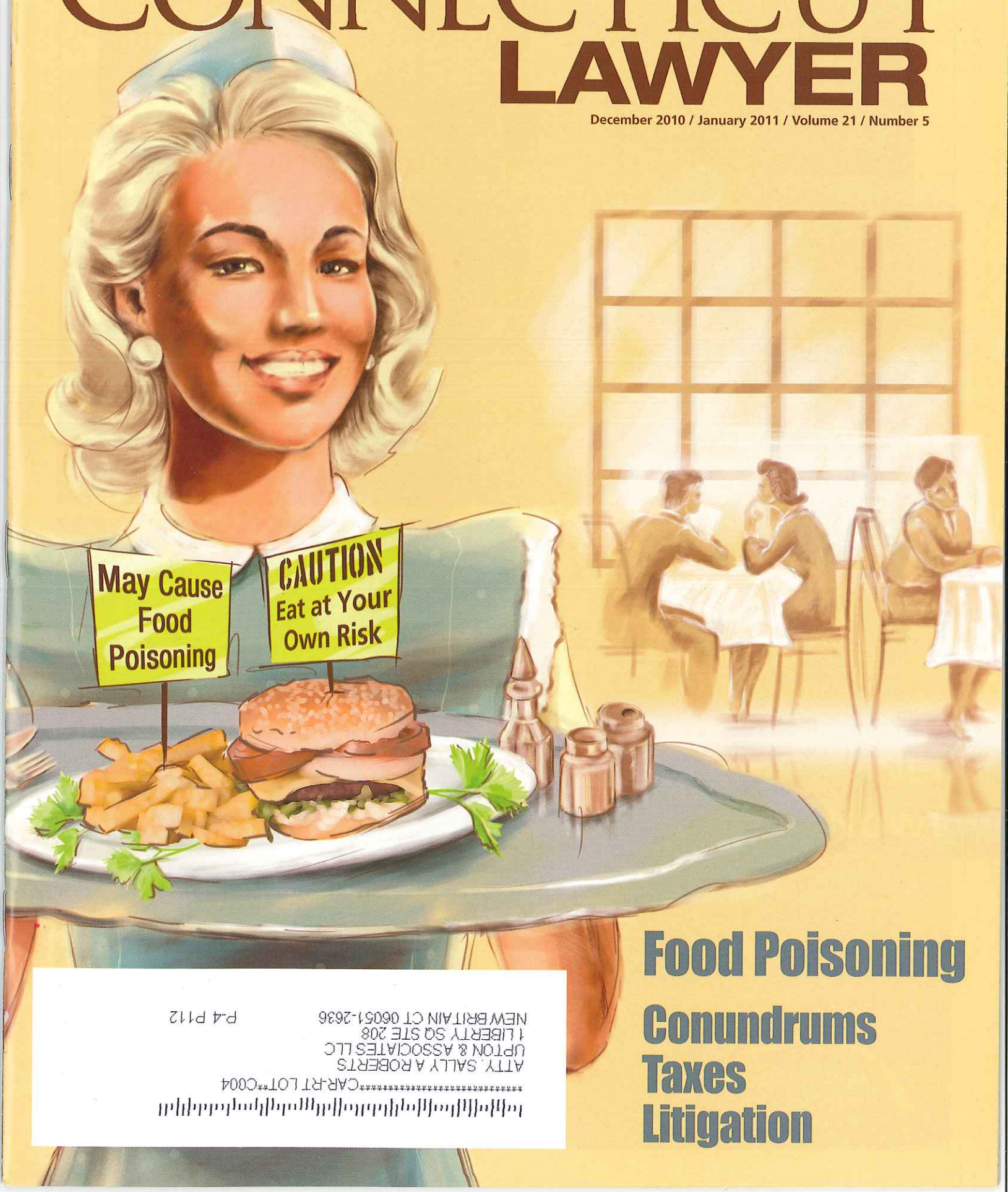
CONNECTICUT LAWYER

December 2010 / January 2011 / Volume 21 / Number 5



Food Poisoning

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Food Poisoning Cases in Connecticut

By Sally A. Roberts

During the holiday season, people tend to prepare and serve more food and, at the same time, more cases of food poisoning occur. When a consumer contracts food poisoning as a result of eating spoiled or contaminated food in Connecticut, who does a consumer seek to hold accountable and under what theory of liability? This article will give a brief summary of food poisoning cases over the years, under different theories of liability.[1]

History

Food poisoning cases are not new. A survey of case law across the country shows many such cases arising as far back as the nineteenth century.[2] In 1869, a case in Michigan[3] was brought for the balance remaining unpaid on the price of the carcasses of three hogs sold to be used as food in a lumber camp. The defense was that one of the carcasses was unsound and unfit for use. In 1897, a meat purchaser filed an action in Illinois against a retail meat dealer after the pork she bought from the dealer was unwholesome and unfit for use.[4] In 1918, a consumer in New York brought an action to recover damages for personal injuries from the consumption of unwholesome and poisonous ice cream sold to him by the retailer.[5]

Breach of Warranty: Privity of Contract

In 1937, a Connecticut consumer filed an action against a company alleging a breach of warranty and negligence after she was injured by a nail embedded in cream cheese she had consumed.[6] The consumer was a boarder, and the owner of the house had bought a package of cream cheese from the company. The cream cheese was not made by the company, but rather the manufacturer sold the cream cheese to the company. The company's defense was that warranty, whether express or implied, required privity of contract between the parties. Without a contract, either express or implied, there was no warranty. The court dismissed the breach of warranty claim because the consumer was not in privity with the company that sold the cheese.[7]

In 1938, The Connecticut Supreme Court reached a similar result.[8] The plaintiffs ate liverwurst purchased by the husband from the retailer, and both became ill from small pieces of glass contained in the meat. The plaintiffs alleged breach of warranty of fitness for consumption and negligence, but the trial court, after finding no evidence of negligence, removed that issue from the jury. The trial court also directed a verdict for the retailer as to one of the injured parties after fiuding no privity of contract. The case was upheld on appeal.[9]

Negligence

In a 1948 case, a patron brought suit alleging negligence, claiming to have been poisoned by food purchased at a restaurant.[10] The customer had consumed a corned beef sandwich on the premises, and his later illness was diagnosed as food poisoning. At the trial, the court directed a verdict, stating that there was no evidence of negligence, which judgment was affirmed on appeal.[11]

Uniform Sales Act

The Connecticut Supreme Court concluded that, under the Uniform Sales Act, food sold in a restaurant for immediate consumption was a service, not a sale.[12] The Court held that there were no warranties in the service of food because the transaction was not for the sale of food but was for the services rendered with food being a mere incident to that service.[13] These decisions are no longer applicable because Connecticut has adopted the Uniform Commercial Code.[14]

Uniform Commercial Code

Under the Uniform Commercial Code, "the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale."[15] "This provision was adopted in response to those cases under the Uniform Sales Act which had concluded that the provision of food or drink to be consumed on the premises, as in a restaurant, did not constitute a sale within the meaning of that statute."[16] In an action brought under the Uniform Commercial Code in 1963, where a customer broke a tooth after taking a bite of a grinder sandwich, the court held that the grinder sold was of such hardness that it was not reasonably fit for humau consumption and the vendor was held liable for its breach of implied warranty under Conn. Gen. Stat. § 42a-2-315.[17]

Strict Liability in Tort

In a 1970 case, a restaurant patron had consumed an egg salad sandwich, after which he became violently ill with salmonella poisoning that required extended hospitalization.[18] The court held that a cause of action based on strict tort liability was stated by the complaint, where the restauraut operator was engaged in the business of selling the sandwich, which reached the consumer without a change in condition, and was defective condition and unreasonably dangerous to the plaintiff.[19] The court also concluded that the sales provision of the Uniform Commercial Code did not preempt the doctrine of strict liability in tort.[20]

Connecticut's Product Liability Act

Connecticut's Product Liability Act was enacted in 1979.[21] Rather than abolishing previously existing rights, the Act merges the previous varied common-law theories into one cause of action.[22] The various theories set forth in the statute include strict liability in tort, negligence, and breach of warranty, both express and implied.[23] The Act is the "exclusive remedy for claims falling within its scope."[24] Thus, common-law counts of product liability will be stricken as uot within the purview of the Act.[25] However, separate counts alleging negligeuce and implied warranty of merchautability have been upheld as falling within the definition of a "products liability claim."[26]

The preparation of food by a restaurant is a product for the purposes of the Act.[27] Prior to the enactment of the Act, the Connecticut Supreme Court had decided that food served at a restaurant was a product for the purposes of strict liability, and that a restaurant was in the business of selling products.[28] In a case brought uuder the Act, a superior court has ruled that a hamburger prepared by a restaurant and sold to a customer was a "product" within the coverage of the Act.[29] The customer suffered serious iujuries as a result of swallowing a hard piece of plastic while eating the hamburger.[30]

Elements of Proof

In actions involving liability for the sale or serving of unwholesome food, the plaintiff has the burden of proving that the food was unwholesome and that the injury or illness resulted from eating it.[31] A prima facie case of liability for selling unfit food is made out by proof that it was diseased and may have caused the injury.[32]

Proof of proximate cause may be problematic. The issue of proximate cause is ordinarily a question of fact, but in some circumstances expert testimony is required to establish cau-

sation. In a lawsuit against the restaurant for food poisoning resulting in hepatitis, the defendant filed a summary judgment motion, assert that the plaintiff failed to establish causation.[33] At his deposition, the plaintiff's physician testified that he could not state with a reasonable degree of medical probability that the plaintiff's meal at the restaurant caused the plaintiff's hepatitis virus. [34] The court denied the motion for summary judgment, reasoning that the Connecticut appellate courts had not decided whether the effect of consuming contaminated food upon the human body was within the common knowledge of lay witness or whether expert testimony was needed to establish causation.[35]

Damages Recoverable

In a product liability claim, a plaintiff may recover compensation for "harm," which includes personal injuries and wrongful death.[36] A plaintiff was awarded damages on a product liability count, in which the customer alleged he suffered injuries and losses as a result of pricks to the inside of his mouth from a broken-off piece of a hypodermic needle in a breakfast sandwich he purchased at a restaurant.[37] The superior court held that the restaurant put a defective product into the stream of commerce by which the customer was injured and that the incident touched off anger, depression, and paranoid feelings that caused the customer to need the help of a psychologist, for which he was awarded damages.[38]

Punitive Damages

The Act provides that the plaintiff may recover punitive damages if the injury resulting from the product seller's "reckless disregard for the safety of product users, consumers or others who were injured by the product." [39] A customer's product liability action in which she sought punitive damages against retail sellers of cheese, who also manufactured and distributed it, was able to withstand the seller's motion to strike where the complaint alleged that the seller omitted a known safety procedure and were in a position to have knowledge that the cheese was defective and likely to cause serious harm.[40]

Punitive damages were also held proper in a case where the injured person ingested blueberry bread that did not list nuts as an ingredient. The injured person was allergic to nuts and suffered anaphylactic shock. The court held a jury could find that the manufacturer had knowledge of the specific and substantial danger from improper labeling products containing nuts and that it acted in reckless disregard for the safety of its consumers when it failed to remove the incorrect label.[41]

Nationwide Recall of Eggs Because of Salmonella Outbreak

A nationwide recall of more than a half-billion contaminated eggs began in mid-August, 2010. [43] The massive egg recalls came weeks after a new U.S. Food and Drug Administration rule took effect that tightened safety rules at large producers and required testing in poultry houses for salmonella hacteria. More than 2,000 illnesses were reported linked to the bacteria *Salmonella enteritidis*. The salmonella outbreak was the largest since the Centers for Disease Control began tracking the illness 30 years ago.[44]

The most common symptoms of salmonella are diarrhea, abdominal cramps and fever within eight hours to 72 hours of eating a contaminated product, and which usually lasts four to seven days in healthy people. However, contamination can cause serious and sometimes fatal infections in young children, frail or elderly people, and others with weakened immune systems.

The responsibility for food safety remains split primarily between the U.S. Agriculture Department and the U.S. Food and Drug Administration. According to news reports,[45] U.S. Department of Agriculture experts knew about the sanitary problems at the Iowa egg farms at the center of the massive nationwide egg recall, but did not notify health authorities, according to the *Wall Street Journal*. Bacteria found in chicken feed used at the two Iowa farms were linked to a salmonella outbreak, according to the FDA. The regulatory gaps may have contributed to delays in discovering salmonella contamination. The FDA, which has overall responsibility for egg safety, said it never heard from the USDA about problems such as dirt and mold at the Iowa egg farms. The USDA said it didn't give notice because the conditions found at the egg packing plant were routine.[46] *The New York Times* reported that the way the responsibilities and resources are divided up can seem so illogical that some bureaucrats themselves have called for change.[47]

A federal lawsuit has been filed on behalf of a Minnesota man who was hospitalized with salmonella. The lawsuit asserts claims for strict product liability, negligence, unjust enrichment, breach of express and implied warranties, and violation of consumer protection law.[48]

Conclusion

Although food poisoning cases have been among the earliest reported "products" cases in many states, the prevalence and impact of food poisoning litigation has increased with advances in technology and the continuing number of high-profile outbreaks of E. coli and other pathogens. Although these cases have been brought under many theories, today in Connecticut food poisoning cases typically fall within the Product Liability Act. **CL**

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Notes

1. *See generally* Jane M. Draper, *Liability for injury or death allegedly caused by foreign object in food or food product, 1 A.L.R.5th 1;* Jane Massey Draper, *Liability for injury or death allegedly caused by spoilage, contamination, or other deleterious condition of food or food product, 2 A.L.R. 5th 1*; Jane M. Draper, *Liability for injury or death allegedly caused by food product containing object related to, but not intended to be present in, product, 2 A.L.R. 5th 189*; and Kristine C. Karnezis, *Liability of packer, food store, or restaurant for causing trichinosis, 96 A.L.R.3d 451.*
2. *See generally 35 Am Jur 2d, Food* §§ 84-106.
3. *See Hoover v. Peters*, 18 Mich. 51 (1869).
4. *See Wiedeman v. Keller*, 171 Ill. 93 (1897).
5. *See Race v. Krum*, 222 N.Y. 410 (1918).
6. *See Fargot v. Great Atlantic & Pacific Tea Co.*, 4 Conn. Supp. 447 (1937).
7. *Id.*
8. *See Borucki v. MacKenzie Bros. Co.*, 125 Conn. 92 (1938).
9. *Id.*
10. *See Albrecht v. Rubinstein*, 135 Conn. 243 (1948)
11. *Id.*

12. *See, e.g., Albrecht v. Rubinstein*, 135 Conn. 243 (1948); *Lynch v. Hotel Bond Co.*, 117 Conn. 128 (1933); *Merrill v. Hodson*, 88 Conn. 314 (1914).
13. *Id.*
14. Connecticut General Statutes Title 42a.
15. Conn. Gen. Stat. § 42a-2-314(1).
16. P. Sherman, *Products Liability for the General Practitioner* (1981), 3.13 p. 52. "Apparently the Code drafters wanted to end the age-old battle of whether an innkeeper or a restaurateur sells food or sell services." *1 Williston, Williston on Sales* (5th ed. 1994) 2-5, p. 30.
17. *See Scanlon v. Food Crafts, Inc.*, 2 Conn. Cir. Ct. 3 (1963). *See also 63 Am Jur 2d, Products Liability* §§ 5, 489-490, 497-499, 674-676.
18. *See Wachtel v. Rosol*, 159 Conn. 496 (1970).
19. *Id.*
20. *Id. See also* Larry D. Schaefer, *Pre-emption of Strict Liability in Tort by Provisions of UCC Article 2, 15 A.L.R. 4th 791.*
21. The Product Liability Act is set forth in Conn. Gen. Stat. §§ 52-572m, 52-572n to 52-572r, 52-240a, 52-240b, and 52-577a. It became effective October 1, 1979.
22. Conn. Gen. Stat. § 52-572n(a) provides that: "a products 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."
23. Conn. Gen. Stat. § 52-572m(b) provides: (b) "Product liability claim" includes all claims or actions brought for personal injury, death or property damage caused by the manufacture, construction, design, formula, preparation, assembly, installation, testing, warnings, instructions, mar keting, packaging or labeling of any product. "Product liability claim" shall include, but is not limited to, all actions based on the following theories: Strict liability in tort; negligence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation or nondisclosure, whether negligent or innocent.
24. *Winslow v. Lewis-Shepard, Inc.*, 212 Conn. 462, 471 (1989); *Hurleyv. Heart Physicians, P.C.*, 278 Conn. 305, 324 (2006) ("In *Gerrity v. R.J. Reynolds Tobacco Co.*, 263 Conn. 120, 126 (2003), we reiterated that the exclusivity provision of the liability act makes it the exclusive means by which a party may secure a remedy for an injury caused by a defective product.").
25. See *Ruff v. Anela, Inc.*, 2003 Conn. Super. LEXIS 1118 (plaintiff customer who was injured when the defendant restaurant served a fish dinner that contained bones causing her to choke and sustain other injuries could not maintain a separate breach of warranty claim).
26. *See Angiolillo v. Stanwich Club*, 2004 Conn. Super. LEXIS 314 (plaintiff who injured teeth when chewing on over-cooked piece of fried dough served by defendant club asserted products liability claim under Conn. Gen. Stat. § 52-572n, negligence (count two), breach of implied warranty of merchantability (count three), and recklessness in violation of Conn. Gen. Stat. § 52-240b (count four). Club moved to strike counts two–four. Court held that the negligence claim could be read as setting forth a statutory products liability claim under § 52-572m(b), and that the breach of warranty claim also fell within § 52572m(b).
27. *Wachtel v. Rosol*, 159 Conn. 496 (1970).
28. *Id.*
29. *Williams v. McDonald's of Torrington*, 1997 Conn. Super. LEXIS 1281. *See also* Charles Cantu, *A Continuing Whimsical Search for the True Meaning of term Product*, 35 St. Mary's L. J. 341(2004).
30. *Williams v. McDonald's of Torrington*, 1997 Conn. Super. LEXIS 1281.
31. *31 Am Jur Proofs of Facts 2d 81, Food Poisoning.*
32. Id. *See also 8 Am Jur Legal Forms 2d, Food* §§ 120:42, 120:51; *12 Am Jur Pleading & Practice Forms 2d, Food, Forms* 31-63, 71-73, 81-84.
33. *Shay v. Adams Mill Restaurant*, 1991 Conn. Super. LEXIS 2399.
34. *Id.*
35 *Id.*
36. Conn. Gen. Stat. § 52-572m(d).
37. *Civitello v. Burger King Corp.*, 2002 Conn. Super. LEXIS 318.
38. *Id.*
39. Conn. Gen. Stat. § 52-240b.
40. *Primini v. Liuzzi Mkt.*, 2003 Conn. Super. LEXIS 3115.
41. *Roome v. Shop-Rite Supermarkets, Inc.*, 2006 Conn. Super. LEXIS 2525.
42. *See generally, How to Document a Food-Poisoning Case*, Marler and Babcock, *Trial* November 2004.
43. For more on recall of eggs, see the U.S Food and Drug Administration Web site: http://www.fda.gov/Safety/Recalls/MajorProductRecalls/ucm223522.htm.
44. Learn more about salmonella at the U.S. Centers for Disease Control and Prevention, http://www.cdc.gov/nczved/divisions/dfbmd/diseases/salmonellosis/.
45. *See* http://www.reuters.com/article/idUS-TRE6893A020100910.
46. *See* http://www.reuters.com/article/idUS-TRE6893A020100910.
47. *See* http://www.nytimes.com/2010/08/25/business/25eggs.html?_r=2&scp=3&sq=egg%20recall&st=cse.
48. *See* http://www.myfoxtwincities.com/dpp/news/minnesota/egg-recall-lawsuit-salmonella-sept-20-2010.

Centers for Disease Control and Prevention estimate that foodborne diseases cause about 76 million illnesses, 325,000 hospitalizations, and 5,000 deaths each year in the United States.

As this article went to press, the U.S. Senate had just passed a bill that provided the biggest overhaul of the nation's food safety laws since the 1930s. The bill would give new authority to the Food and Drug Administration and require new responsibilities on the part of farmers and food companies to prevent contamination. It would also set safety standards for imported foods. Under the bill, the FDA would be able to recall food and access internal records at farms and food production sites. The FDA would be able to regularly inspect farms. The bill would require importers to provide evidence that products grown and processed overseas meet safety standards. The House of Representatives approved a similar bill last year.