

Legal Issues for Food Safety

What every food professional should know

By William Marler



Each year, millions in North America are sickened from food-borne pathogens such as *E. coli* O157:H7, salmonella and listeria. Where a lengthy and costly investigation ensues, it usually uncovers the cause of the outbreak to be a contaminated food source, an unsanitary processing or storage facility or unclean food handling. What follows tends to make front-page news — images and stories of sick children, massive product recalls, plant and restaurant closures and, in some cases, bankrupt companies. Too often, these dangerous and sometimes deadly outbreaks could have been prevented.

Preventing an outbreak is not only better for consumers but helps protect a company's image and bottom line. In addition to the cost of defending against civil lawsuits, there is significant damage to business, including lost revenue, bad publicity and loss of future sales. To make matters worse, in some cases there might be criminal penalties. Understanding liability, minimizing risk and taking precautionary measures will help to safeguard a company's future

Food-borne Illness Liability

In the U.S., a business is typically held strictly liable for selling a defective food product. In other words, a victim does not need to prove or identify the specific failure of the business but only show the food was contaminated and it caused the illness.

In Canada, however, where liability is primarily fault-based, a victim typically must show the business negligently stored, processed, distributed or sold a defective product, leading to the injury. And while Canadian courts have been reluctant to impose strict liability for food product defects, judges still have the discretion to follow American precedence.

Even without strict liability, it is not necessarily difficult to attribute liability to a food producer, distributor or retailer. A victim's claim can be based on the implied warranty the food was fit for human consumption and the business failed to take reasonable care to ensure the food was safe. There are various regulations that might help establish the warranty. The Food and Drugs Act makes it a violation to sell food that contains a harmful substance, is unfit for human consumption, contains some filthy, diseased, animal substance or is manufactured or prepared under unsanitary conditions. The Food Premises Regulation requires food be protected from contamination while on business premises. The Sale of Goods Act establishes an implied condition in a sale of goods contract that the goods are reasonably fit for human consumption. Based on any one of these regulations, a victim might argue there is an implied warranty the food should have been safe to consume and

the business had a duty to prevent contamination. Consequently, where food is defective due to a contamination with a dangerous pathogen, liability is, in effect, similar to strict liability. More importantly, given the breadth of regulations, just about anyone in the chain of food could be held liable — from the supplier all the way to the food retailer.

Prevention and Damage Control

There are a number of precautionary measures a business can take to decrease the likelihood of a food-borne illness outbreak; or, should outbreak occur and the business become the subject of a civil lawsuit or government investigation, may help limit liability.

- 1. Protect the chain.** It is imperative everyone from the supplier to the retailer follows similar safety protocols. Just as a chain is only as strong as its weakest link, if one part of a food chain fails to maintain adequate food safety standards the rest may suffer. A business should require, through a contract, that its suppliers or distributors comply with the best safety standards. It is also important to ensure each stakeholder has sufficient product and general liability insurance.
- 2. Maintain records.** Keeping thorough purchase and distribution records allows for more accurate and timely trace-back of ingredients and trace-forward of product. When an outbreak occurs, being able to isolate the point of contamination helps to avoid needless finger pointing and resolve the problem quicker. Additionally, maintaining open inspection records will reduce speculation about the sanitary conditions, handling or preparation of food.
- 3. Make cleanliness a priority.** Making sanitation a top priority will encourage employees to take cleanliness more seriously. This might entail elevating the sanitation department to a level on par with the accounting, marketing or human resources departments.
- 4. Work with the health department.** Developing a strong working relationship with relevant government departments allows for more efficient flow of information, thereby expediting the investigation and limiting the amount of damage. Additionally, cooperating with health departments shows transparency and improves public trust and relations. ●●

William Marler is the managing partner of Marler Clark LLP, PS, a law firm that has been involved in every major food-borne illness outbreak in the U.S. and has represented thousands of individuals in claims against food companies whose contaminated products have caused serious injury and death. William is a major force in food safety policy in the U.S. and abroad. Contact him at 206.346.1888.