

CHAPTER 9

YOUR RESPONSIBILITIES AS A HOSPITALITY OPERATOR

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“LET ME SEE the incident report,” said Trisha Sangus, as she took the document from the hand of Director of Security Travis Daniels. She studied the paper carefully. As a hotel general manager, she had seen dozens of reports of guests who had, or claimed to have had, an accident that could put the hotel at some legal risk. Trisha reviewed every incident report involving guests, and her insurance company was glad she did. Despite the cheerful holiday music playing in the background, Trisha knew a guest incident could mean a troubled holiday for the hotel.

“What’s the background on this incident?” she asked.

“Well,” began the security director, “as I understand it, Larry Nolan checked into the hotel around 11:00 P.M. last night. I verified that with the front desk manager. Our front desk system notes the time of check-in. Some time after 1:00 A.M., Isaac, one of the night auditors, heard a thud, a brief shout, and a clattering of ice near the lobby elevator. When he went to the elevator entrance, he saw Mr. Nolan lying on the floor near the ice machine, with an ice bucket on the ground and ice all around.”

“He slipped on the ice?” Trisha asked. “No,” said the director, “he claims he slipped on a Christmas ornament that had fallen from a wreath that was hanging on the wall about 3 feet from the ice machine. I talked to him by telephone in his room this morning. He said his cousin was a lawyer, and he was going to sue!”

“Was it a glass ornament?” Trisha interrupted.

“Yes. It was hanging about 9 feet above the ground.”

“Did you investigate?” Trisha continued. “Had the ornament in fact fallen and broken?”

“Unfortunately, yes; I checked myself,” said the director. All our decorations have four ornamental balls except this one. It has three, and a spot where it appears one was once attached. I think Mr. Nolan was probably right. The bulb did fall.”

“What about Lance Dani, the manager on duty?” Trisha asked. “Did he file his manager-on-duty [MOD] closing report?”

“Yes,” replied the director. “I have it here. Mr. Dani did the last rounds of the hotel at midnight, just as our procedures dictate. His report is signed and dated.”

“Those rounds include checking the ice machine areas for leaks. Did Lance put his initials by that portion of the checklist?”

“Yes, he did,” replied the director.

“And did he note a broken ornament?” Trisha asked as she reached across her desk for the MOD report.

“No,” said the director. “The bulb must have fallen after midnight. A bad break for the hotel.”

“Well,” replied Trisha, “we make our own breaks generally. I’ll call the insurance company and file a report. That’s standard procedure, but frankly, I don’t believe Mr. Nolan has much of a liability claim against the hotel, thanks to Lance doing his job right. But this will be a good time to review our accident procedures at the daily staff meeting.”

As the director of security left her office, Trisha was glad everyone had performed well in the case of this accident. She had been in hotels where the staff had not been as well trained, and the results, as she knew, could be disastrous, for both the hotels and their managers’ careers.

IN THIS CHAPTER, YOU WILL LEARN:

1. To differentiate between the types of legal duties required of a hospitality operator, and the consequences of the failure to exercise reasonable care in fulfilling these duties.
2. To evaluate operational activities in light of their impact on guest safety and potential legal damages.
3. To understand how a lawsuit is initiated and moves through the U.S. court system.
4. To create a checklist of the steps that should be initiated immediately following an accident.

9.1 DUTIES AND OBLIGATIONS OF A HOSPITALITY OPERATOR

Duties of Care

LEGALESE

Duty of care:

A legal obligation that requires a particular standard of conduct.

Hospitality operators owe a *duty of care* to those individuals who enter their establishments. Some duties of care are rather straightforward. For example, a restaurateur has a duty of care to provide food that is safe and wholesome for guests. While hospitality operators are not required to be insurers of their guests’ safety, and

are generally not held liable for events they could not reasonably foresee, they are required to act prudently and use reasonable care, as defined later in this chapter, to fulfill their duties of care.

Because of the wide variety of facilities they operate, hospitality managers can encounter a variety of duties of care. These include the duties:

1. *Provide a reasonably safe premise.* This would include all public space, the interior of guestrooms, dining rooms, and the exterior space that make up the operator's total physical facility.
2. *Serve food and beverages fit for consumption.* This duty of care is shared with those who supply products to a foodservice operator, and would also include the techniques used by an operator to prepare and serve food or beverages.
3. *Serve alcoholic beverages responsibly.* Because of its extreme importance, this duty of care will be examined separately in Chapter 12, "Your Responsibilities When Serving Food and Beverages."
4. *Hire qualified employees.* This duty must be satisfied to protect yourself against charges of negligent hiring and other potential liabilities.
5. *Properly train employees.* This duty must be satisfied to protect yourself against charges of negligent staff training.
6. *Terminate employees who pose a danger to other employees or guests.* This duty must be satisfied to protect yourself against charges of negligent employee retention.
7. *Warn of unsafe conditions.* When an operator is aware, (or, in some cases, should be aware) of conditions that pose a threat to safety (such as a wet floor or broken sidewalk), those conditions must be made obvious to the guest.
8. *Safeguard guest property, especially when voluntarily accepting possession of it.* In the hospitality industry, guests may retain control of their own property (such as when they take an item into their hotel room) or the operator may take possession of it (such as when a guest's car is valet-parked, a coat is checked, or valuables are deposited in a hotel's safety deposit box). In each case, the law will detail the duty of care you must exercise to protect guests' property.

» ANALYZE THE SITUATION 9.1

ALAN BRANDIS ARRIVED AT the Golden Fox restaurant for a Friday-night fish fry. During his meal, a severe thunderstorm began, which caused the ceiling of the men's restroom to leak. After finishing his meal, Alan entered the men's room to wash his hands. He slipped on some wet tile, which was caused by the leak in the roof. Alan struck his head during the fall and was severely injured.

One week later, Alan's attorney contacted the owners of the Golden Fox with a claim for damages. The restaurant owners maintained the fall was not their responsibility, claiming they were not the insurers of guest safety. Although the owners knew of the condition of the roof, they said it leaked only during extremely heavy thunderstorms and was too old to fix without undue economic hardship. Most important, because the

storm was not within their control, the owners maintained that it was not reasonable to assume they could have foreseen the severity of the storm, and thus they could not be held liable for the accident.

1. Was the severity of the storm a foreseeable event?
2. What duty of care is in question here?
3. Did the restaurant act prudently?
4. Are the restaurant's defenses valid? Why or why not?

Standards of Care

LEGALESE

Standard of care:

The industry-recognized, reasonably accepted level of performance used in fulfilling a duty of care.

In fulfilling the duties of care just detailed, you must exercise a *standard of care* appropriate to the given situation. An appropriate standard of care is determined, in part, on the level of services a guest would reasonably expect to find in a hospitality facility. For example, a guest departing on a seven-day cruise of the Pacific would reasonably expect that the ship's staff would include a full-time doctor. The same guest visiting a quick-service restaurant at 11:00 P.M. would not expect to find a doctor on hand. In both cases, it is possible that a guest could suffer a heart attack and require medical care. The ship's standard of care, however, would include medical treatment, while the restaurant's would not.

Many disputes involving liability and negligence in the hospitality industry revolve around the question of what an appropriate standard of care should be. Like the law itself, these standards are constantly evolving. Generally speaking, you as a hospitality manager are required to apply the same diligence to achieve your standards of care as any other reasonable hospitality manager in a similar situation. Because standards are constantly changing, and because the standard of care you apply may be assessed during litigation by people who are not familiar with you or your operation, you must strive to stay abreast of changing procedures and technology. To help you do that, refer back to the continuing education components of the STEM principles discussed in Chapter 1, "Prevention Philosophy."

9.2 THEORIES OF LIABILITY

Despite the best efforts of management, accidents involving people can and do happen in hospitality facilities. Employees and guests are subject to many of the same risks in a hospitality facility that they are subject to outside the facility. For example, it is just as possible to trip and fall in a restaurant parking lot as it is to fall in a grocery store parking lot. It is not your responsibility as a hospitality manager to ensure that accidents never happen in your facility; that would be impossible. It is your responsibility to operate in a manner that is as safe as possible, and to react responsibly when an accident does occur. If you do not, the legal system is designed to hold you and your operation accountable.

Reasonable Care

Hospitality managers must strive to provide an environment that is safe and secure. For example, a hotel manager who rents a room with a lock on the door should be responsible for ensuring that the lock is in proper working order. A guest would

reasonably expect the hotel to provide a lock that was in working order. In fact, the concept of reasonability is so pervasive in law that it literally sets the standard of care that hospitality organizations must provide for their employees and guests. That standard is embodied in the concept of *reasonable care*.

Essentially, reasonable care requires you to correct potentially harmful situations that you know exist, or that you could have reasonably foreseen. The level of reasonable care that must be exercised in a given situation can sometimes be difficult to establish. In the case of the manager supplying a guestroom with a working lock, the standard is quite clear. It becomes complex, however, when the guest actually uses the lock. What if the guest does not use the lock properly, or forgets to use it at all? What if the guest abuses the lock to the point where it does not function and then has a theft from his or her room? Clearly, in these cases, the guest bears some or all of the responsibility for his or her own acts.

The doctrine of reasonable care places a significant burden on you as a hospitality manager. It requires that you use all of your skill and experience to operate your facility in a manner that would be consistent with that of a reasonable person (or manager) in a similar set of circumstances.

Torts

A *tort* is a wrong against an individual, in the same way that a crime is a wrong against the state. For example, a patron who drinks too much in a bar and then drives a motor vehicle is guilty of driving under the influence (DUI) of alcohol, a crime against the state. If that same driver causes an accident that injures another motorist, the intoxicated driver would be guilty of a tort, that is, an act that results in injury to another.

There are two types of torts: intentional and unintentional. Intentional torts include:

- Assault
- Battery
- Defamation
- Intentional infliction of emotional distress

Unintentional torts include:

- Negligence
- Gross negligence

Negligence is the most common unintentional tort.

Many legal actions a hospitality manager will experience are those that involve torts. The following sections explain the main types of torts committed against patrons, and those a hospitality manager will most likely face.

Negligence

A person or organization who has not used reasonable care in a situation is deemed to have been *negligent*. Assume, for example, that a guest dives into a resort swimming pool and injures her neck. She thought the pool was deep enough for diving, but the point at which she jumped was only 4 feet deep. The pool was not marked in any way to indicate the water's depth. If a lawsuit follows, and a judge later decides that the resort knew, or could have foreseen, that its guests might dive into the pool, the resort could be found negligent; that is, it did not do what reasonable facility operators would do to protect their guests, such as posting signs prohibiting diving, or installing visible depth markers.

LEGALESE

Reasonable care:

The degree of care that a reasonably prudent person would use in a similar situation.

LEGALESE

Tort: An act or failure to act (not involving a breach of contract) that results in injury, loss, or damage to another (e.g., negligence is an unintentional tort, whereas battery, physically touching someone, is usually an intentional tort).

LEGALESE

Negligent (negligence):

The failure to use reasonable care.

Negligence is said to legally exist when the following four conditions have been met:

1. A legal duty of care is present.
2. The defendant has failed to provide the standard of care needed to fulfill that duty.
3. The defendant's failure to meet the legal duty was the *proximate cause* of the harm.
4. The plaintiff was injured or suffered damages.

LEGALESE

Proximate cause:

The event or activity that directly contributes to (causes) the injury or harm.

In the hospitality industry, managers not only are responsible for their own actions but, under the doctrine of respondeat superior, also can be held accountable for the work-related acts of their employees. In some cases, managers are even held responsible for the acts of their guests or guests of their guests. The degree of responsibility that a hospitality manager might have for the acts of others ordinarily depends on the foreseeability of the act. If a dangerous act or condition was foreseeable, and no action was taken to warn patrons or prevent the accident, then liability will usually attach.

It is important to note that negligence can result from either the failure to do something or because something was done that probably should not have been. In the swimming pool example, the resort's negligence was the result of a failure to act. But what if the pool's depth was 4 feet and the resort incorrectly marked it as 8 feet? In this situation, if a guest dives into the pool and is injured, the resort's negligence would be the result of a specific inappropriate action it took, not inaction.

An operator can be considered negligent even when he or she is only partially responsible for the harm caused to another. Consider the case of a man who slips on an icy sidewalk in front of a restaurant and falls into a heavily trafficked street, where he is subsequently hit by a car. The fall may have caused only minor injuries by itself, but an even greater injury occurred because he was struck by the car. It is likely that the owner of the sidewalk will face potential charges of negligence, even if the majority of the damages suffered by the injured man were caused by the car, not the fall itself.

Gross Negligence

When an individual or organization behaves in a manner that demonstrates a total disregard for the welfare of others, the act is deemed to be *gross negligence*. The distinction between negligence and gross negligence is an important one, for a simple reason: The penalty is usually greater in a situation involving gross negligence than one involving ordinary negligence. That is because an operator found to have been grossly negligent may be assessed punitive damages (discussed later in the chapter) to serve as an example and to deter others from committing the same act. Often, it is difficult to determine the difference between negligence and gross negligence. The difference in the eyes of a jury, however, can be millions of dollars in an award to a party that can prove it was harmed as a result of the reckless action or inaction of the operator.

LEGALESE

Gross negligence:

The reckless or willful failure of an individual or an organization to use even the slightest amount of reasonable care.

» ANALYZE THE SITUATION 9.2

PAUL AND BEATRICE METZ took their 11-year-old daughter Christine on a weekend skiing trip; they stayed at the St. Stratton ski resort. The St. Stratton owned and maintained four ski trails and a ski lift on its property.

One morning, Mr. and Mrs. Metz were having coffee in the ski lodge while their daughter was riding the ski lift to the top of the mountain. On the way up, the car containing Christine Metz and one other skier jumped off its cable guide and plunged 300 feet down the mountain. As a result of the fall, Christine was permanently paralyzed from the neck down.

The Metz family filed a lawsuit against the resort. Their attorney discovered that the car's connections to the cable were checked once a year by a maintenance staff person unfamiliar with the intricacies of ski cable cars. The manufacturer of the cable car recommended weekly inspections, performed by a specially trained service technician.

The ski resort's corporate owners maintained that all skiers assumed risk when skiing, that the manufacturer's recommendation was simply a recommendation, and that their own inspection program demonstrated they had indeed exercised reasonable care. In addition, they maintained that Christine's paralysis was the result of an unfortunate accident for which the cable car's manufacturer, not the resort, should be held responsible.

1. Did the resort exercise reasonable care?
2. What level of negligence, if any, was present? Ordinary negligence? Gross negligence?
3. What amount of money do you think a jury would recommend the resort be required to pay to compensate Christine Metz for her loss, if it is found to have committed a tort against her?
4. Are the resort's defenses valid ones? Why or why not?

Contributory and Comparative Negligence

Sometimes guests, through their own carelessness, can be the cause or partial cause of their own injury or harm. In legal parlance, this is called *contributory negligence*. Consider the case of the wedding guest who attends an evening reception at a local country club. In the course of the evening, the guest leaves the clubhouse and wanders onto the golf course. Because the course is not lit at night, the guest trips over a railroad tie used to define the tee box on the third hole. The guest may claim that the club should have marked the railway tie as a hazard, and that it should have reasonably foreseen that guests would leave the clubhouse and walk on the golf course. The club's attorney, however, is likely to maintain, and rightly so, that walking at night on an unlighted golf course is dangerous and the guest did not exercise reasonable care. Although many variables may determine the final outcome of this situation, the courts have held that the contributory negligence of the injured party can reduce an operator's liability for the damages suffered. Judges and juries will be able to compare the negligence of the plaintiff and the defendant when assessing responsibility for the injuries.

The doctrine of *comparative negligence* has become an acceptable way in which to recognize that reasonable care is a responsibility shared by both hospitality

LEGALESE

Contributory negligence: Negligent conduct by the complaining party (plaintiff) that contributes to the cause of his or her injuries.

LEGALESE

Comparative negligence: Shared responsibility for the harm that results from negligence. The comparison of negligence by the defendant with the contributory negligence of the plaintiff. Also known as comparative fault.

operators and those who claim to have been injured by them. If the court determines, for example, that a plaintiff was 25 percent responsible (contributory negligent) for his or her injuries, and the defendant was 75 percent responsible, the amount of damages awarded to the plaintiff would be reduced by 25 percent. The laws that determine comparative negligence vary widely across the 50 states. What is important for you, as a hospitality manager, to remember is to not overlook evidence of negligence on the part of the injured party during your investigation of an incident.

Strict Liability

In some cases, a hospitality organization can be found liable for damages to others even if it has not acted negligently or intentionally. This is because some activities are considered to be so dangerous that their very existence imposes a greater degree of responsibility on the part of the person conducting the activity. For example, if an amusement park elected to train a wild tiger as part of its promotional activities, it would be held responsible for the tiger's actions, even if the park could not be proved to be negligent in the tiger's handling. This is true because keeping dangerous animals in close proximity to people is, in itself, a dangerous activity, and one that was voluntarily undertaken by the amusement park. In these types of circumstances, those who engage in the activity are judged not by their actions, but by the nature of the activity itself, which creates absolute, or *strict liability*.

LEGALESE

Strict liability:

Responsibility arising from the nature of a dangerous activity rather than negligence or an intentional act. Also known as absolute liability or liability without fault.

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5. Contact the attorney's office by telephone or letter and ask if he or she can help you understand how the state and/or local courts view comparative negligence in his or her practice area.

In the hospitality industry, the greatest operational threat imposed by strict liability is that involved with the serving of food and beverages. Recently, the courts have more often begun using the doctrine of strict liability to penalize those who sell defective food and beverages. The position of the courts is that the selling of unwholesome food and beverages is, in itself, so dangerous that those who do so, even unwittingly, will be held to a limited form of strict liability.

Intentional Acts

Although the law makes a distinction between negligence and gross negligence, it reserves the greatest sanctions for those who not only do not exercise reasonable care but also commit *intentional acts* that cause harm to others. If the employees of an innkeeper intentionally invade the privacy of a guest (e.g., viewing guest behavior in a guestroom via a hidden video camera), the innkeeper is subject to severe liability, including punitive damages.

LEGALESE

Intentional act:

A willful action undertaken with or without full understanding of its consequences.

To illustrate this concept, consider this situation: It is late Friday night, about 11 P.M., and your bar is packed—210 people at last count. Your fire occupancy limit is 125, but nobody pays attention to those signs. So far, the night has been fairly peaceful. You finally have a chance to sit down for a moment, so you take a seat at the end of the bar where you can see what's going on, and you ask your bartender to pour you a long, tall, cold ginger ale.

The drink arrives, and as it touches your lips—flash!—out of the corner of your eye, you see a flurry of activity. Two guys are fighting, and really going at it. You grab one guy and the bouncer grabs the other. There is blood all over the face of the guy you grabbed, and he is wailing. You notice a broken beer mug on the table. Three girls are screaming hysterically and wiping blood off their clothes and skin.

You finally get things calmed down, transport the injured patron to the hospital, and start collecting information. You find out:

- The fight started when a guy asked one of the girls to dance; she declined, and everyone at the table, including the subsequently injured patron, began laughing.
- The guy who asked the girl to dance took offense, picked up an empty beer mug, and smashed it into the face of “Mr. Laughter.”
- The two guys had never seen each other before.
- The girls had never seen the “dancer” before the incident occurred.

Are you financially responsible for the injuries? Historically, the courts have decided that a hospitality operator is not responsible for damages suffered by a patron that were caused by the intentional actions of a third party, when the third party is a customer or guest. The courts' rationale is that the intentional or criminal act of a third party could not be foreseen by the operator; therefore, it would be impossible for the operator to take any precautions or preventative measures to keep it from happening.

Crimes against Guests

Recently, however, the courts in many jurisdictions have concluded that if violent acts previously occurred on a property, or even if the property is in a “high-crime zone,” an incident and resulting injury could be considered foreseeable. Hence, the operator might be held responsible if it failed to use reasonable care in managing the establishment. Additionally, courts have concluded that even though no crime has previously occurred, in some instances a property has the duty to provide additional security, and can be found negligent if they do not. Some courts have awarded high-dollar judgments against hospitality facilities for negligent security. Consider the Van Blargen case, where an assault victim sued and recovered \$500,000 from the hotel property he patronized. Van Blargen was assaulted in a private outdoor area while he was walking back to his room. Since the court likened the pool area to a private passageway, because of the surrounding foliage and landscape enclosures, it determined that the hotel had a duty to provide heightened security in such a private area.

Negligence Per Se

The barroom brawl just described does not provide enough facts to discern whether the incident and resulting injury were foreseeable by the operator. But what is readily apparent from the facts is the concept of *negligence per se*.

You may recall that the bar had more than the allowed number of patrons. Is this negligence per se? Quite possibly. The injured patron's attorney will certainly argue that the occupancy restrictions should have been maintained, not just for fire

LEGALESE

Negligence per se:

When a rule of law is violated by the operator; such violation of a rule of law is considered to be so far outside the scope of reasonable behavior that the violator is assumed to be negligent.

regulations, but for physical safety as well. The occupancy restrictions would have helped to maintain order. More than likely, an expert in building safety or club management would concur.

It could also be argued that the excessive occupancy contributed to the likelihood of a fight breaking out on the premises, and that likelihood would have been foreseeable by the operator. In other words, fights, altercations, and injuries are more likely to occur when there is not enough space between patrons (another reason for restrictive occupancy rules).

The moral of this story is, follow the law. It is tempting to pack the house, but there can be dire consequences if an injury occurs and you have violated an ordinance, such as excessive occupancy or serving an underage customer. Always obey local, state, and federal laws.

9.3 LEGAL DAMAGES

If an injured party suffers a demonstrable loss as a result of a tort, the law requires that the entity responsible for the loss be held accountable. The process for doing so is by awarding damages to the injured party. There are two types of damages for personal injuries most likely to be encountered by a hospitality manager: compensatory damages and punitive (or exemplary) damages.

Compensatory damages are actual, identifiable damages that result from wrongful acts. Examples of actual damages include doctor, hospital, and other medical bills, pain and suffering, lost income as a result of an injury, or the actual cost of repairing damage to a piece of real or personal property. The recovery of these damages is said to “compensate” the injured party for any out-of-pocket costs incurred as a result of the accident, as well as for pain and suffering. If, for example, a maintenance worker for the hotel accidentally leaves some tools in the hallway of a hotel, and a guest falls and breaks her watch, the cost of replacing the watch can be easily identified, and the hotel could be expected to reimburse the guest. The same could well be true of any medical bills the guest might incur due to the fall.

Punitive damages seek to serve as a deterrent not only to the one who committed the tort, but also to others not involved in the wrongful act. The principle here is that an individual who was grossly negligent or acted maliciously or intentionally to cause harm should be required to pay damages beyond those actually incurred by the injured party. In this way, society sends a message that such behavior will not be tolerated and that those who commit the act will pay dearly for having done so.

Generally, punitive damages will be awarded only when a defendant’s conduct was grossly negligent (the reckless disregard or indifference to the plaintiff’s rights and safety) or intentional. In the hospitality industry, a manager could be found to have reckless disregard for the safety of a guest if, for example, the manager knew that a guestroom’s lock was defective, yet sold that room to a guest who was subsequently assaulted and seriously injured.

LEGALESE

Compensatory damages:

Monetary amount awarded to restore the injured party to the position he or she was in prior to the injury (e.g., medical expenses, lost wages, etc.). Also referred to as actual damages.

LEGALESE

Punitive damages:

A monetary amount used as punishment and to deter the same wrongful act in the future by the defendant and others.

9.4 ANATOMY OF A PERSONAL INJURY LAWSUIT

Hospitality managers do not want to operate their business in a way that will result in legal action being taken against them. In today’s litigious society, even for a prudent operator, the threat of loss to the business because of lawsuits is very real. Some of the lawsuits that are filed are frivolous, while others raise serious issues. In either case, the effective hospitality manager must be aware of how lawsuits are filed, how they progress through the court system, and, most important, the role the hospitality manager plays in the process.

Personal Injury

Much of your concern as a hospitality manager will focus on the potential for damages that result from *personal injury*. The reason for this is fairly straightforward: Hospitality managers provide guests with food and beverages, lodging accommodations, and entertainment; yet the process of providing these goods and services can place a business in potential jeopardy. The adage “accidents can happen” today can be extended to “accidents can happen, and if they do, the affected parties may sue!”

Certainly, it is best to manage your business in such a way as to avoid accidents. Nevertheless, accidents and injuries will occur, and many times determining where to place the responsibility for the accident is unclear. Consider the case of Norman and Betty Tungett. The Tungetts check into a motel, and at about midnight, Mrs. Tungett goes out to her car to get a piece of luggage. While she is in the parking lot, she is assaulted. In addition to being badly frightened, she suffers physical harm, as well as lingering apprehension about being out after dark by herself. Listed here are just a few of the questions that could be raised in a case such as this:

1. Were the lights in the parking lot working well enough to minimize the chance that a guest would be assaulted?
2. Was management vigilant in eliminating potential hiding places for would-be assailants?
3. Were the Tungetts warned on check-in that the parking lot might not be safe, late at night?
4. Were there any access doors allowing Mrs. Tungett to easily get to her room after visiting the lot?
5. Had the motel experienced similar incidents in the past, and if so, what precautions had been taken?

Notice that, in this example, there is no clear-cut reason for believing the motel is in any way responsible for the Tungetts problem. It is important to remember, however, that the court system gives the Tungetts and their attorney the right to file a personal injury lawsuit in an effort to determine if, in fact, the motel was totally or partially responsible for the assault. In doing so, the Tungetts will seek damages resulting from the assault. Such a lawsuit will, without doubt, be time-consuming for management, and expensive to defend against. Nevertheless, such lawsuits are filed on a daily basis, and it is rare that hospitality managers do not find themselves involved, to some degree, in such a suit at some time in their career. For this reason, we will examine the anatomy of a personal injury lawsuit from its inception to conclusion.

Demand Letter

Typically, a manager will learn that he, she, and/or the business are being sued when a *demand letter* is received. The demand letter comes from an attorney who has been contacted by the injured plaintiff and has agreed to take up the plaintiff's cause. As you can see in Figure 9.1, the typical demand letter sets forth the plaintiff's version of the facts surrounding an alleged personal injury, and might also include the monetary amount of damages being sought and usually a deadline for the manager to respond to the charges.

Attorneys, generally, will accept a personal injury case with one of three payment plans. The first is the hourly fee, whereby the attorney bills his or her client (the plaintiff) at an hourly rate for each hour the attorney works on the personal injury claim. In this case, it is clearly in the best interest of the plaintiff to seek a conclusion to the case as quickly as possible to minimize attorney fees. In a second type of plan,

LEGALESE

Personal injury:

Damage or harm inflicted upon the body, mind, or emotions.

LEGALESE

Demand letter:

Official notification, typically delivered to a defendant via registered or certified mail that details the plaintiff's cause for impending litigation.

January 15, 2000
Via Certified Mail: Z 123 456 789

Nina Phillips, General Manager
XYZ Hotel
Re: My client: Ginny Mayes
Date of Accident: January 1, 2000

Dear Ms. Phillips:

Please be advised that I represent Ginny Mayes. Ms. Mayes has retained my firm to represent her in her claim for damages against the XYZ Hotel and others that might be responsible for causing the incident that led to her injuries.

As you are aware, my client attended the New Year's Eve Gala that was hosted by the XYZ Hotel on December 31, 1999. At midnight, and until a few minutes thereafter, employees of the XYZ Hotel began opening champagne bottles by "popping the corks" (releasing the corks and allowing them to fly into the air).

My client was dancing on the dance floor when she was suddenly struck in her left eye by one of the corks. The cork was traveling at a high rate of speed, and when it struck her eye, she lost her balance and fell, striking her head on the wooden dance floor.

As a result of the negligent acts of the employees/agents of the XYZ Hotel, my client suffered severe injuries including a subdural hematoma, a concussion, facial lacerations, and a permanent partial loss of sight in her left eye.

You are further advised that my client's occupation for the past fifteen (15) years has been as a pilot for a major airline. Airlines require high vision standards to be met by their pilots. Ms. Mayes's physicians have advised her that she will no longer meet the minimum vision standards required to be a pilot (report enclosed), as a direct result of the injuries she sustained while attending the New Year's Eve Gala.

Accordingly, demand is hereby made for the sum of \$25,000,000 (twenty-five million dollars) to compensate my client for the injuries she suffered due to the negligence and gross negligence of the employees of XYZ Hotel Company; including past, present, and future pain and suffering; past, present, and future medical expenses for both treatment and rehabilitation; and past, present, and future lost wages.

If you have liability insurance, you are strongly urged to advise the carrier of this claim, as most policies require prompt notification when a claim is made.

Please be advised that in the event this matter is not resolved to my client's satisfaction within ten (10) days of your receipt of this correspondence, that she has authorized me to pursue any and all legal remedies available to her in this regard, including filing suit seeking the recovery of compensatory damages, punitive damages, costs of court, and reasonable attorney fees.

Finally, you are advised that time is of the essence in this regard and that your silence will be deemed an admission. Please contact me or have your attorney contact me as soon as possible if you have any questions.

Thank you for your courtesy and cooperation.

Very Truly Yours,

Ms. Alixandre Caroline, Attorney at Law

Figure 9.1 Demand letter.

the attorney agrees to take the case for one flat fee. In this situation, it is clearly in the best interest of the attorney to seek a quick resolution of the case. The third payment form is the *contingency fee*. Lawyers representing defendants charged with crimes may not charge contingency fees, and in most states, contingency fee agreements must be put in writing. Clearly, in a case where the attorney is representing the client on a contingency basis, it is in the best interest of the plaintiff and the attorney to seek the most favorable, rather than the fastest, settlement possible.

Regardless of the form of payment agreed on between the plaintiff and his or her attorney, the demand letter is the first step in the litigation process. After receiving the demand letter, the defendant is given the opportunity to respond. If the response to the demand letter does not satisfy the plaintiff, he or she will likely instruct the attorney to file suit against the defendant.

Filing a Petition

Filing a petition (also called a pleading or complaint) is the term used to describe the process of initiating a lawsuit. A petition is a document that officially requests a court's assistance in resolving a dispute. The petition will identify specifically the plaintiff and the defendant. In addition, it will describe the matter it wishes for the court to decide. Included in the complaint against the defendant will be the plaintiff's suggestion for settlement of the issue. The plaintiff may, for example, ask for monetary damages. After the petition has been filed with the administrative clerk of the court, the lawsuit officially begins.

Once the complaint is filed with the court, the court will notify the defendant of the plaintiff's charge and will include a copy of the complaint in the notification. Upon receipt of the complaint, the defendant needs to respond in writing within the time specified in the notice from the court.

Discovery

In the discovery phase of a civil lawsuit, both parties seek to learn the facts necessary to best support their position. This can include answering questions via *interrogatories* or *depositions*, requests for records or other evidence, and sometimes visiting the scene of the incident that caused the complaint.

The discovery process can be short or very lengthy. Either side may ask for information from the other, and if necessary, a judge will rule on whether the parties to the suit must comply with these requests. In some instances, one party in a lawsuit may obtain a court order demanding that specific documents be turned over, or that specific individuals be called to testify in court. This order is called a *subpoena*. A subpoena may also be used to obtain further evidence or witnesses while a trial is ongoing.

The plaintiff in the lawsuit has the burden of proving the allegations set forth in the petition. This is the responsibility of proving to the finder of fact (judge or jury) that a particular view of the facts is true. In a civil case, the plaintiff must convince the court "by a preponderance of the evidence," that is, over 50 percent of the believable evidence. In a criminal case, the government has a higher standard, and must convince the court "beyond a reasonable doubt" that a defendant is guilty.

Trial and Appeal

The trial is the portion of the injury suit process during which the plaintiff seeks to persuade the judge or jury that his or her version of the facts and points of law should prevail. In a like manner, the defendant also has an opportunity to persuade for his or

LEGALESE

Contingency fee:

A method of paying for a civil attorney's services where the attorney receives a percentage of any money awarded as a settlement in the case. Typically, these fees range from 20 to 40 percent of the total amount awarded.

LEGALESE

Interrogatories:

Questions that require written answers, given under oath, asked during the discovery phase of a lawsuit.

LEGALESE

Depositions: Oral answers, given under oath, to questions asked during the discovery phase of a lawsuit. Depositions are recorded by a certified court reporter and/or by videotape.

LEGALESE

Subpoena: A court-authorized order to appear in person at a designated time and place, or to produce evidence demanded by the court.

her side. Most personal injury cases are tried in front of a jury. After a jury is selected to hear the trial, the process, while it may vary somewhat from state to state, is as follows:

1. Presentation by plaintiff
2. Presentation by defendant
3. Plaintiff's rebuttal
4. Summation by both parties
5. Judge's instructions about the applicable law and procedures to the jury
6. Jury deliberation
7. Verdict
8. Judgment or award
9. Appeal of verdict and/or award

LEGALESE

Appeal: A written request to a higher court to modify or reverse the decision of a lower-level court.

Either side has the right to appeal a verdict or award. In the personal injury area, it is common for a losing defendant to *appeal* the size of the award if it is considered by the defendant's counsel to be excessive.

LEGALLY MANAGING AT WORK:

The Manager's Role in Litigation

DEMAND LETTER

Upon receipt of a demand letter, turn it over to your insurance company and your attorney for advice. Follow the recommendations of the insurance company and your attorney. Be as cooperative as possible with any investigations that your insurance company or attorney may instigate.

NOTIFICATION OF FILING A LAWSUIT

Ordinarily, a representative of the court (e.g., constable, sheriff, or a private person authorized by the court) will personally hand you the pleading to ensure that the court knows you received it. If you are served with a pleading, you must recognize that these pleadings, and your company's obligations to respond, are time-sensitive. You need to deliver the pleading to your attorney as prescribed; make sure your insurance company gets a copy and that you keep one for future reference.

DISCOVERY

As stated previously, the discovery process enables each party to obtain information from the other party, which will be used as documentary evidence to help prove the facts of a case. Managers will often be asked to turn over records of their business, repair invoices, reports, and information stored electronically. Plaintiffs often must turn over medical records and reports, doctor bills, receipts for damages, and other types of personal information. Often, a manager or staff member may be asked to

prepare a personal statement during the discovery process, or even go to court and testify as a witness during the trial.

The cost of responding to discovery requests, either by testifying or preparing documents, can be a very expensive proposition for your operation, not only from a financial perspective but also because of the time involved and the disruption it causes to your staff. Accordingly, the better organized you are at the outset of the incident, the less of a burden the discovery process will be. Work closely with your attorney during this phase, be cooperative, and be sure to meet all time limits imposed for responses, as missing a deadline can be fatal to your side of the case.

TRIAL AND APPEAL

Request that your attorney update you frequently about trial settings (the date the trial will commence). Reciprocally, you need to let your attorney know about any times that you or your employees will be unavailable to testify (such as vacations, scheduled surgeries, etc.).

If your case is appealed, your involvement in the appellate process will be very minimal, if at all. This process rarely requires anything new from you that was not provided before the trial. Nevertheless, you should continue to maintain your records of the case and keep track of any witnesses.

Alternative Dispute Resolution

There are alternatives to resolving personal injury claims in court. The parties at any time during the litigation process can agree on a settlement. Two other common methods used in the hospitality industry are mediation and arbitration. Both can be highly effective alternatives to the time, cost, and stress involved in going through a trial.

In mediation, a trained and neutral individual (the mediator) facilitates negotiation between the parties, in order to achieve a voluntary resolution of the dispute. In most cases, one full day of mediation can result in a compromise acceptable to both the plaintiff and defendant. Mediation can involve sessions jointly held with both parties and their attorneys, or separate meetings with each party, their attorneys, and the mediator. The cost of mediation will vary based on the complexity of the case, but is generally far less than that involved in going to a trial. If the mediation is unsuccessful, the parties may still pursue a trial. If a settlement is made, the parties sign a settlement agreement approved by their attorneys. This agreement, if drafted properly, is an enforceable contract.

In arbitration, a neutral third party (usually chosen by mutual agreement of both parties) makes a binding decision after reviewing the evidence and hearing the arguments of all sides.

Make sure that you and your attorney have established guidelines about what you can say, if anything, and when you can say it. Be patient. To be effective, the negotiation process can sometimes appear tedious, but the art of compromise usually takes time. Be flexible and willing to compromise. Many times, an apology at this point in the process will help pave the way for compromises on other significant issues, including the amount of money to be paid.

9.5 RESPONDING TO AN INCIDENT

Despite all of your careful planning, preparation, and prevention techniques, guests can still be seriously injured on your property. Because of the explosion of litigation in this country and the large jury awards that can result, owners and operators of hospitality facilities have spent great amounts of time, energy, and money to implement training programs and procedures that will reduce accidents. But, when accidents do occur, you must be prepared to act in a way that serves the best interest of both your operation and the injured party.

In his book *Accident Prevention for Hotels, Motels, and Restaurants* (Van Nostrand Reinhold, 1991), author Robert L. Kohr states that the first 15 minutes following an accident are “critical” in eliminating or greatly limiting your legal liability. He is correct. It is your job to know what to do—and, just as important, what not to do—during this critical time period.

The moments following an accident are often confusing and tense. For a manager, they will demand excellent decision-making skills. The steps given in the next Legally Managing at Work box describe how control people (such as people in positions including owners, managers, and supervisors) should react during this crucial time period. Remember, the objective is to act in such a way as to protect both the business and the accident victim. The steps described in Legally Managing at Work will help you accomplish both.

As you can see, it is imperative that control people take charge of the scene immediately after an accident occurs. They should be the only ones talking to the injured party, and they need to be prepared to react and think quickly under pressure. Role-playing is a great way to train people to know how to respond appropriately when an accident or emergency situation arises.

Hospitality operations must continue to undertake serious prevention efforts, but they should also be prepared for reality: Accidents do happen, and the steps taken the first few minutes after an accident can be crucial in minimizing the negative impact of a potential claim.

LEGALLY MANAGING AT WORK:

Responding to an Accident

STEP 1. DO CALL 911.

First and foremost, get qualified, professional help. Do not leave it to the discretion of an untrained person to determine whether an injury requires professional medical treatment. Do not allow the delay of a decision-making process to increase your chance of liability. Call 911.

STEP 2. DO ATTEND TO THE INJURED PARTY.

Let the injured party know that you have requested emergency assistance. Try to make him or her as comfortable as possible. If you have certified care providers on your staff, allow them to administer appropriate aid. Restrict the movement of the injured party as much as possible unless the injury makes immediate movement necessary.

STEP 3. DO BE SENSITIVE AND SINCERE.

Do not treat the injured person as a potential liability claim. If you do, you will probably end up with one. In discussions with many injured patrons who later filed lawsuits, it was found that a significant reason for making their claim was the insensitive treatment exhibited by the establishment after the accident occurred. Treat the injured party with sensitivity, sincerity, and concern.

STEP 4. DO NOT APOLOGIZE FOR THE ACCIDENT.

Being sensitive, sincere, and concerned does not equate to taking responsibility for the accident. Besides, until the investigation is completed, you do not know if an apology by you for the accident is appropriate.

STEP 5. DO NOT ADMIT THAT YOU OR YOUR EMPLOYEES WERE AT FAULT. DO NOT TAKE RESPONSIBILITY FOR THE ACCIDENT.

Statements such as these made immediately following an accident are often based on first impressions, without knowing all of the facts. Unfortunately, making such statements may have a profound impact on the injured party, as well as a judge or jury, who may perceive them to be a credible admission of guilt or liability. Even when the circumstances surrounding an incident seem glaringly obvious, refrain from admitting fault or responsibility. There is no reason to discuss liability, negligence, or responsibility at this time. The focus should be on the guest's injuries, not on the cause of the accident.

STEP 6. DO NOT OFFER TO PAY FOR THE MEDICAL EXPENSES OF THE INJURED PARTY.

By offering or promising to pay for medical expenses, the control person is possibly entering into a contractual arrangement with the injured party or the medical provider to pay for the cost of treatment. This contract might be enforceable even if the outcome of the accident investigation shows that the hospitality operation was not at fault. In minor injury situations, you can offer to call a particular doctor or treatment center for the injured party, but allow him or her to choose the provider. In very limited circumstances, you might want to agree to pay for the initial treatment only, but specify your position in writing with the medical provider.

STEP 7. DO NOT MENTION INSURANCE COVERAGE.

Fortunately, most hospitality operations have insurance for many types of accidents and injuries that occur on their premises. Unfortunately, the fact that an operator has insurance will sometimes be reflected as dollar

signs in the eyes of the injured party. Psychologically, it is much easier to pursue a big, cold, indifferent, and unfamiliar insurance company than it is to pursue a very warm, concerned, and well-meaning hospitality manager.

STEP 8. DO NOT DISCUSS THE CAUSE OF THE ACCIDENT.

Discussing the cause of the accident with the injured party is a no-win situation. If the injured party argues or implies that the hospitality operation is at fault for the accident, and the control person agrees, fault has been admitted. If the control person disagrees, it will only create ill feelings and exacerbate the situation. Remaining silent is not an admission of liability, and is preferable to arguing with the injured party. Another alternative is for the control person to reassure the injured party, that he or she will conduct a complete investigation and will be happy to discuss the circumstances upon its completion.

STEP 9. DO NOT CORRECT EMPLOYEES AT THE SCENE.

This immediate reaction can have a very serious negative impact in the future. On-the-scene reprimanding of employees is sometimes interpreted by the injured party that a mistake was made or that the operation caused the accident. Control people need to remember that they cannot change what has already occurred. They can only hope to positively influence the future decision-making process of the injured party. This can best be accomplished by focusing on the injured party, not on the operation. There will be plenty of time to assess each employee's performance and to take appropriate corrective action if it is warranted, after the investigation has been completed.

STEP 10. DO CONDUCT A COMPLETE AND THOROUGH INVESTIGATION.

Although it will take a great deal longer than 15 minutes, a significant amount of the information for a thorough investigation needs to be gathered immediately after the accident. If other guests saw the accident, request that they write down what they saw. Ask them to sign and date their statements, and to leave their address and phone number in case you need to contact them in the future. It may take years for a claim to be resolved. Attorneys and investigators will need to be able to locate the people who gave statements. An incident report, such as the one shown in Figure 9.2, can be used to help gather such information. Remember, evidence wins lawsuits, and the more evidence and documentation you

have, the better your chances for a favorable ruling, or one that minimizes the amount of damages you will have to pay.

It is also important to have your employees fill out and sign a written report. Employees may change jobs, voluntarily leave, or be terminated from an operation before an accident claim is resolved. Depending on why they left, employees' perceptions of an accident, or the events leading up to it, may change over time, along with their overall perception of the operation and its owners and supervisors. It is not unusual for an employee to first recount a positive rendition of the events from the employer's perspective, then upon being terminated, to later report information that would make the employer look negligent in the eyes of an attorney or judge.

STEP 11. DO COMPLETE A CLAIM REPORT AND SUBMIT IT TO YOUR INSURANCE COMPANY IMMEDIATELY.

Most insurance policies require prompt notification of any and all potential claims if they are to provide coverage under the policy. The reason is that insurance companies want their experts to become involved in the investigation as early as possible. Your failure to report the claim could cause the claim to be excluded from coverage.

STEP 12. DO NOT DISCUSS THE CIRCUMSTANCES SURROUNDING THE ACCIDENT OR THE INVESTIGATION WITH ANYONE EXCEPT THOSE WHO ABSOLUTELY NEED TO KNOW.

Conversations and opinions given to employees, or even people not associated with the business, can come back to haunt you. Restrict your conversations to the hospitality operation's attorneys or authorized representatives of the insurance company.

STEP 13. DO NOT THROW AWAY RECORDS, STATEMENTS, OR OTHER EVIDENCE UNTIL THE CASE IS FINALIZED.

Cases can be resolved in several different ways: The claim could be settled prior to trial; the case could be tried in court and decided, or perhaps appealed until all avenues for appeal are exhausted. And sometimes a potential injury claim may not be filed as a lawsuit right away. Whatever the circumstance, the case will not be considered closed until the statute of limitations runs out (ordinarily two years from the date of the injury in a personal injury claim). If you are not absolutely certain whether a claim has been finalized, check with your operation's attorney or the insurance company, and request a letter of consent to destroy the evidence.

INCIDENT REPORT			
Business _____		Date _____	
Address _____		City _____	State _____
Complainant			
Last Name _____		First Name _____	Initial _____
Address _____		City _____	State _____ Zip _____
Home Telephone _____		Business Telephone _____	
Type of Incident			
Theft _____	Accident _____	Property Damage _____	Other _____
Injury			
First aid given?	Yes _____	No _____	
First aid refused	Yes _____	No _____	
EMS called?	Yes _____	No _____	
Taken to emergency?	Yes _____	No _____	
Nature of injury _____			

Detail of Incident			

Property and Value			
Damaged/Missing Property Description		Estimated Value	
_____		_____	
_____		_____	
_____		_____	
_____		_____	

Figure 9.2 Incident reporting form.

Room Entry	Room Number _____
Room entered? _____	Time _____
Door locked? _____	Door chained? _____
Entered by _____	Witnessed by _____
Police Report	
Police Officer Name _____	
Shield # _____	Report # _____
Arrest made? _____	Citation issued? _____
Witnesses:	
Name _____	Tel: _____
Address _____	City _____ State _____
Name _____	Tel: _____
Address _____	City _____ State _____
Name _____	Tel: _____
Address _____	City _____ State _____
Comments: _____	

Prepared by _____	Reviewed by _____
Date _____	Date _____

Figure 9.2 *(Continued)*



INTERNATIONAL SNAPSHOT

Negligence

Negligence overseas can spell liability at home. The standards used in the United States to determine whether the employees of a hospitality facility exercised reasonable care may apply to the foreign operations of American hospitality companies. Consider the following:

- Many Americans desire to travel overseas.
- Many of those Americans are more comfortable staying at a facility that has a familiar name and appearance.
- The American hospitality industry purposefully seeks to attract the business of those people.
- Those marketing efforts often succeed because the industry is able to combine the allure of exotic places with the peace of mind that accompanies known corporate brands.

Americans who travel overseas expect that their experience will be consistent with their experiences in the United States. So do U.S. courts. American travelers eventually come home, and when they have suffered losses overseas at facilities operated by American companies, any suit they file is likely to be filed at home. When that happens, U.S. courts usually impose U.S. legal standards. The following factors, either alone or in combination, will be considered:

- *Whether the parties to the litigation, namely the dissatisfied guest and the U.S. operator of the overseas facility, are United States citizens.* U.S. courts are not comfortable imposing foreign legal standards upon United States citizens.
- *The nature of the foreign jurisdiction's legal principles.* Some are repugnant to the policy of the U.S. jurisdiction. Similarly, U.S. courts are unaccustomed to analyzing and applying foreign legal standards.
- *Whether the foreign hospitality facility is under the control of an American company.* For example, American hospitality companies typically impose their corporatewide practices and procedures on their foreign operations. The managers of the foreign operations may have been trained in the United States by the American operator.

Managers of overseas hospitality facilities operated by U.S. companies should strive to meet U.S. standards of care in all aspects of the hospitality operation. U.S. courts evaluating their performance after an American tourist has an unfortunate experience will most likely expect them to do nothing less.

Provided by Perrin Rynders, of the Varnum Riddering Schmidt Howlett Law Firm, in Grand Rapids, Michigan. www.varnumlaw.com

WHAT WOULD YOU DO?

Assume you are a mediator whose job is to help opposing parties limit the expense and time of going to trial in matters of personal injury. In your current case, Jeremy and Anne

Hunter have filed a personal injury suit against the Fairview Mayton Hotel's ownership group and its franchisor, Mayton Hotels and Resorts Inc.

According to the Hunters, they checked into their suite at the Fairview Mayton, one of 150 independently owned, franchise-affiliated properties, on a Friday night. Their daughter Susan, who was 8 years old at the time, opened a sliding patio door, and upon seeing the outdoor

hot tub that was part of suite, asked her parents if she could get in. They told her yes. Upon entering the tub (it is agreed by both parties that Susan "jumped" into the hot tub), she suffered third-degree burns over 80 percent of her body, and her facial features were permanently disfigured because the water in the hot tub was 160 degrees Fahrenheit, not 102, the maximum recommended by the tub's manufacturer, and well above the 105-degree maximum dictated by local health codes. An investigation determined that the hot tub safety switch, designed to prevent accidental overheating, had been bypassed when some wiring repair was performed by the hotel's maintenance staff. (The Hunters are also suing the franchise

company because a mandatory inspection of property safety, which, as part of the franchise agreement was to have been performed annually, had not been done in the three years prior to the accident.)

The hotel's insurance company takes the position that Susan's parents gave her permission to use the tub, despite a written warning on the side of the tub saying it was not to be used by persons under age 14, and thus they bear a majority of the responsibility for the accident.

The Mayton franchise company's insurance company states it is not responsible for the acts of its franchisees, and thus cannot be held accountable. The hotel's manager has been terminated. The Hunters, whose lawyer has accepted the case on a contingency basis, is suing for a total of \$5 million.

1. What would you recommend the Fairview Mayton's insurance company do?
2. What would you recommend the franchise company's insurance company do?
3. What would you recommend the Hunters do?

To illustrate the importance of following company policies, consider the case of *Faverty v. McDonald's Rests. of Oregon*, 892 P.2d 703 (Or. Ct. App. 1995).

FACTUAL SUMMARY

Matt Theurer (Theurer), an 18-year-old McDonald's employee, was involved in a severe auto accident one morning after work. Theurer fell asleep at the wheel and crossed over into oncoming traffic. His car struck a van driven by Frederic Faverty. Theurer was killed in the accident and Faverty was seriously injured.

The day before the accident, Theurer worked three shifts, for a total of nearly 13 hours, at a McDonald's restaurant. The first shift began after school at 3:30 P.M. and ended at 7:30 P.M. Theurer returned to the restaurant at midnight and worked on a special cleaning project until 5:00 A.M. The final shift of the morning was a continuation of the midnight shift ending at 8:21 A.M. Theurer asked to be excused from his next regular shift and left work, telling the manager he was tired and needed to rest.

On five occasions during the week before the accident, Theurer worked at least until 9:00 P.M. On a few nights he worked past 11:00 P.M., and once past midnight. In addition to working for McDonald's, Theurer was involved in a number of extracurricular activities and served in the National Guard. Many of his friends and family believed he worked too much and was not sleeping enough. McDonald's had a policy of not requiring its high school employees to work past midnight. Additionally, McDonald's policy was to limit the number of shifts worked to two a day. McDonald's controlled the schedules of its employees and knew how many hours each had worked.

The plaintiff Faverty settled the potential claims against the representatives of Theurer's estate. He then sued McDonald's, claiming it was responsible for the acts of an employee even away from the work site. Faverty claimed McDonald's should not have allowed Theurer to work so many hours when it knew Theurer would drive home while tired and pose a risk to himself and others.

QUESTION FOR THE COURT

The question for the court was whether McDonald's was responsible for the acts of its employees outside of the job site. McDonald's initially argued it was Theurer's employer and as such was not responsible for his conduct. As the employer, McDonald's argued, it would only be responsible for Theurer's actions on the job site and would be under no duty to control Theurer away from work. Faverty argued McDonald's had an obligation to avoid conduct that was unreasonable and created a foreseeable risk of harm to a third party. McDonald's next argued that an Oregon State law set the number of hours an employee could work, and the law was not violated. Faverty argued the law did not apply to restaurants and did not establish a maximum number of hours employees could be required to work.

THE HOSPITALITY INDUSTRY IN COURT

DECISION

The jury ruled for Faverty, finding McDonald's responsible. Faverty was awarded damages for his injuries. The appeals court agreed with the trial court verdict and held McDonald's had an obligation to avoid unreasonable conduct that created a possible risk to third parties. The court also held McDonald's was unreasonable in requiring Theurer to work as many hours as he did, and should have recognized he was tired and posed a risk to the public.

MESSAGE TO MANAGEMENT

This situation possibly could have been avoided if the manager at the restaurant had followed McDonald's policies. Set reasonable policies, follow them, and work hard to be sure your employees comply.

WHAT DID YOU LEARN IN THIS CHAPTER?

All hospitality businesses must operate in a reasonably safe manner or face potential liability for accidents and injuries that occur to their guests. Specific areas (or duties) have been identified in the law that help to define the scope of the business's responsibility to visitors. These include the duty (or obligation) to provide a reasonably safe facility and grounds, to serve food and beverages fit for consumption, and to hire qualified employees. The term "reasonably," however, is sometimes a difficult standard to define, as it is based on current and customary practices in the industry.

If you failed to operate in a reasonably safe manner and damages occur as a result, you might be found to have been negligent and be held liable for damages. If you ignored the safety and well-being of visitors, then you may be found to have been grossly negligent and face greater liability than for ordinary negligence. The visitor also has a responsibility to act reasonably, or he or she may be found to have contributed to the cause of damages.

Types of damages include property loss, medical expenses, lost wages, pain and suffering, punitive fines, and legal fees. Not all types of damages are recoverable in every type of claim.

A personal injury claim is usually initiated with a demand letter. If the situation cannot be resolved amicably, a lawsuit may commence. The steps in a lawsuit include the filing of a petition, the discovery period, and a trial before a judge or jury. You, as a manager, have a crucial role in the litigation and/or resolution process. Claims do not always have to end up in trial; they are sometimes resolved through mediation or arbitration techniques.

If an accident should occur on your property (and one probably will despite your best prevention practices), the way your staff responds can have a significant impact on the consequences that arise from the accident.

RAPID REVIEW

After you have studied this chapter, you should be prepared to:

1. Define and explain the difference between a breach of contract, a crime, and a tort.
2. Describe examples of negligence, gross negligence, and an intentional act that could result in the commission of a tort.
3. Detail the essential difference between a duty of care and a standard of care, using an example of each.
4. Give three examples of strict liability as it may apply to hospitality managers offering food, lodging, and entertainment products.

5. Using the Web or the library, search the hospitality trade press to find an article describing an incident of a jury awarding punitive damages to a plaintiff where a hospitality organization was the defendant. Explain why you believe the jury came to its conclusion.
6. Outline the process involved in initiating a personal injury lawsuit, and discuss the hospitality manager's role in that process.
7. List at least five advantages that result from using an alternative dispute resolution process, as opposed to going to trial in a personal injury lawsuit.
8. Create a checklist that can be used to guide a manager's actions in the first 15 minutes after an accident.

In teams, design a procedural checklist (one-page maximum) for a manager-on-duty to follow when responding to a serious accident in a 1,000-room resort hotel located 100 miles away from the nearest medical center.

TEAM ACTIVITY