January 1997

The Franchising Dilemma Continues: Update on Franchisor Liability for Wrongful Acts by Local Franchisees

Randall K. Hanson

Recommended Citation
THE FRANCHISING DILEMMA CONTINUES:
UPDATE ON FRANCHISOR LIABILITY
FOR WRONGFUL ACTS BY
LOCAL FRANCHISEES

RANDALL K. HANSON*

I. INTRODUCTION

Imagine going into a New York City Burger King restaurant for dinner. After dinner you ask for the key to the restroom, but your request is refused. Further assume the reason you were refused the right to use the restroom is because you are an African American male.¹ Next, imagine being disabled and being unable to gain access to locally owned San Antonio Dairy Queen stores.² Finally, imagine being robbed and assaulted as you enter a hotel room. The hotel is locally owned and operated, but is a franchisee of Howard Johnson, a nationally recognized hotel chain.³ Are local franchisees solely responsible for events such as these, or can the franchisor be required to accept responsibility for such activities as well?

Customers of franchisees are anxious to reach into the deep pockets of franchisors. When customers are injured they instinctively expect compensation from the franchisor. Since they relied on the national image and advertising in deciding to do business with the franchise, the customers expect the franchisor to compen-

---

ate them for their injuries.\(^4\) However, these customers often fail to realize that they are dealing with a locally owned franchisee rather than a national franchisor.\(^5\) In deciding cases, courts are likely to focus on the extent of control exerted by the franchisor over the franchisee. The greater the franchisor's control the more likely the franchisor will be held liable.

This means that franchisors are often confronted with a perplexing dilemma. They are practically compelled by Federal law to closely control and supervise local operations in order to protect their trademark and to assure customers of consistent, high quality products or services.\(^6\) Yet, when franchisors exert the control necessary to be in accordance with Federal law, their legitimate intentions may in essence backfire and leave them legally liable for the actions of the local franchisee.

Determining the appropriate level of liability for franchisors is perplexing.\(^7\) Broad liability for franchisors drives up their costs and threatens the viability of the franchisor-franchisee format, while narrow liability potentially fails to adequately protect victims. Equity demands a delicate balance of the recognizable dilemma for franchisors resulting from broader liability for franchisors and the understandable expectations of customers.

Despite this, one thing is for certain: franchising is here to stay. Recent estimates indicate that franchising accounts for more than $800 billion in annual sales and service contracts.\(^8\) Over 40 percent of all retail sales involve franchises and more than eight million people are employed by franchises in over half a million outlets.\(^9\) With the widespread use of franchising arrange-

---


5. See Phoebe Carter, Annotation, Franchisor's Tort Liability for Injuries Allegedly Caused by Assault or Other Criminal Activity on or Near Franchise Premises, 2 A.L.R.5th 369, 380 (1992).


9. Id.
ments it is no surprise that there are increasing numbers of lawsuits against franchisors by customers injured by actions of a franchisee.

The purpose of this update is to review recent franchisor liability cases to determine the direction of franchisor liability cases. The three most common theories used to invoke franchisor liability will be discussed, and North Carolina's approach to this area of the law will also be examined.

II. THIRD PARTY CLAIMS AGAINST FRANCHISORS WHEN CUSTOMERS ARE INJURED

There are three main theories asserted when a customer seeks to recover from a franchisor for injuries suffered at a locally owned franchise. First, that the franchisee is an actual agent for the franchisor; second, that there is an apparent agency relationship; and finally, that the franchisor is liable under a negligence theory.

A. Actual Agency Based On Control

Essentially, under the actual agency theory, the franchisor may have created liability due to the establishment of a principal/agent relationship. Such a relationship may occur when a franchisor exerts extensive control over the activities of the franchisee, and such activities must be carried out in accordance with the instructions of the franchisor. As principal, the franchisor may be held liable for the actions of the franchisee. Factors which will encourage plaintiffs' attorneys and increase the chances of recovery include the following: franchisor premises inspections; the right to conduct unannounced random inspections of inventory, records, and assets; location approval; architectural approval; dimension requirement for furniture, fixtures, and equipment; specific signage and decorating requirements; prohibition on selling any products or services other than those of the franchisor; pricing and menu controls; franchise renewal dependent upon compliance with franchisor rules; guidelines for mandatory training programs; controls over operational procedures; advertising restrictions; prescribed book-keeping require-

ments; control over trademark usage; extensive operations manual with required compliance.

One of the early successful cases against a franchisor under an actual agency theory is *Singleton v. International Dairy Queen, Inc.*\(^\text{12}\) In *Singleton*, a young girl was injured when a glass door broke as she entered a locally owned Dairy Queen.\(^\text{13}\) The victim fell on the glass, severely, cutting herself.\(^\text{14}\) The franchisor brought a motion for summary judgment, alleging that the local Dairy Queen was an independent contractor and as such the franchisor was not liable for the actions of the franchisee.\(^\text{15}\) The victim avoided the summary judgment motion by asserting that the franchisor supplied the remodeling designs that included the door specifications.\(^\text{16}\) The court examined in detail the types of control exerted by the Dairy Queen over local franchisees and concluded that the control exerted was extensive.\(^\text{17}\) The control factors present created a genuine fact issue as to whether the relationship between Dairy Queen and the local franchise was a master-servant relationship or an independent contractor relationship and the court concluded that it was appropriate for a jury to decide that issue.\(^\text{18}\) Therefore, the court refused to release the franchisor from having to defend against the victim's claim.\(^\text{19}\) Although this case merely denied summary judgment for the franchisor, it caused concern for franchisors in general because of the control language used in the court's opinion.

One of the first highly publicized cases against a franchisor involved a fast food chain. In *McLaughlin v. Chicken Delight, Inc.*,\(^\text{20}\) a fast food franchisor was sued after a driver employed by a local franchisee struck plaintiff's decedent while making a delivery.\(^\text{21}\) The court reviewed the extensive controls set in place by the franchisor. These controls included requirements that the franchisee buy equipment, supplies, and food products as well as follow cooking specifications and menu prices.\(^\text{22}\) The franchisee


\(^{13}\) Singleton, 332 A.2d at 161.

\(^{14}\) Id. at 160-61.

\(^{15}\) Id. at 162.

\(^{16}\) Id. at 161.

\(^{17}\) Id. at 162.

\(^{18}\) Id. at 162-63.

\(^{19}\) Id. at 163.

\(^{20}\) 321 A.2d 456 (Conn. 1973).

\(^{21}\) Id. at 457.

\(^{22}\) Id. at 458.
was also forced to maintain a delivery system. Location, construction, and remodeling all had to comply with franchisor specifications. The franchisor also retained inspections rights. After reviewing these controls, the court concluded that the controls in place were not sufficient to invoke liability.

The 1990's version of the Chicken Delight case would likely involve Domino's Pizza. Throughout the United States, there have been hundreds of lawsuits commenced against Domino's Pizza after drivers injured victims while making deliveries. Victims alleged that the franchisor controlled the local franchisees in the usual ways, but also had in place a company policy of a thirty-minute delivery guarantee. Victims argued that this policy resulted in young drivers driving at excessive speeds to make timely deliveries. For years, Domino's argued that the drivers were independent contractors, not employees. If correct, agency principles and respondeat superior would not apply. Domino's further argued that the guaranteed delivery area was small and that they were fast in the kitchen, not on the road. 

Parker v. Domino's Pizza, Inc. shows that these arguments were not successful. This case arose after two pedestrians, while in the process of rendering aid to victims of an accident allegedly caused by a Domino's driver, were struck by another vehicle. Domino's sought and initially received summary judgment by

---

23. Id.
24. Id.
25. Id.
26. Id. at 459-60.
28. Id.
29. Id. The author states:
Domino's Pizza guarantees a delivery within 30 minutes of the order. If not, Domino's will give the customer a free pizza or refund $3, depending on where the customer lives. Many trial lawyers contend that delivering pizzas hot costs too much in life and limb. At least 100 suits are pending against the company. Claimants allege that Domino's drivers, many of them young and inexperienced, have injured them or killed their family members in their rush to be good employees and back up the guarantee.

Id.
30. Id.
32. Id. at 1027.
alleging that the delivery driver was neither an agent nor employee, but rather an independent contractor.\textsuperscript{33}

On appeal, the Florida District Court of Appeals overturned the grant of summary judgment.\textsuperscript{34} The court stated it would look not at actual control asserted by Domino's but rather the right to control.\textsuperscript{35} In reviewing the franchise agreement the appeals court specifically noted 24 control factors which Domino's asserted over their local franchisee.\textsuperscript{36} The controls included: sales quotas, site and plan approval, food preparation, signage and decorating requirements, mandatory training program for employees of the local operation, company inspections, quality standards regarding every single item served by the franchisee, strict advertising restrictions, new ideas of local employees became Domino property, franchisee was required to obtain general liability insurance naming Domino's as an additional insured, and a random inspection provision.\textsuperscript{37} In the Domino's operations manual the local franchisee was required to comply with a requirement that "a Domino's pizza is delivered within 30 minutes after the order is taken. Pickup pizzas are ready in 10 minutes."\textsuperscript{38} In terse language, the court stated:

The manual which Domino's provides to its franchisees is a veritable bible for overseeing a Domino's operation. It contains prescriptions for every conceivable facet of the business: from the elements of preparing the perfect pizza to maintaining accurate books; from advertising and promotional ideas to tending rules; from organization to sanitation. the manual even offers a wide array of techniques for "boxing and cutting" the pizza, as well as tips on running the franchise to achieve and optimum profit. The manual literally leaves nothing to chance.\textsuperscript{39}

Almost simultaneously with this Florida loss, Domino's suffered another staggering legal defeat. In December of 1993, a St. Louis jury rendered a $78,000,000 judgment against Domino's

\begin{itemize}
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} \textit{Id.} at 1029.
\item \textsuperscript{35} \textit{Id.} at 1027.
\item \textsuperscript{36} \textit{Id.} at 1028.
\item \textsuperscript{37} \textit{Id.}
\item \textsuperscript{38} \textit{Id.} at 1029.
\item \textsuperscript{39} \textit{Id.}
\end{itemize}
after another accident by a local driver. Domino's immediately dropped its thirty minute guarantee.

The actual agency theory was recently used in a 1996 case involving a Texas Jack-in-the-Box restaurant. In this case, the plaintiffs' son was fatally shot by a co-worker during a 1994 robbery of the restaurant by the co-worker and others. Plaintiffs asserted that the franchisor exerted extensive control over the franchisee, thus creating an agency relationship. The control factors alleged by the plaintiffs included: the franchisor retained sole discretion as to equipment used; the service format and operation procedures; all improvements had to be authorized by the franchisor; the franchisor's training program had to be followed; inspections rights were retained; and the franchisor had control over the hours of operation. The franchisor attempted to avoid liability by asserting that the franchisee was an independent contractor and by further pointing out that the franchise agreement specified that the franchisee was deemed an independent contractor and not an agent. The agreement had a provision which stated that the franchisor had no control over the terms and conditions of employment of the franchisee's employees.

The court, applying Texas law, held in favor of the franchisor, concluding that an agency relationship was not established. The court indicated that the plaintiffs had to establish "that the principal has the right to assign the agent's task and the right to control the means and details by which the agent will accomplish the task" in order to establish an agency relationship. The court conceded that the "franchisee was required to

41. Id.
43. Id. at 684.
44. Id. The parents also alleged that the franchisor negligently failed to provide adequate security and that the defendants negligently hired the troubled co-worker.
45. Id. at 685.
46. Id. at 687.
47. Id.
48. The court faced a conflict of law argument centering around whether Texas law or California law should be applicable to the case, and, while applying Texas law, the court concluded that California law would have reached the same conclusion. Id. at 685.
49. Smith, 928 S.W.2d at 687.
50. Id.
follow certain corporate standards, [but] the day-to-day operation . . . was delegated fully" to the franchisee. In citing a California case, the court stated that mere licensing of trade names does not create an agency relationship and the control necessary to establish an agency relationship must go "beyond those necessary to protect and maintain its trademark, trade name, and good will." Essentially, control of the day-to-day operation was the element the Texas court looked for to establish an actual agency relationship.

A 1996 case involving Dairy Queen sheds further light on potential franchisor liability. Although this case did not explicitly involve an actual agency theory, the theory asserted was closely related. In Neff v. American Dairy Queen Corp., a disabled customer brought a claim under the Americans with Disabilities Act (ADA). The plaintiff, confined to a wheelchair, alleged that Dairy Queen had violated the ADA by failing to make locally owned San Antonio, Texas Dairy Queen stores accessible to her. Under the ADA, anyone who "owns, leases, or operates" a place of public accommodation must not allow barriers to the enjoyment of the premises by persons with disabilities. Dairy Queen responded to the lawsuit by asserting that it did not own or operate the San Antonio stores.

The plaintiff asserted that because of the extensive control asserted by the franchisor, that Dairy Queen was really an operator of the facilities. The plaintiff further asserted that Dairy Queen retained the right to set standards for building and equipment maintenance and Dairy Queen had the right to "veto" proposed structural changes. Other control factors that the plaintiff asserted made Dairy Queen an operator included the right to control accounting procedures, personnel uniforms, use of trade-

51. Id.
52. Id. at 688 (citing Beck v. Arthur Murray, Inc., 54 Cal. Rptr. 328 (Cal. Ct. App. 1966)).
56. Neff, 58 F.3d at 1064.
58. Neff, 58 F.3d at 1064-65.
59. Id. at 1065.
60. Id. at 1067-68.
marks, equipment requirements, and supplies.\(^{61}\) Further, franchisees were required to follow the standard “Dairy Queen” management system, as prescribed in the Store Management Operations Manual.\(^{62}\) This covered product preparation, merchandising, sanitation procedures, and employee training.\(^{63}\)

Despite these claims, the court determined that Dairy Queen did not own the San Antonio stores and did not “operate” the stores.\(^{64}\) Therefore, Dairy Queen could not be held liable under the ADA for violations at the franchisee facilities.

In summary, the actual agency theory seems to render varying degrees of success for plaintiffs. Plaintiffs who are harmed by actions of local franchisees are quick to point out the extensive controls put in place by franchisors.\(^{65}\) The typical franchise relationship usually provides for extensive controls and this provides plaintiffs with built-in ammunition for their case. It appears the most powerful factors which could give rise to successful lawsuits under this theory are factors which will involve the franchisor in the day-to-day affairs of the franchisee. If the franchisor conducts regular inspections and then places demands on the franchisee for corrections, this is particularly helpful to the victim’s case.

B. Apparent Agency Theory

Lawsuits against franchisors for wrongful actions of a franchisee typically include allegations of an actual agency and an apparent agency. If extensive controls are not in place, the victim will seek to establish that there is at least an appearance of an agency such that the franchisor should be held liable.\(^{66}\) It is true that the public is often led to believe that it is dealing with a national franchisor rather than a locally owned franchisee. When one enters a franchise operation it is common to see signs, logos, and packaging all referring to a national franchisor without reference to local ownership.\(^{67}\) Some franchise operations intentionally create the appearance that the local operation is part of the national organization through the widespread use of logos and

\(^{61}\) Id. at 1067.
\(^{62}\) Id.
\(^{63}\) Id.
\(^{64}\) Id. at 1068-69.
\(^{66}\) Carter, supra note 5, at 384.
\(^{67}\) Id.
advertising schemes. The Restatement (Second) of Agency Sec. 267 provides as follows:

One who represents that another is his servant or agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.68

Victims' attorneys hope that the franchisor has pushed a national image on the public which arguably misled the public into thinking they were dealing with the franchisor rather than a locally owned franchisee. The plaintiffs' attorneys will be delighted if there are no signs indicating local ownership on the premises.

From the franchisors' perspective, it appears that requiring signs indicating local ownership should be mandated. It would seem that this notice would have little negative impact on the buying public and would make the creation of an apparent agency less likely.

Turning to case law, attorneys for franchisors and attorneys for victims will again find divergent outcomes on similar cases when an apparent agency theory is asserted. Two recent cases involving Best Western hotels resulted in opposite holdings. In Giamo v. Congress Motor Inn, Corp.,69 a guest at a Best Western hotel was injured as he left his hotel room to go to work.70 As the guest left the hotel, he drove down an inclined driveway, skidded on ice and lost control of his vehicle.71 The car struck another car and the guest was injured.72 The guest suffered further injuries when he slipped as he got out of the car.73 He sued the local owner and Best Western for slip and fall injuries on the hotel driveway.74 Best Western, however, is not set up on a franchise basis; rather it is a non-profit membership corporation whose members are owners of independently owned hotels and motels.75

68. RESTATEMENT (SECOND) OF AGENCY § 267 (1958).
70. Id. at 5.
71. Id.
72. Id.
73. Id.
74. Id.
prohibited by its articles of incorporation from operating or managing member properties.76

The plaintiff argued that Best Western had an apparent agency relationship with the local hotel.77 The plaintiff asserted that Best Western asserted significant control over the hotel and that it encouraged third persons to think they were dealing with Best Western International when they sought lodging at a Best Western facility.78 The plaintiff submitted copies of Renovation and Refurbishing Guidelines which allegedly demonstrated significant control over the facility.79 If this agreement were violated, membership could be canceled.80 Best Western also required that the Best Western logo be prominently displayed on the facility's premises and in all advertising.81 Rules and Regulations of Best Western also directed the operation of the reservation system, administration, lobby and front office, buildings, grounds, and public areas.82 The regulations went so far as to direct the local facility as to snow removal.83 On the basis of these facts the court held that a guest could reasonably conclude that the hotel was

76. Id.
77. Id. at 7. The court stated:
   An agent is cloaked with apparent authority when the principal acts in a way that causes a third party to reasonably believe that the agent is authorized to act on the principal's behalf. Apparent authority may be created by any manifestation by the principal that he has authorized or consents to the agent's conduct. Such manifestations may be verbal, written or implicit in the principal's conduct.

Id.

78. Id. at 8. The court stated:
   Here plaintiff urges the theory of apparent authority arguing that Best Western International, through its Rules and Regulations, imposes substantial control over each member's operations. Further, Best Western International encourages third persons to think they are dealing with Best Western International when they seek and obtain lodging at a Best Western facility, and consequently, third persons reasonably believe this is so.

Id.

80. Id.
81. Id.
82. Id.
83. Id. The court specifically quoted the snow removal requirement stating: "Snow removal shall be performed when necessary by plowing and/or use of a melting compound. Icy conditions shall be corrected with an appropriate melting compound or traction providing material." Id.
owned by Best Western and operated by its employees. Therefore, the court held that summary judgment was not appropriate for Best Western and the case should proceed to trial.

In Myszkowski v. Penn Stroud Hotel, Inc., plaintiff, a disc jockey was sexually assaulted in the ladies' room of a Pennsylvania Best Western hotel. The plaintiff alleged that the hotel provided inadequate security. She was at the hotel working as a disc jockey for a campus ministry group's social function. At about 1:30 a.m., the plaintiff left the ballroom to use the ladies' restroom, where she was attacked and sexually assaulted. The plaintiff alleged that Best Western held itself out as the owner/operator of the hotel, that she relied on this representation, and as a result Best Western could be held vicariously liable for the negligent acts of the local hotel. The court, however, concluded that the doctrine of apparent authority simply was not applicable in this case. The court noted that in its opinion the plaintiff never relied on apparent authority on the night of the attack. She was present at the facility not because it was a Best Western hotel, but because she was hired to work as a disc jockey. She never contracted or negotiated with Best Western or the local hotel. She simply agreed to show up at the designated place on the designated night and play music for a social function sponsored by the

84. Id.
86. Id. at 624.
87. Id.
88. Id.
89. Id. at 629.
90. Id. at 629-30.
91. Myszkowski, 634 A.2d at 630.
92. Id. The court stated:

Under the facts of this case, we fail to see how appellant can be said to have relied upon the apparent authority of Penn Stroud to avoid being the victim of this random act of violence. Our review of the record indicates that appellant has presented no evidence which even remotely supports her allegation that she relied upon the fact that Penn Stroud represented Best Western, as its agent, on the night she was sexually assaulted. As explained, appellant was hired by a third party, a campus ministry group, wholly unrelated to either Best Western or Penn Stroud, to work as a disc jockey on the night of April 24, 1987 at the Best Western Pocono Inn. Appellant neither contracted nor negotiated with Best Western or Penn Stroud; the ministry group specified to appellant where the function was to take place.

93. Id.
ministry group. She did not rely on the name “Best Western.”

She would have appeared at most any location the campus ministry group had designated. Therefore, the court affirmed the dismissal of the lawsuit as against Best Western.

In the 1995 case of *Watson v. Howard Johnson Franchise Systems, Inc.*, the failure to display a sign indicating local ownership came back to haunt a franchisor. In this case, a husband and wife were robbed and assaulted as they brought their luggage into a HoJo Inn. The plaintiff asserted an apparent agency theory against Howard Johnson. Numerous billboards were used to advertise the hotel through the use of the franchisor’s name, and the advertisements did not refer to the franchisee as owner and operator of the hotel. It was also pointed out that Howard Johnson required prior approval of all advertising, so it was aware that the billboards did not indicate local ownership. The franchise agreement required the franchisee to permanently display a plaque at the registration area stating that the hotel was

---

94. Id.
95. Id.
96. Myszkowski, 634 A.2d at 630. The court stated:

She simply agreed to show up at the designated place, on the designated night and play music for a social function sponsored by the ministry group. Our review of the record not only indicates that she did not rely on the fact that the designated place carried the name “Best Western,” but that it appears she would have performed the service she had contracted to at most any location the campus ministry group had designated. Thus, Best Western cannot be held vicariously liable for the alleged negligence of Penn Stroud under the theory of apparent authority.

Id.
97. Id.
99. Id. at 758.
100. Id.
101. Id. The court stated:

The Watsons contend the evidence demonstrates that Howard Johnson held out the hotel as its own and that they relied on such representations to the extent that Williams was Howard Johnson’s apparent agent. Williams used numerous billboards to advertise its hotel as a “HoJo Inn by Howard Johnson.” The advertisements did not refer to Williams as the owner and operator of the franchise. The sign in the parking lot of the hotel again referred to the hotel as a HoJo Inn by Howard Johnson.

Id. at 758-59.
102. Id. at 759.
independently operated, but no such sign was displayed. The further damaging Howard Johnson's case was the fact that it had specifically noted in an inspection report that such a sign was lacking. The court concluded that there was a question of fact as to the existence of an apparent agency, resulting in a reversal of an earlier summary judgment award in favor of Howard Johnson.

These cases suggest that the threat of an apparent authority theory can be diminished simply by insisting that conspicuous signs be placed in franchise operations indicating local ownership and operation. The presence of such signs greatly decreases any chance a plaintiff may have relied on the name of the franchisor. Franchisors who refuse to require these signs apparently feel such information will negatively impact business operations or they simply have not deemed such notice necessary.

In the 1996 case of Perry v. Burger King Corp. the plaintiff alleged that he ate at a New York City Burger King and was denied use of the bathroom because he is black. He asked for the key to the restroom and was told that the bathroom was out of order. He asserted "that he saw white patrons leaving the restroom, and again requested the key, but was denied once more." He alleged that "after another white patron emerged from the restroom, ... [that] he held open the door and observed that the facilities were in working order." Burger King alleged that the restaurant was a locally owned independent contractor and that it was not an agent or employee of Burger King. The plaintiff alleged that Burger King exerted a high level of control over the franchisee such that it controlled and regulated the day-to-day operations such that it resulted in an apparent agency relationship. The plaintiff alleged that there were no signs indicating local ownership and that the local and the national franchisor acted in concert for the purpose of maintaining to the public that

103. Id.
104. Id.
105. Id.
107. Id. at 551.
108. Id.
109. Id.
110. Id.
111. Id.
112. Perry, 924 F. Supp. at 554.
the restaurant is a Burger King restaurant. Burger King was dismissed as a defendant through a grant of summary judgment. The court felt that the evidence of an apparent agency was merely speculation or conjecture.

In summary, the apparent agency theory is the biggest threat to franchisors. Although the cases seem to send mixed messages about the predictability of success, there are enough cases available to suggest that franchisors cannot ignore this theory. The very nature of a franchise relationship necessitates a certain amount of control. The more the control the more likely an apparent agency can be created. There appears to be no logical reason why a franchisor would not insist on the use of prominent signs to indicate local ownership. It would seem that such signs would have little negative impact on the public’s decision to do business with a franchisee or not and the sign gives the franchisor an additional argument that allegations of an apparent agency relationship is not supported by the facts. National advertising which indicates that many franchise operations are locally owned would also appear to be a wise approach with very little negative ramifications. Clearly franchisors who wish to avoid liability should also be careful to avoid the creation of controls to the point that it is unclear whether the franchisor is in charge or a local owner is in charge.

C. Negligence Theory

The third theory commonly used against a franchisor is negligence. In order to establish a negligence claim, four elements must be proven: the existence of a duty, breach of the duty of care, causation, and damages. Almost anytime someone is injured, it is predictable that the victim will allege that another failed to use reasonable care under the circumstance resulting in damages or injuries. The context in which franchisors are affected by this theory typically involves a situation where someone is injured while on the premises of a local franchise and then the

113. Id.
114. Id. at 555.
115. Id. at 554.
119. Id.
victim seeks to recover from the franchisor for his/her injuries.\textsuperscript{120} Two McDonald's cases with opposite outcomes typify the use of a negligence theory for injuries inflicted by the criminal actions of third parties at franchise locations.

\textit{Martin v. McDonald's Corp.},\textsuperscript{121} a murder and robbery took place after closing hours at an Oak Forest, Illinois fast food restaurant.\textsuperscript{122} Prior to the robbery and murder, the franchisor had voluntarily performed a security inspection of this particular McDonald's restaurant.\textsuperscript{123} The inspector had recommended that several changes be made concerning the closing procedures at the store.\textsuperscript{124} The changes recommended included that "no one should go out or throw garbage out the back door after dark. Trash and grease were to be taken out the side glass door at least one hour prior to closing by one employee while another employee watched activity from inside."\textsuperscript{125} The inspector also recommended that locks be changed and a new alarm system be installed for the back door.\textsuperscript{126} The inspector who made the recommendations never returned to view the night time closing procedures to see if the changes had been implemented.\textsuperscript{127}

On the night of the robbery, six teenage female workers were working to clean up and close the business.\textsuperscript{128} A criminal appeared at the back of the restaurant and ordered the crew into the refrigerator.\textsuperscript{129} The robber forced the assistant manager to open the safe and get him money.\textsuperscript{130} In the course of moving the six-member crew into the refrigerator, one employee was fatally shot and two others were assaulted by the lone criminal.\textsuperscript{131} The franchisor was sued for negligence. The trial court held in favor of

\begin{thebibliography}{130}
\bibitem{120} For an interesting negligence case involving a robber who shoots and injures a customer see Taco Bell v. Lannon, 744 P.2d 43 (Colo. 1987).
\bibitem{121} 572 N.E.2d 1073 (Ill. Ct. App. 1991).
\bibitem{122} \textit{Id.} at 1076.
\bibitem{123} \textit{Id.} at 1077. McDonald's Corporation had recognized that security was a problem at all franchise operations and has set up a branch of its corporation to deal with security problems. \textit{Id.} A regional security officer for McDonald's undertook the duty of checking for security problems and to communicate security policies to store managers. \textit{Id.}
\bibitem{124} \textit{Id.}
\bibitem{125} \textit{Id.} at 1077.
\bibitem{126} \textit{Id.}
\bibitem{127} \textit{Martin}, 572 N.E.2d at 1078.
\bibitem{128} \textit{Id.} at 1076.
\bibitem{129} \textit{Id.}
\bibitem{130} \textit{Id.}
\bibitem{131} \textit{Id.}
\end{thebibliography}
the estate of the deceased worker and awarded $1,003,445.37. The trial court also held in favor of the two assaulted employees awarding each of them $125,000.

On appeal, the franchisor asserted that it owed no duty to the employees since it was merely the licensor of the business. The court disagreed and upheld the trial court decision. The court concluded that McDonald's ordinarily had no duty to protect plaintiffs from criminal acts of third parties, but it had voluntarily recognized the threat of robbery and undertaken the review of the security procedures. Once McDonald's assumed the duty to review the security procedures, it had a responsibility to perform that duty with care and competence. Failing to follow up on its earlier recommendations left McDonald's saddled with a large negligence judgment.

In Hoffnagle v. McDonald's Corp., a franchisee-employee sued the franchisor under a negligence theory. The plaintiff was working at a McDonald's restaurant in Cedar Rapids, Iowa. "At approximately 10:00 p.m., two men entered the restaurant, were served, and sat down in the dining area to eat their food." The plaintiff was sweeping the floor, and the two men took her outside the restaurant to the parking lot where they attempted to force her inside their car. The plaintiff resisted and a managerial employee came to her assistance. With the other employee's assistance, plaintiff escaped and returned to the restaurant. As the plaintiff sat down to compose herself, the managerial assistant returned to work, helping a drive through customer. The managerial assistant noticed that the assailants remained outside, driving their car from one side of the parking lot to the other, but the managerial assistant did not lock the

132. Id. at 1075.
133. Martin, 572 N.E.2d at 1076 (These damages were assessed for the negligent infliction of emotional distress.).
134. Id.
135. Id. at 1078.
136. Id.
137. Id.
138. 522 N.W.2d 808 (Iowa 1994).
139. Id. at 810.
140. Id.
141. Id.
142. Id.
143. Id.
144. Hoffnagle, 522 N.W.2d at 810.
doors or call police. Some time later one of the assailants again entered the restaurant and again attempted to take the plaintiff outside. The managerial assistant again intervened, causing the assailants to leave. Finally the managerial assistant called the police and the plaintiff made an official complaint against the assailants. The plaintiff filed suit against McDonald's alleging negligence. The primary allegation of the plaintiff was that McDonald's negligently failed to provide security or to provide adequate security training for the franchisee. The plaintiff alleged that the managerial employee was not appropriately trained because she failed to lock the doors or telephone the police after the first attack on the plaintiff. The trial court granted summary judgment in favor of McDonald's concluding that McDonald's owed no duty toward the employee of a local franchise under these facts.

The Iowa Supreme Court upheld the judgment in favor of McDonald's, concluding that McDonald's did not retain sufficient control over the operations of the restaurant to impose a duty of security upon the franchisor as toward its franchisee's employees. The court felt that the controls asserted by McDonald's over the franchisee were simply to require adherence to the "McDonald's system", to adopt and use McDonald's business manuals, and to follow other general guidelines outlined by McDonald's. Since the day-to-day control of the employees was

145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Hoffnagle*, 522 N.W.2d at 812.
151. *Id.*
152. *Id.*
153. *Id.* at 814.
154. *Id.* The court stated:
The franchisee, the Mrozinskis, rather than the franchisor, McDonald's, has the power to control the details of the restaurant's day-to-day operation. The Mrozinskis own the business equipment, operate the business, hold the operating licenses and permits, determine the wages, and provide the basic daily training and insurance for the franchisee's employees. The Mrozinskis, not McDonald's, hire, fire, supervise and discipline the franchisee's employees. On the other hand, McDonald's simply has the authority to require the franchisee to adhere to the "McDonald's system," to adopt and use McDonald's business manuals, and to follow other general guidelines outlined by McDonald's.
THE FRANCHISING DILEMMA CONTINUES

1997

handled by the franchisee, the franchisor could not be held liable when a co-employee failed to immediately call for police protection upon a disturbance.

Whenever personal injuries are suffered, it is likely that a negligence claim will be asserted. The beauty of a negligence theory from a plaintiff's perspective is that it can be applied in almost any situation. Whether a franchisor has acted reasonably obviously is decided on a case-by-case basis, often resulting in unpredictable outcomes. The numbers of negligence claims seems likely to continue to explode as more and more businesses are operated on a franchise basis. It appears that the best approach for a franchisor and franchisee to take is to simply take an overly cautious approach in all business situations. If the franchisor does make security inspections, it is clear that any recommendations later made must be subsequently followed up on to ensure that the recommendations are implemented. Failure to follow up will likely result in negligence liability.

III. NORTH CAROLINA FRANCHISOR LIABILITY DECISIONS

North Carolina has decided a limited number of cases in this area. The most important cases are motel cases decided in 1987 and 1988 against Ramada Inn and Holiday Inn.155 In Hayman v. Ramada Inn, Inc.,156 a flight attendant trainee for Piedmont Airlines was assaulted while a guest at a Winston-Salem, North Carolina Ramada Inn.157 The trainee unsuccessfully sued Ramada Inn on the basis of an actual and apparent agency theories. The second case, Crinkley v. Holiday Inns, Inc.,158 has been widely cited. In this case, Holiday Inn was held liable when a husband and wife were assaulted when they were checking into their hotel room.159 Holiday Inn was held liable on an apparent agency theory for failing to indicate to the plaintiffs that the hotel was locally owned.160 The jury award of $500,000 was upheld.161 In holding Holiday Inn liable on an apparent authority theory, the court felt

Id.
155. For a more in-depth review of these two North Carolina cases see Hanson, supra note 7, at 199-200.
157. Id. at 275, 357 S.E.2d at 395.
158. 844 F.2d 156 (4th Cir. 1988).
159. Id. at 159.
160. Id. at 160.
161. Id.
compelled to explain why Holiday Inn was liable, while Ramada Inn was not held liable the year before in the Hayman case. The court distinguished the two cases primarily by noting that in Hayman the plaintiff stayed at the Ramada Inn pursuant to her employer's directives while in Crinkley, the plaintiff exercised free choice in choosing to stay at the Holiday Inn. Also, in Crinkley, the plaintiffs' choice of lodging was influenced by national advertising which failed to indicate local ownership. The Crinkley decision still causes concern for franchisors in North Carolina in that they may be held liable for wrongful acts at the local level even if day-to-day control is not present.

In 1996, the North Carolina Court of Appeals decided a franchise case with an unusual twist. What made this case unusual was that a franchisee was attempting to avoid liability by asserting it was an agent of the franchisor. In most cases involving franchise liability, a third party is the one seeking to establish the existence of an actual agency relationship. In Alamance County Board of Education v. Bobby Murray Chevrolet, a local franchise dealership attempted to avoid liability by asserting the existence of an actual or apparent agency relationship with General Motors. Bobby Murray Chevrolet, a local franchisee received an invitation to bid on approximately 1200 school bus chassis for a number of school districts in North Carolina. The franchisee consulted with GMC Truck Division regarding prices and availability and submitted a bid. The bid was accepted and the initial deadline for orders from the school districts was set at July 31, 1990. A number of bus contracts were successfully completed and performed without problems. A subsequent problem did develop when General Motors agreed to extend the time for placing orders. Orders were placed, but were not completed as transmission shortages developed. The school district plaintiffs notified Bobby Murray Chevrolet that the chassis would be purchased from another source and any increased costs would be

162. Id. at 167.
164. Id. at 223, 465 S.E.2d at 308.
165. Id. at 224, 465 S.E.2d at 308.
166. Id.
167. Id.
168. Id.
169. Alamance County Bd. of Educ., 121 N.C. App. at 225, 465 S.E.2d at 309.
sought from the dealership. The school districts later sued for and recovered over $150,000.

Bobby Murray Chevrolet attempted to avoid liability by asserting that General Motors breached its contract and that Bobby Murray was merely acting as an agent of General Motors and therefore should not be liable to the school districts. To support this assertion, Bobby Murray argued that although it was not normally an agent of General Motors, it became an agent rather than a franchisee as a result of General Motor's extension of the time period for bus orders from July 31 to August 31. Bobby Murray asserted that this action constituted day-to-day control by General Motors over the operation of its franchisee. The court disagreed, noting that the dealer agreement between General Motors and Bobby Murray specifically provided that neither party was an agent or representative of the other and the extension of the day for bids did not constitute control such as to give rise to a principal-agent relationship. The court gave little credence to Bobby Murray's argument that there was an apparent agency relationship by stating that "[n]o evidence establishes that GM represented Bobby Murray to be its agent or permitted Bobby Murray to represent itself as GM's agent. Thus, Bobby Murray's apparent agency argument also fails." Since Bobby Murray failed to establish itself as an agent, it could not escape liability.

In summary, it appears that North Carolina, by its decision in Crinkley, established a precedent of significant liability potential for franchise liability. Franchisors in North Carolina must demand conspicuous notice of local ownership to avoid the crea-

170. Id.
171. Id.
172. Id. at 231, 465 S.E.2d at 312.
173. Id. at 231, 465 S.E.2d at 312-13.
174. Id. at 232, 465 S.E.2d at 313.
175. Alamance County Bd. of Educ., 121 N.C. App. at 232, S.E.2d at 313. The court stated:
   
   Whether an agency relationship was created in this case is determined by "the nature and extent of control and supervision retained and exercised by [GM] over the methods or details of conducting the day-to-day operation [of Bobby Murray]... . We do not believe extension of the date by which Bobby Murray could place orders for school bus chassis in any way constituted an exercise of day-to-day control by GM over the operation of its franchisee.

Id. (citing Hayman v. Ramada Inn, Inc., 86 N.C. App. 274, 357 S.E.2d 394 (1987)).

176. Id.
tion of an apparent agency relationship. Further, franchisors must devise their systems in ways which avoid meddling in day-to-day operational activities. Failure to do this will likely result in a finding of an actual or apparent agency relationship with full liability resting on the franchisor.

IV. CONCLUSION

Franchise liability law is still in a confusing state. Case decisions vary widely from state to state. Some decisions indicate that typical franchise provisions constitute control and liability while other decisions indicate that typical controls are not sufficient to impose liability.177 The legal system has a responsibility to indicate what kind of controls will be allowed without the imposition of liability on the franchisor. The present system sets up a tightrope situation where the franchisor feels compelled to impose controls to assure uniform activities, but there is a fear of becoming involved in the day-to-day activities of the franchisee operations as this will result in devastating liability.

Until a clearer directive is delivered by the courts, franchisors should be at a minimum requiring that signs be placed in all franchise operations indicating local ownership and continuously reviewing legal decisions in states where they operate. Of course, procedures should be continuously reviewed to implement safety measures which will hopefully minimize injuries.

Unfortunately, franchisors probably need to start accumulating data on criminal activities at local operations. It appears that one of the highest risks to franchising liability at this time is having franchise operations in high crime areas. Negligence judgments will be increasingly difficult to defend against if there are a large number of recent criminal acts at a location where a plaintiff is injured. Franchise operations in locations that have been targeted by criminals in the past are going to have to face the extremely difficult decision as to whether or not to hire full-time security guards. Whether the legal system will or should force franchisors into this position is going to be the perplexing issue heading into the year 2000 and beyond.

177. For a discussion of public policies for and against increased franchisor liability see Hanson, supra note 7, at 192-94.