

Legal Aspects of An Outbreak of
Legionnaire's Disease at a Hotel in
Ocean City, Maryland

Jules Zacher, Esquire
1601 Walnut Street
Suite 707
Philadelphia, PA 19102
Phone: 215-988-0160
Fax: 215-988-0169
www.juleszacher.com
zacherlaw@aol.com

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I. BACKGROUND OF THE CASE

This paper is about the legal ramifications of a hotel not preventing seven people from contracting Legionnaire's disease. Six of these seven persons engaged in litigation against the hotel for its negligence. The cases are still pending in federal and state court. The paper will discuss the actions and inactions of the hotel which precipitated the litigation, as well as the litigation itself.

Many persons are under the impression that the outbreak of the disease at the Bellevue Stratford in Philadelphia was the last occurrence of this dangerous and sometimes fatal disease. Unfortunately, this is not the case. Outbreaks of the disease have occurred on cruise ships, malls, hospitals and other hotels on an all too frequent basis.

Legionnaire's disease is caused by the bacteria genus *Legionella*. One species of the genus *Legionella* is *pneumophila* (Lp). The species *Legionella pneumophila* contains 15 serogroups which are given numbers, e.g. Lp1. Lp1 is responsible for more reported cases of Legionnaire's disease in the United States than any other *Legionella* species or serogroup. Infection occurs when an infectious dose of the bacteria enters deeply into a susceptible person's lungs, either by inhaling contaminated aerosolized water droplets, or by aspirating water into the lungs while drinking or receiving respiratory therapy. Common sources of aerosolized water are Jacuzzi's, shower heads, water faucets and cooling towers.

The outbreak of Legionnaire's disease which this paper deals with occurred in Ocean City, Maryland. Legionnaire's disease is a reportable disease in Maryland. All reports about Legionnaire's disease are received by the Department of Health and Mental Hygiene. In this case, Baltimore County completed a CDC case report and a Department

of Health and Mental Hygiene form based on complaints from two persons who had contracted Legionnaire's disease and had stayed at the same hotel in Ocean City. Both forms were used to obtain information about the patient's usual residence and travel for the 10 days before the onset of Legionnaire's disease.

Ocean City, Maryland is located in Worcester County, Maryland on the Atlantic Ocean. There are more than 300 hotels in Ocean City, and the hotel in question is one of them. The hotel is the location of numerous conventions through-out the year, and has significantly less hotel guests during the fall and winter months.

The actual first confirmed case associated with the hotel occurred in April 2000. The second occurred in November 2002. Both guests were hospitalized. Neither of these cases were reported to the hotel by the State. The next three confirmed cases associated with the hotel occurred in October 2003. An additional four confirmed cases occurred from December 2003 through February 2004. All seven of these cases were reported to the hotel.

II. CHRONOLOGY OF THE CASE

1. Initial Actions

The first inkling that anything could be wrong was a phone call from the Maryland Department of Health and Mental Hygiene in Baltimore on December 1, 2003 to the State Health Officer located in Wicomico County, the county where the hotel was located. The call was made because two persons had contracted Legionnaire's disease and the only thing in common was that they both had stayed at the same hotel in October, 2003.

The local State Health Officer immediately contacted the hotel and requested an inspection of the premises. A representative of the State Health Officer, the hotel, and two persons brought in by the hotel conducted a visual inspection on December 2, 2003 of various parts of the hotel, including possible aerosol reservoirs by inspecting the hotel's hot water heaters and storage tanks. The inspectors also looked at other possible sites of water aerosolization at the hotel, including cooling towers, whirlpool spas, decorative fountains and the potable water system. No water samples were taken during the initial inspection. ¹

2. December 30, 2003 Water Test

Numerous telephone conferences were then conducted between the State epidemiologist in Baltimore and the State Health Officer and her staff in Snow Hill, Maryland. A determination was made to test the hotel water systems for the presence of *Legionella*. The December 30, 2003 test consisted of taking samples from the hotel's cooling tower, whirlpool spa and spa filters, domestic water heaters, domestic hot water storage tanks, and guest room sinks and showers where the persons stayed in October, 2003. Water temperature, pH and chlorine or bromine (in the cooling tower and whirlpool spas) concentrations were also measured at the time of sample collection. ²

The water test carried out on December 30, 2003 confirmed the presence of *Legionella* in the shower heads and water faucets of the room where the two hotel guests had stayed in October 2003. The *Legionella* serogroup found in the water was the same serogroup found that infected two victims, i.e. *Legionella pneumophila* serogroup 1. However, since the victims were diagnosed by urinary antigen tests rather than by the culture method, the patient's specific molecular subtype of Lp1 could not be compared

with the subtype found in the water. Water temperatures in various locations tested throughout the hotel were conducive for growth and amplification of *Legionella* (77° to 108° Fahrenheit).³

3. January and February 2004 Actions

The first remediation at the hotel occurred on or around January 25, 2004. The procedure consisted of hot water flushing of distal sites. A second water test was then conducted by the State on January 29, 2004 at which time no *Legionella* was found. *Legionella pneumophila*, however, was detected apparently from reamplification at multiple sites from samples collected on February 18, 2004 during a third water test. A second hot water flush was then attempted by the hotel on February 24, 2004. *Legionella pneumophila* was found at two sites from a fourth water test conducted from February 25 through 26, 2004. The hotel then hyperchlorinated the water system on March 1, 2005 and installed a chlorine dioxide system that began operation on May 4, 2004. No *Legionella* was found in the domestic water system thereafter.⁴

The State recommended various additional actions after February 21, 2004 because another guest had tested positive for Legionnaire's disease who had stayed at the hotel after the January 2004 hot water flush. The hotel agreed to inform guests of the potential for exposure to *Legionella* at the hotel on February 22, 2004. The State permitted the hotel to discontinue informing its guests about Legionnaire's disease on March 17, 2004.

4. State Epidemiologist

The State Epidemiologist wrote in his report that there were seven outbreak-associated confirmed cases at the hotel after October, 2003. An outbreak-associated

confirmed case was defined as someone who had pneumonia as seen by x-ray with laboratory evidence of *Legionella* infection in a resident or visitor to Ocean City, Maryland between October 1, 2003 and March 1, 2004 and who became ill within 10 days of staying at the hotel. Laboratory evidence must include one of the following: (a) isolation of *Legionella* from respiratory secretion, (b) detection of *Legionella* in respiratory secretions by direct florescent antibody testing (DFA), (c) *Legionella* antigens appearing in urine by EIA, and (d) a rise in titer showing recent *Legionella* infection between paired acute and convalescent phase serum specimens ⁵

All seven cases had chest x-ray confirmed pneumonia. Five were confirmed by positive *Legionella* urinary tests. Two were confirmed by significant rises in serologic titers. Seventy percent of the cases were male. Five of the cases were smokers, four had diabetes, and one was immunocompromised. All were hospitalized and all had stayed at hotel during the incubation period (the period in which they were exposed to *Legionella*, based on the date of onset of symptoms). No other common locations or activities linked all the cases. All reported showering at the hotel. None had knowingly been near the cooling tower.⁶

The state epidemiologist estimated that the rate of expected cases of Legionnaire's disease in Ocean City was five (5) cases per 100,000 population year. Identifying seven (7) cases with the Princess Royale resulted in a rate of 233 cases per 100,000 population year, statistically higher than expected when compared to the rates in Ocean City⁷.

III. LEGAL ASPECTS

1. Litigation History

The first suit was initiated against the hotel in federal court in Baltimore, Maryland in August, 2004 for a person from a state other than Maryland. A subsequent case was filed in the same federal court because this person resided in Delaware. The hotel was located in Maryland, thereby establishing the required diversity to bring the two cases in federal court. Four other cases were filed in the state court of Maryland because the injured parties lived in the same state as the defendant hotel, i.e. Maryland.

The original complaint in federal court against the hotel was for negligence. The subsequent complaint against the hotel included a claim for punitive damages. A claim for violation of Maryland's Consumer law was also included. The defendant challenged the claim for violation of the state law, but the claim was upheld by the federal judge.

Extensive discovery ensued after the filing of the complaint in federal court. 1400 pages of documents were supplied by the hotel as a result of a discovery request by the plaintiff. The hotel manager's deposition was taken over two days as a result of the records being reviewed. The local health officer and the state epidemiologist, amongst others, were also deposed. The state produced about 1100 documents. The case is currently not scheduled for trial because of mediation efforts by a federal Magistrate.

2. Negligence of the Hotel

The case law of Maryland will be referred to because the hotel was located in Maryland. To determine whether the hotel was negligent, it is necessary, however, to refer to the standard national treatise on negligence, The Restatement of Torts, 2nd. A major element to be determined from the Restatement is whether a duty is owed by the

defendant hotel to the injured plaintiffs. The duty of an innkeeper, i.e. the hotel, is ". . . to take reasonable action (a) to protect (guests) against unreasonable risk of physical harm, and (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others." This duty is a result of a special relationship between the hotel and its guests⁸. This duty only arises if the harm to the plaintiff was foreseeable⁹.

It was certainly foreseeable that other guests could contract Legionnaire's disease once the hotel was told by the state in early December, 2003 that two guests who had stayed at the hotel had contracted Legionnaire's disease. This duty on the part of the hotel was reinforced when the state told hotel management in January, 2004 that *Legionella* was present in the two rooms tested in December 2003 for the two guests who stayed at the hotel in October, 2003. Therefore, the hotel had a duty to prevent any harm from occurring to its future guests, using "reasonable action" to do so.

Such action would include ridding the hotel of the *Legionella* in a proper manner, as well as informing the guests of the two guests who had contracted the disease in October, 2003 and the ongoing State investigation. It is inappropriate, therefore, for the hotel to say as it has that it was waiting for the State to definitively affirm that the hotel was the source of the Legionnaire's disease before informing its guests of the State investigation, or of the two persons who had already contracted the disease at the hotel..

Another major element to be reviewed in the Restatement is the status of the injured person. The status of someone on another person's land is critically important in these cases because it goes to the level of duty owed by the building owner. A guest or customer of a hotel, shopping mall or restaurant, just to name a few examples of

buildings, is called a “business visitor”¹⁰. The corporation or privately held company owning the building i.e. hotel, is called the “possessor” because this entity controls the premises. Once the possessor has invited the business visitor onto its property, there is “an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make (it) safe for (the business visitor’s) reception”¹¹. As further stated in comment c of Section 343, “On the other hand, one entering a store, theater, office building or hotel, is entitled to expect that his host will make far greater preparations to secure the safety of his patrons than a householder will make for his social or even his business visitors”¹² Thus, a very high level of duty is owed this particular business visitor.

The possessor of land is only liable to a business visitor for physical injury caused by a condition on the land, such as the presence of *Legionella*, “...if, (the possessor) (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that (the business visitor) will not discover or realize the danger, or will fail to protect (himself) against it, and (c) fails to exercise reasonable care to protect (the business visitor) against the danger”¹³

Using reasonable care to discover the presence of *Legionella* on the premises is not only required for the building as originally constructed, but also “...an inspection (is required by the possessor) to discover (the building’s) actual condition and any latent defects, followed by such repair, safeguards, or warning as may be reasonably necessary for (the business visitor’s) protection under the circumstances...To the invitee (hotel guest) the possessor (hotel owner) owes...the additional duty to exercise reasonable

affirmative care to see that the premises are safe for the reception of the visitor...and to give such warning that the visitor may intelligently decide whether or not to accept the invitation...”¹⁴. The significance of this comment to the Restatement section is that it clarifies that a building owner must not only protect against known defects, as is the case when a state agency tells the building owner that there is *Legionella* present as indicated above in the discussion of the duty owed to the plaintiff, but also requires the hotel owner to use “reasonable care” to discover the presence of *Legionella* in the building even before being told by the State¹⁵. As further indicated in the Reporter’s Notes to Comment B to section 343, “The possessor’s (hotel’s) duty includes inspection of the premises to discover possible unknown defects.”¹⁶ This part of Comment B reinforces the hotels duty to inspect for the presence of *Legionella* even before the first guests became ill in October, 2003 as part of proper maintenance system, including water testing and proper record keeping, for the water being supplied to its hotel guests. Certainly not warning hotel guests at the hotel before February 21, 2004, the first date that the hotel told guests or anyone in the public of the presence of *Legionella*, would not satisfy the warning requirement of Comment B of section 343.

Another legal doctrine which must be considered in the case against the hotel is *res ipsa loquitur*. Although not significantly different from the negligence of the hotel under Section 343 Comment B of the Restatement, the doctrine *res ipsa loquitur* “merely provides a permissible inference of negligence which ... may be rebutted by testimony and evidence produced on behalf of”¹⁷ the defendant. Further, a jury may only infer that the hotel was negligent if all the elements of *res ipsa loquitur* were present.

The elements necessary to establish *res ipsa loquitur* are “1. A casualty of a sort which usually does not occur in the absence of negligence. 2. Caused by an instrumentality within the defendant’s exclusive control. 3. Under circumstances indicating that the casualty did not result from the act or omission of the plaintiff”¹⁸ There is certainly no evidence in the case against the hotel that the injured plaintiff’s caused their own injuries. They used the room assigned to them by the hotel and the hotel in general in a normal manner and acquired the disease as a result. The second element, i.e. exclusive control by the defendant hotel, is also present in the case. No one other than the defendant was responsible for maintaining the hotel and keeping it free from *Legionella*. It is also clear that hotel guests acquisition of Legionnaire’s disease did not occur absent someone’s, i.e. the hotel’s, negligence. Thus, all three elements of *res ipsa loquitur* are present and the jury can therefore infer that the hotel was negligent.

3. Breach of Contract

Another legal theory which the plaintiffs can employ against the hotel is breach of contract. When the seven infected guests contracted with the hotel for rooms they were not expecting to acquire Legionnaire’s disease as part of the contract. As a result, each of the guests/plaintiffs is entitled to recover the damages which resulted from the breach of contract. These damages include medical care, e.g. hospitalization and doctor bills. In Legionnaire’s disease cases these bills can be fairly significant because of the hospitalization which is frequently required to make the plaintiff well again.

4. Compensatory Damages Caused By the Hotel's Negligence

The major damage awarded in these cases under compensatory damages is for pain and suffering. Clients have indicated they feel as if they are dying when the symptoms first appear. Suffering during the convalescent period is also part of this element of damages. Often times a jury will award a multiple e.g. one or three times the known damages, i.e. medical bills, to arrive at a figure for pain and suffering.

Although most injured persons go back to work fairly quickly or are retired, lost wages are another source of damages. The period of time someone is out of work because of the disease, e.g. while in the hospital, is clearly recoverable. Some people have also experienced a lessening of their earning capacity because of the disease. This is also recoverable. Finally, future medical care such as lung function studies are also recoverable.

5. Punitive Damages

Perhaps the most controversial element of any trial involving Legionnaire's disease is the awarding of punitive damages by the jury. In order to prevail on a claim for punitive damages, the injured party must show actual, and not implied, malice on the part of the defendant. Further, "...facts sufficient to show actual malice must be...proven by clear and convincing evidence." ¹⁹ A jury cannot infer that the hotel should have punitive damages be assessed against it. Rather, there must be clear and convincing evidence that such damages should be awarded. The reason for this high level of proof is that the purpose of punitive damages is to punish the defendant for willful and wanton behavior. A possible example of such behavior is the hotel's failure to warn its guests of the

presence of *Legionella* at the hotel after the definitive findings of the water testing on December 30, 2003.

IV. Conclusion

Seven people contracted Legionnaire's disease at a hotel in Ocean City, Maryland because of the hotel's negligence. This unfortunate scenario is common through out the United States, and indeed the world. It is hoped that this article will provide information regarding the right of persons who have been afflicted by this disease so that future outbreaks will be less likely to occur.

¹ Summary Report Outbreak 2003-277, March 26, 2005, David Blythe, MD, MPH, Office of Epidemiology and Disease Control Programs, Community Health Administration, Maryland Department of Health and Mental Hygiene, Pages 1,7.

² Ibid, Pages 7,8,14,15.

³ Ibid, Pages 14,15.

⁴ Ibid, Page 15.

⁵ Ibid, Page 5,6.

⁶ Ibid, Page 11,12.

⁷ Ibid, Page 12

⁸ Restatement of Torts 2d Section 314(A)(2), The American Law Institute. 1993

⁹ Columbia Courtyard Inc. et al v Jennifer Corinaldi and Ronald Corinaldi, 162 Md. App. 207, 873 A2d 483 at page 489.

¹⁰ Bass vs Hardee's Food Systems, Inc. (1997) 982 FSupp 1041, at page 1044

¹¹ Ibid, Restatement of Torts 2d Section 332

¹² Ibid, Restatement of Torts 2d Section 343

¹³ Ibid, Restatement of Torts 2d Section 343

¹⁴ Ibid, Comment B to Restatement of Torts 2d Section 343

¹⁵ Chadwick McGarr, a minor, etc. et al. v Baltimore Area Council, Boy Scouts of America, Inc. et al., 74 Md. App. 127 at page 139, 536 A2d 728 at page 734

¹⁶ Ibid, Reporter's Notes to Comment B to Restatement of Torts 2d Section 343, citing Dickey v Hochschild, Kohn & Co., 157 Md 448, 146 A 282, see also Nalee Inc., etc., vs Jacobs, 228 Md 525, 180 A2d 677

¹⁷ Apper v Eastgate Associates 28 Md. App. 581 at page 594, 347 A2d 389 at page 397

¹⁸ Ibid, Apper v Eastgate Associates at page 588.

¹⁹ Robert Scott v Terry Napoleon Jenkins, 345 Md. 21, 690 A2d 1000 at page 1004.