

## TORT LAW

### *Proving Causation in Food Poisoning Cases*

by Jeremy Robinson, Column Editor

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Whew! Now that the election cycle is over (at least for a short time), the news media will have to revert to finding other ways to fill the dead air. And while this may consist largely of sensationalist hype and lurid celebrity gossip, occasionally there will be actual news.

One type of event that seems to be in disturbingly regular rotation on the news outlets recently is contamination of our food supply. From fruits and vegetables to undercooked meats and processed products of unknown constitution, nothing seems safe from human error. Not surprisingly, this type of food mishandling can lead to serious illness and consequent lawsuits to seek compensation for the injured victims.

Adulterated food cases can come in many different forms, from foreign objects in food products (*see, e.g., Mexicali Rose v. Superior Court* (1992) 1 Cal.4th 617 [plaintiff sustained injuries after swallowing a chicken bone contained in an enchilada purchased at defendant's restaurant]) to allergic reactions to common food additives (*see, e.g., Livingston v. Marie Callender's, Inc.* (1999) 72 Cal.App.4th 830 [customer suffered severe adverse reaction after eating vegetable soup sued restaurant operator for failing to warn that soup contained monosodium glutamate]). Of particular relevance to this column are cases in which the plaintiff is sickened by some form of bacterial contamination of the food and develops food poisoning.

Food poisoning cases create interesting issues relating to proof and causation. In the typical foreign object cases, the plaintiff may be fortunate enough to still have the item causing injury or at least may be able to identify it with some accuracy. In food poisoning cases, however, the "evidence" tends to disappear quickly, leaving the plaintiff trying to prove contamination from his or her resulting illness and (most often) general facts regarding improper food preparation methods.

Recently, Division 3 of the Fourth District court of appeal addressed the standard of proof of causation in such cases. The case is *Sarti v. Salt Creek Ltd.*, 2008 WL 4695985; it came to the court following a grant of judgment notwithstanding the verdict ("JNOV") by the trial judge, erasing a successful jury verdict. The Fourth District reversed the JNOV and reinstated the original jury verdict, finding that the case upon which the JNOV was granted was erroneously decided.

The case can be summarized as follows. On April 7, 2005, the plaintiff Sarti and a friend ate at the defendant Salt Creek Grille. They split an appetizer that included raw ahi tuna. Sarti became

nauseous and chilled the next day. The day after that she suffered constant diarrhea, fever and chills. The diarrhea continued for the next 10 days. By April 19, Sarti was unable to move her legs and was having a hard time focusing her eyes. She was taken to the emergency room and put into intensive care, where a neurologist diagnosed a variant of Guillain-Barre syndrome (an immune response to foreign antigens like infections and damages the peripheral nerves). She was tested and found to have *Campylobacter* bacteria. Expert testimony would later indicate that Sarti's Guillain-Barre was an idiosyncratic immuno-suppressant reaction to the constant diarrhea brought on from *Campylobacter*.

Complicating matters for the plaintiff significantly is the fact that *Campylobacter* is **not** found in raw tuna, unless that tuna has been cross-contaminated by raw chicken, in which the bacteria is common. Sarti's sickness was reported to the Orange County Health Department. The report resulted in a "food borne illness" report dated May 5, 2005 – a little less than a month after the meal. The report identified four practices at the Salt Creek Grille that could lead to cross-contamination. Specifically, wipe-down rags were not being sanitized between wiping down surfaces; there was also an insufficient amount of sanitizer in the dishwasher; chicken tongs were sometimes used for other food (the tongs would take raw chicken off the grill and then cooked food would be touched with the same tongs); raw vegetables were stored under "raw meat" (the expert testifying did not say what kind of raw meat), so that a drop of raw meat juice might get on the vegetables. There was also testimony that the waiter who served Sarti had used a wet, unsanitized rag stored underneath the bar to wipe down Sarti's table.

The plaintiff Sarti never completely recovered from her illness. She had to use a walker for eight months and to this day retains only about 40% of what would have been her normal endurance.

The plaintiff sued the partnership that owns the Salt Creek Grille for breach of warranty. Following trial, the jury returned a verdict of \$725,000 in economic damages and \$2.5 million in non-economic damages. The trial judge perceived that the jury's verdict was based on the inference that the practice of using the same wipe down rag (or storing raw meat over raw vegetables, or touching cooked food with chicken tongs that had previously touched raw chicken) had led to cross-contamination from raw chicken to raw tuna.

Following the verdict, Salt Creek Grille moved for a JNOV, which was granted by the trial judge despite his belief that Sarti had presented the jury with sufficient evidence to prove her case. The reason for granting the JNOV was that the judge read *Minder v. Cielito Lindo Restaurant* (1977) 67 Cal.App.3d 1003 as imposing a heightened causation standard in food poisoning cases and barring the use of inferences to prove causation in such a case. Therefore, the judge felt compelled by the *Minder* decision to grant the defendant's request for JNOV in spite of his feeling that the plaintiff's evidence could sustain the jury's findings.

The *Minder* case involved a couple who developed food poisoning (*Shigella flexneri*, Group B) after eating brunch at the defendant's Mexican restaurant. Among the evidence presented at trial was a health inspection report prepared a couple of months before the plaintiffs' illnesses that detailed various general unsanitary conditions in the restaurant and testimony from the plaintiffs' treating physician that the plaintiffs' illnesses were the result of contaminated food. *Minder v. Cielito Lindo Restaurant*, *supra*, 67 Cal.App.3d at 1006-1007. The jury sided with the plaintiffs but the appellate

court reversed the verdict, concluding the plaintiffs had not presented sufficient evidence to link their illness with the consumption of the food at the defendant's restaurant. *Id.* at 1008.

The court in *Sarti* conducted a detailed analysis of the holding in *Minder* and the bases for the court's conclusions in that case. The analysis is too lengthy to summarize here, but suffice it to say that while the *Sarti* court agreed with the ultimate decision in *Minder* based on the specific facts of that case, it found the reasoning to be lacking in several respects and declined to follow it. In particular, the court strongly disagreed with the suggestion in *Minder* that food poisoning cases are subject to some type of heightened proof of causation standard, holding:

**We cannot agree, however, with the strong implication in the *Minder* analysis that food poisoning cases are somehow unique in tort law... Food poisoning cases follow the same rules as other tort cases: "The basic elements of proof in a food poisoning case are essentially those of any personal injury action."**

*Sarti v. Salt Creek Ltd.*, 2008 WL 4695985, 9, quoting 4 Frumer & Friedman, *Products Liability*, § 48.06, p. 48-23 (rel.109-8/2008).

Despite rejecting the *Minder* court's implication that food poisoning cases are subject to a different causation standard than other tort cases, the court in *Sarti* did agree that the plaintiffs in *Minder* had not satisfied even the general causation requirements. Critical, in the *Sarti* court's view, to the success of the case before it, as opposed to the facts in *Minder*, was the fact that, unlike *Minder*, there was expert testimony expressly making the link between the particular kind of food poisoning involved (*Campylobacter*) and the particular unsanitary conditions found at the restaurant – cross-contamination from raw chicken. An expert for *Sarti* testified that anything that might have touched something that touched raw chicken would be cross-contaminated. Particularly given the lack of proper sterilization in the dishwasher and the waiter's constant use of an unsterilized wipe down rag, a reasonable jury could infer either that a rag used to wipe down a raw chicken board was used to wipe down a vegetable or tuna board, or, alternatively, that a drop or two of raw chicken juice may have leaked onto some of the vegetables stored beneath it.

As such, the decision in *Sarti* is a bit of a mixed bag. While the court did clarify that causation in food poisoning cases may be shown in the same manner as any other personal injury case, it also indicated that in order to be successful in a food poisoning cases, the plaintiff must be able to present evidence showing how the challenged food preparation procedures would lead to the **specific** ailment suffered by the plaintiff. The plaintiff's food-borne illness and the general poor sanitation or preparation practices on the part of the defendant food supplier are not enough to allow for the inference of causation.