So.2d 499 (Florida Court of Appeals).

Gapsky v. RTM Acquisition Co. d/b/a Arby's Restaurant, 2014. Pa. Super. Unpub. Lexis 3100 (2014).

Getz, D., 1994. Products liability – illinois redefines he standards of merchantability for food products: Reasonable expectations. Southern Illinois Law Journal, 18: 637-652.

Goodman v. Wenco Foods Inc., 1992. 423 S.E.2d 444 (Supreme Court of North Carolina).

Grinberg, E., 2009. FDA says residue is frog or toad. How did it get in Pepsi can? CNN.com. [Accessed November 5, 2009].

Haddon, H. and S. Nassauer, 2016. Grocers forge ahead online. Wall Street Journal: B6.

Hagan v. Coca-Cola Bottling Co., 2001. 804 So.2d 1234 (Supreme Court of Florida).

Hairston v. Burger King Corporation, 2000. 764 So.2d 176 (Louisiana Court of Appeals).

Hansen v. Texas Roadhouse Inc., 2012. 345 Wis. 2d 669, 827 N.W.2d 99, 2012 Wisc. App. Lexis 951.

Hollinger v. Shoppers Paradise of New Jersey Inc., 1975. 340 A.2d 687 (Supreme Court of New Jersey).

Horan v. Dilbet Inc., 2015. U.S. Dist. Lexis 112734 (D.N.J. 2015).

Howard v. Kerzner Int'l Ltd., 2014. U.S. Dist. Lexis 23783 (S.D. Fla. 2014).

Jackson v. Nestle-Beich Inc., 1992. 589 N.E.2d 547 (Supreme Court of Illinois).

Jackson v. Winn Dixie Stores Inc., 1983. 439 So.2d 1147 (Louisiana Court of Appeals).

Jargon, J., 2016. Chipotle profit plunges 95%. Wall Street Journal: B6.

Jewell, M., 2007. Doughnut to be healthier. Miami Herald: 4A.

Jim Dandy Fast Foods and Inc. v. Carpenter, 1976. 535 S.W.2d 786 (Texas Court of Appeals 1976).

Keeton, P.W., D.B. Dobbs, R.E. Keeton and D.G. Owen, 1984. Prosser and keeton on torts (Hornbook Series 5th Edn.,) West Publishing Company: St. Paul, Minnesota.

Kell, J., 2016. Bring home-cooking to your kitchen. Fortune: 44-45.

Kestin, S., 2016. Diners blindly trust those who skirt the rules. Sun-Sentinel: 1A, 8-9A.

Khanimov v. McDonald's Corporation, 2014. 121 A.D.3d 1052 (N.Y. App. Div. 2d Dep't.).

Koperwas v. Publix Supermarkets Inc., 1988. 534 So.2d 872 (Court of Appeals of Florida1988).

Koster v. Scotch Associates, 1993. 640 A.2d 1225 (Supreme Court of New Jersey).

Lee v. City of New York, 2012. 16 N.Y.S.3d 132 (Sup. Ct. of N.Y, Queens Co. 2012).

Lipp, J. and Hafer, 2014. What's in the package: Food, beverage, and dietary supplement law and litigation. Colorado Lawyer, 43(7): 77-87.

Livingston v. Marie Callender's Inc., 1999. 85 Cal. Rptr.2d 528 (California Supreme Court 1999).

Luna v. American Airlines Inc., 2014. 578 Fed. Appx. 58, 2014 U.S. App. Lexis 18166 (2d Cir. N.Y. 2014).

Martins v. Royal Caribbean Cruises Ltd., 2016. U.S. Dist. Lexis 152686 (S.D. Fla. Nov. 3, 2016).

McCarley v. West Quality Food Service, 1998. 960 S.W.2d 585(Supreme Court of Tennessee).

McGinty v. Grand Casinos of Miss. Inc., 2014. Miss. App. Lexis 269, 83 U.C.C. Rep. Serv. 2d (CBC) 652 (Miss. Ct. App. 2014).

McKinney v. Mac Acquisition LLC, 2014. U.S. Dist. Lexis 53437 (E.D. La. 2014).

Miller v. Atlantic Bottling Corp, 1972. 191 S.E.2d 518 (Puerto Rico Appeals Court).

Mix v. Ingersoll Candy Co., 1936. 6 Cal. 2d 674 (California Supreme Court 1936).

Mortazavi, M., 2016. Tainted: Food, identity, and the search for dignitary remedies. Brooklyn Law Review, 81: 1463-1492.

Mujtaba, B.G., 2014. Managerial skills and practices for global leadership. ILEAD Academy: Florida.

Mujtaba, B.G. and W.C. Johnson, 2016. Creating an organizational culture of delightful customer intimacy at publix super markets, inc. International Journal of Marketing Practices, 3(2): 47-67.

Newman, J., 2016. Safety issues stalk grocers' prepared meals. Wall Street Journal: B1, B2.

Ochoa v. State of New York, 2015. 50 Misc. 3d 1203(A); 29 N.Y.S.3d 848; N.Y. Misc. Lexis 4648; 2015 NY Slip Op 51870(U).

Parra v. Tarasco Inc., 1992. 595 N.E.2d 1186 (Illinois Court of Appeals 1992).

Restatement Restatement Third of Torts: Products Liability, 1997. American Law Institute 1997.

Restatement Second of Torts, 1979. American Law Institute 1979.

Rhodes v. Lazy Flamingo 2 Inc., 2015. U.S. Dist. Lexis 94762 (M.D. Fla. July 21, 2015).

Rouse v. George, A. Hormel and Co., 1976. 339 So.2d 1320 (Louisiana Court of Appeals).

Schafer v. JLC Food Systems, I., 2005. 695 N.W.2d 570 (Minnesota Supreme Court).

Segal, M.E., 2006. The truth behind mcdonald's hot coffee suit. Miami Herald, Business Monday: 8.

Sims v. Dixie Restaurants Inc., 2012. No. 4: 11cv00583 jlh. U.S. Dist. Lexis 106268 (E.D. Ark. July 31, 2012).

Southern States Coop v. Doggett, 1982. 292 S.E.2d 331 (Virginia Supreme Court).

Tyson Foods Food Safety and Quality Assurance Department, 2016. Safety First. Fortune: 56.

U.S. Legal – Legal Definitions, 2016. Adulterated Food Law & Legal Definitions. Retrieved from http://definitions.uslegal.com/a/adultrated-food [Accessed September 22, 2016].

Wachtel v. Rosol, 1970. 271 A.2d 84 (Supreme Court of Connecticut 1970).

Way v. Tampa Coca Cola Bottling Co., 1972. 260 So.2d 288 (Florida Court of Appeals).

Webster v. Blue Ship Tea Room, I., 1964. 198 N.E.2d 309 (Supreme Court of Massachusetts 1964).

Weiner v. Dinex Group LLC, 2014. N.Y. Misc. Lexis 4542, 2014 NY Slip Op 32697(U) (N.Y. Sup. Ct. Oct. 9, 2014).

Wikipedia, 2016. Foodborne Illness. [Accessed September 22, 2016].

Wikipedia, 2016. Adulterated food. Available from https://en.wikipedia.org/wiki/Adulterated_food [Accessed September 22, 2016].

Wikipedia Food Contaminant, 2016. [Accessed September 22, 2016].

Williams v. O'Charley's Inc., 2012. 221 n.C. App. 390, 728 s.E.2d 19, 2012 n.C. App. Lexis 768.

Worthy v. The Beautiful Restaurant, I., 2001. 556 S.E.2d 185 (Georgia Court of Appeals).

Zabner v. Howard Johnson's, I., 1967. 201 So.2d 824 (Florida Court of Appeals 1967).