It’s Not Just Montezuma’s Revenge Anymore...

Last 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).¹ Of viruses, only the common cold is reported more often than viral gastroenteritis.²

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.³

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.⁴ 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.⁵

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).⁶ 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.⁷ Charmingly 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;8
• age-induced decrease in cellular and humoral immunity, which is caused by decreased T-cell activity, and thus decreases resistance to pathogens;9 and
• age-induced decrease in peristalsis,11 which significantly slows the elimination of enteric pathogens.12

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.12 Today it is plainly established that restaurant or catered meals are in fact a product, and that the act of preparing them is manufacturing.13 Because prepared food items contaminated with a pathogen are essentially per se defective, such cases turn almost entirely on the issue of causation.14 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.15 Where the spread of a norovirus outbreak has occurred through person-to-person transmission without the aid of a food item, traditional notions of negligence16 and premises liability17 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 carrier16 and business invitee19 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 hotels’ 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.20 The CDC now operates a Vessel Sanitation Program designed to combat the problem.21 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,22 shortened statutes of limitations,23 and arbitration clauses.24 As a general rule, these limitations have been upheld.25

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.

References
3. See CDC Web site n.1 Supra.
4. Id.
6. See CDC website n.1 Supra
7. Id.
9. Id.
10. Peristalsis is the rhythmic contraction of smooth muscles to propel contents through the digestive tract.
11. Supra at 21.
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.
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).
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.