

David W. Babcock, J.D.



## It's Not Just Montezuma's Revenge Anymore...

*Editor's note: The Journal recognizes the importance of providing readers with practical and relevant legal information through Legal Briefs columns. In every other issue of the Journal, this information is presented by one or more of several insightful and dedicated columnists: Bill Marler, Denis Stearns, Drew Falkenstein, Patti Waller, and David W. Babcock, all of the law firm Marler Clark.*

The attorneys at Seattle-based Marler Clark, LLP, PS ([www.marlerclark.com](http://www.marlerclark.com)) have developed a nationally known practice in the field of food safety. Marler Clark represents people who have been seriously injured, or the families of those who have died, after becoming ill with foodborne illness during outbreaks traced to restaurants, grocery chains, and other food suppliers. The attorneys have litigated thousands of food contamination cases throughout the United States, many of them high-profile, including the Jack in the Box and Odwalla E. coli outbreaks; the Malt-O-Meal, Sun Orchard, and Chili's Salmonella outbreaks; the Senor Felix Shigella outbreak; and the Subway and Chi-Chi's hepatitis A outbreaks.

David W. Babcock, the author of this month's installment, joined Marler Clark as the firm's senior litigation associate in 2001. Representing children and the elderly has been central to Mr. Babcock's practice at Marler Clark, where he focuses on litigation resulting from foodborne-illness outbreaks.

**L**ast night you attended a catered function for your favorite charity. Now, 24 hours later, you are feeling less than charitable. In the past hour, you have vomited five times. Your head is pounding, your back aches, and you have a fever. Just before the diarrhea begins, a friend from the charity's board calls to see how you are doing. She informs you that several others who attended the function are sharing in your misery.

### Noroviruses 101

If you found yourself in a scenario such as this one, chances would be that you had contracted a norovirus. You would not be alone. Noroviruses is the name given to a group of related viruses that cause acute gastroenteritis in 23 million cases a year, according to estimates by the Centers for Disease Control and Prevention (CDC).<sup>1</sup> Of viruses, only the common cold is reported more often than viral gastroenteritis.<sup>2</sup>

Norovirus is recognized as the cause of over half of all foodborne-illness outbreaks. In fact, of 232 outbreaks of norovirus between July 1997 and June 2000, 57 percent were foodborne, 16 percent were spread from person to person, and 3 percent were waterborne.<sup>3</sup>

The good news about noroviruses is that they are very unlikely to cause serious or lasting injury. While the acute symptoms of norovirus—nausea, vomiting, diarrhea, fever, chills, and aches—can be severe, they typically last less than 60 hours.<sup>4</sup> People infected with norovirus usually recover in two to three days; however, in some cases, severe

dehydration, malnutrition, and even death can result from norovirus infection, especially among children, the elderly, and immunocompromised adults in hospitals and nursing homes.<sup>5</sup>

Reported outbreaks associated with noroviruses are on the rise. It is not clear, however, whether this rise is due to any increase in illnesses. In the past 10 to 15 years, diagnostic techniques for identifying noroviruses have advanced significantly, and increased reports may simply be due to an increase in surveillance. One way or the other, public awareness seems to be increasing.

Increased public awareness of noroviruses could be due in large part to the most common settings for outbreaks. Those settings include restaurants and catered meals (36 percent); nursing homes (23 percent); schools (13 percent); and "vacation settings or cruise ships" (10 percent).<sup>6</sup> Nursing homes, schools, and cruise ships rank high on this list primarily because proximity among potential outbreak members plays a dominant role in the spread of noroviruses.

Noroviruses are highly contagious—spreading either in fecal matter or vomitus. There is strong evidence that norovirus is prone to "aerosolization," allowing microscopic droplets to contaminate surfaces and making for easy transmission from person to person.<sup>7</sup> Charming enough, the "projectile" nature of vomiting associated with noroviruses is a contributing factor here as well.

Elderly populations, such as residents of long-term care facilities, are more likely to suffer severe complications from norovirus

infection. Factors that play a role in this heightened virulence among elderly populations include

- age-induced decrease in stomach acid production, which allows ingested pathogens to enter the intestinal tract;<sup>8</sup>
- age-induced decrease in cellular and humoral immunity, which is caused by decreased T-cell activity, and thus decreases resistance to pathogens;<sup>9</sup> and
- age-induced decrease in peristalsis,<sup>11</sup> which significantly slows the elimination of enteric pathogens.<sup>12</sup>

## Legal Implications

The legal fallout from outbreaks of noroviruses depends largely on the setting of the outbreak and the vehicle of transmission. Determining whether the method of transmission was foodborne or waterborne or was person to person will go a long way toward determining the causes of action available to those who were made ill.

## Foodborne Norovirus Claims

Foodborne norovirus outbreaks in commercial food service settings give rise to strict product liability claims, just as they would with more notorious pathogens like *E. coli* O157:H7, *Salmonella*, and hepatitis A. Contaminated food cases were among the earliest cases to establish strict liability principles, in Washington and elsewhere.<sup>12</sup> Today it is plainly established that restaurant or catered meals are in fact a product, and that the act of preparing them is manufacturing.<sup>13</sup> Because prepared food items contaminated with a pathogen are essentially per se defective, such cases turn almost entirely on the issue of causation.<sup>14</sup> In other words, the focus of the plaintiff's case would be proving the link between the individual plaintiff's illness and the established outbreak.

## Person-to-Person Transmission in Commercial or Institutional Settings

Different issues arise outside of the foodborne context. When transmission of the illness cannot be tied to consumption of a product, strict liability principles are most likely not available.<sup>15</sup> Where the spread of a norovirus outbreak has occurred through person-to-person transmission without the aid of a food item, traditional notions of negligence<sup>16</sup> and premises liability<sup>17</sup> are more applicable.

The duties of hotels, conference centers, health care facilities, and cruise ships to prevent the spread of noroviruses among their patrons are consistent with their general duties under common carrier<sup>18</sup> and business invitee<sup>19</sup> doctrines. Consistent with these principles, such businesses would have a duty to take reasonable steps to prevent such transmission, to respond accordingly in high-risk scenarios, and to sufficiently warn patrons of the risks of transmission. For example, Marler Clark is involved in litigation resulting from an outbreak of a norovirus involving more than 1,000 people associated with a large hotel in 2004. A central issue in that litigation is whether the hotel took adequate steps to prevent the spread of the illness, such as removing sick employees from the workplace; cleaning properly after ill guests; and restricting access to high-risk areas and activities. Also at issue is the adequacy of the hotel's communication of the situation to its guests and other patrons.

## Cruise Ships

Outbreaks of noroviruses on cruise ships present some additional legal considerations. According to CDC,

Cruise-ship outbreaks demonstrate how easily noroviruses can be transmitted from person to person in a closed environment, resulting in large outbreaks. The continuation of these outbreaks on consecutive cruises ... suggests that environmental contamination and infected crew members can serve as reservoirs of infection for passengers.<sup>20</sup>

The CDC now operates a Vessel Sanitation Program designed to combat the problem.<sup>21</sup> In addition, measures implemented by cruise ships to combat the spread of illnesses on board often include quarantining of passengers who report themselves ill. While this method is likely effective in curbing the spread of illness, it is not always a welcome development for the sick individual or family.

Passengers' rights in such situations are frequently curtailed by conditions imposed through the purchase of the ticket. These limitations often include forum selection clauses,<sup>22</sup> shortened statutes of limitations,<sup>23</sup> and arbitration clauses.<sup>24</sup> As a general rule, these limitations have been upheld.<sup>25</sup>

## Protecting Against Norovirus

There are a few things that individuals can do to reduce the risk of contracting noroviruses. These include frequent handwashing, washing fruits and vegetables before consumption,

quickly and thoroughly cleaning contaminated areas, and removing and perhaps discarding implicated clothing and linens.

For businesses hoping to avoid sickening patrons and incurring potential legal hassles, there are additional precautions to take. A first step is to educate employees on the importance of personal hygiene. In conjunction, food service and hospitality industry businesses should make every effort to keep sick workers out of the workplace. Finally, each establishment should have a well-thought-out and feasible plan for responding to incidence of illness on the premises quickly and effectively.

Efforts on both sides of the "table," as it were, will help all of us enjoy a healthier and safer environment. 🐞

(Portions reprinted, with permission, from Bar Bulletin, August 2007, Volume 25, Issue 12, pages 12-13, a publication of the King County Bar Association.)

**Disclaimer:** Legal Briefs is published for informational purposes only; none of the information is intended to be, nor is, formal legal advice. NEHA and the *Journal of Environmental Health* are not liable or responsible for actions taken on the basis of the information contained in these columns.

## References

1. CDC. Norovirus: Technical Fact Sheet. at <http://www.cdc.gov/ncidod/dvrd/revb/gastro/norovirus-factsheet.htm>. Last updated on August 3, 2006. Accessed on August 14, 2007.
2. FDA/Center for Food Safety and Applied Nutrition. *The Bad Bug Book: Norwalk Virus Family*. at <http://www.cfsan.fda.gov/~mow/chap34.html>. January 1992 with periodic updates. Accessed on September 4, 2007.
3. See CDC Web site n. 1 *Supra*.
4. *Id.*
5. Mayo Clinic. Norovirus. April 5, 2007. at <http://www.mayoclinic.com/health/norovirus/DS00942/DSECTION=1>. Accessed on August 15, 2007.
6. See CDC website n.1 *Supra*
7. *Id.*
8. See, James L. Smith. *Foodborne Illness and the Elderly*. *Journal of Food Protection*. Sept. 1998 at 1229-39.
9. *Id.*
10. Peristalsis is the rhythmic contraction of smooth muscles to propel contents through the digestive tract.

11. *Supra* at 21.
12. *Mazetti v. Armour & Co.*, 75 Wash. 622 (1913).
13. *Almquist v. Finley School District*, 114 Wn. App. 395, 57 P3d 1191 (2002).
14. See R. Drew Falkenstein. *An Introduction to Liability, Negligence, and All Things in Between: Part I*. Journal of Environmental Health. Sept. 2005 at 41.
15. The illness need not be tied to a specific food item, which is often very difficult. A link to a meal, or even to food from a particular source over a time frame is sufficient. For example, a sick food service worker might contaminate a wide variety of foods over a certain time frame, making isolation to a specific food very difficult, but not exonerating the food service establishment.
16. *Supra* at 10.
17. See David W. Babcock. *Legal Implications of Zoonotic Disease Outbreaks at Petting Zoos and Animal Exhibits*. Journal of Environmental Health. November, 2006 at 46.
18. A common carrier is an organization that transports persons or goods, and offers its services to the general public. See WILLSTN-CN § 58:3 (4th ed.).
19. A business invitee is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land. See Restatement (Second) of Torts § 332 (1965).
20. CDC. *Outbreaks of gastroenteritis associated with noroviruses on cruise ships--United States, 2002*. MMWR, Dec. 13, 2002 at 1112-1115.
21. "Vessel Sanitation Program." at <http://www.cdc.gov/nceh/vsp/desc/aboutvsp.htm>. Accessed on August 16, 2007.
22. A "forum selection" provision in a contract designates a particular state or court as the jurisdiction in which the parties will litigate disputes arising out of the contract. See 17A Am. Jur. 2d Contracts § 259.
23. Statutes of limitation are designed to protect potential defendants from stale claims by requiring plaintiffs to assert claims within a reasonable time period while evidence is fresh. See 51 Am. Jur. 2d Limitation of Actions § 15.
24. An arbitration clause is a provision to a contract requiring the arbitration of disputes under the contract. See 67 Am. Jur. 2d Sales § 156.
25. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

# THANK YOU FOR SUPPORTING THE NEHA/AAS

## SCHOLARSHIP FUND

**Leon F. Vinci**  
Lincoln, NE (12/06)

**Howard M. Stiver, M.P.H.**  
Lebanon, OH (1/07)

**Heather Gallant**  
Sandwich, MA (1/07)

**Edwin Vazquez, R.E.H.S.**  
Alexandria, VA (1/07)

**Gary Brown, Ph.D.**  
Richmond, KY (1/07)

**Edward H. Rau, R.S., M.S., C.H.S.P.**  
Frederick, MD (1/07)

**Dee Clingman**  
Orlando, FL (1/07)

**Richard F. Collins, M.S.E.H., R.S., D.A.A.S.**  
Atlanta, GA (1/07)

**James Speckhart**  
Charlotte, NC (1/07)

**Richard Pantages**  
Fremont, CA (1/07)

**Lisa Jones, R.S.**  
Las Vegas, NV (3/07)

**LeGrande G. Beatson, Jr., M.S., R.E.H.S.**  
Lynchburg, VA (3/07)

**Richard W. Mitzelfelt**  
Edgewood, NM (3/07)

**Wendell A. Moore**  
Bowie, MD (3/07)

**James J. Balsamo, Jr., M.S., M.P.H., R.S., C.F.S.P.**  
Metairie, LA (3/07)

**Vincent Radke**  
Atlanta, GA (5/07)

**Marian B. Balster**  
Arroyo Grande, CA (5/07)

**Frank S. Sedzielarz, R.S.**  
Fridley, MN (5/07)

**Lawrence H. Pierce, R.E.H.S./R.S.**  
Mililani, HI (5/07)

**Corwin D. Brown**  
Garden Grove, CA (5/07)

**Martha A. Sanders**  
Apo, AP (5/07)

**James D. Nelson, Jr., CIH**  
Tampa, FL (5/07)

**Bruce M. Etchison, R.S.**  
Oakland, CA (5/07)

**Lori Braunesreither**  
Pleasant Hill, CA (5/07)

**Kevin F. Anderson**  
Ames, IA (6/07)

**Valerie Metroff**  
Savannah, GA (6/07)

**Elizabeth Tennant**  
Seattle, WA (6/07)

**Steven M. Breithaupt, R.S.**  
Gallup, NM (6/07)

**Contributing Authors to Dr. M.T. Morgan's Env. Health Textbook** (6/07)

**Taraleen Malcolm**  
Kingston, Jamaica (6/07)

**Sanford Brown, Ph.D., M.P.H., R.E.H.S., R.S.**  
Fresno, CA (6/07)

**John S. Horvath, R.E.H.S.**  
Snellville, GA (6/07)

**John A. Steward, R.E.H.S.**  
Atlanta, GA (7/07)

**David H. Nash, Ph.D., C.F.S.P., M.P.H.**  
Philadelphia, PA (7/07)

**Vickie L. Church, M.P.A., R.E.H.S.**  
San Diego, CA (10/07)

**Welford Roberts, Ph.D., R.E.H.S./R.S., D.A.A.S.**  
South Riding, VA (10/07)

## NOMINATIONS NOW ACCEPTED

# 2008 Walter S. Mangold Award

The Walter S. Mangold Award, which recognizes extraordinary achievement in environmental health, has been presented since 1956 to the brightest and best in this profession. Nominations for this award may be made by an affiliate or by any five NEHA members, regardless of their affiliation.

Although the Mangold—NEHA's most prestigious award—is presented to an individual, it also honors an entire profession for its skill, knowledge, and commitment to public health. Nominations are due in the NEHA office by Thursday, March 13, 2008.

**For information**, please visit [www.neha.org/about/awardinfo.html](http://www.neha.org/about/awardinfo.html). Members can obtain nomination forms by calling (303) 756-9090, extension 302, or by sending an e-mail to [kclapper@neha.org](mailto:kclapper@neha.org).