

***Litigating the Food Poisoning Case:
The Importance of Prior Inspections and Investigations***

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Food poisoning cases are not new to trial lawyers. In fact, food poisoning cases are among the early strict product liability cases in a number of states.¹ Today, advances in technology, combined with a number of high-profile “outbreaks”, such as the Jack-in-the-Box *E. coli* O157:H7 outbreak in the Western U.S. in 1993, have greatly increased the prevalence and impact of food poisoning litigation.

As a general rule, food poisoning cases are products liability cases.² In other words, they are brought forward under the doctrine of strict liability. Since it does not require great legal argument to establish that a sandwich contaminated with *Salmonella* or some other pathogen is “defective” under statutory or common law definitions, the battle is fought in proving that the food your client consumed was in fact contaminated, and therefore the source of the client’s injuries.

In litigating the food poisoning case, it is likely that the defendant, its insurer, and their counsel will initially expect the production of “smoking gun” evidence, i.e. leftovers of the product at issue that test positive for the contaminating pathogen in question. The realities of the food service business dictate however, that the offending items are often long gone (i.e. consumed by the now ill individuals) before they can be tested. As the representative of the sickened individual, it is then necessary to gather other factual support for the claim.

One extraordinarily effective tool in establishing the defectiveness of a product that no longer exists is uncovering documentation of the food service establishment's prior history. Such documents would include information regarding prior incidents or accusations of food contamination and prior inspections of the facility and the establishment's food production and service procedures. The documents can be acquired either through the discovery process or through use of federal or state freedom of information act requests.

The uncovered documents will assist in making the plaintiff's case in a variety of ways. In some cases, there may be documentation of improper food handling procedures that can circumstantially prove the manner of contamination in a particular client's case. In other situations, a list of improper techniques and code violations can serve as a tool for limiting a defendant's trial options, or positioning a case for early and favorable settlement. Finally, particularly egregious or repetitive examples of improper food handling techniques can build a punitive damages case, where such damages are available.

Finding the Shadow of a Smoking Gun: Identifying the Improper Procedure that Led to the Contamination of the Food Consumed by Your Client.

As noted above, it is a rare case, at least with respect to restaurant based food poisoning claims, where contaminated leftovers will be located by the time investigative agencies or lawyers are on the scene. This missing piece of the puzzle can be supplied however by identifying specific errors in the preparation of the suspected food or foods.

For example, in 2001 a young girl suffered a particularly severe *E. coli* O157:H7 infection that had left her with permanent kidney damage. The little girl had eaten a hamburger purchased at a midsized fast-food chain. Hamburgers are commonly viewed as the most common source of *E. coli* O157:H7 infections in humans, and nothing else in the girl's food history was a likely source of the infection. By the time health department officials investigated, however, the case of hamburgers out of which the girl's had been chosen was long gone. The health department did not find any food on site that tested positive for *E. coli* O157:H7. A thorough review of the restaurant's current and prior inspections though, revealed a serious flaw in the firm's cooking method that provided an explanation for the client's exposure. According to the inspection report:

Hamburger buns are toasted on the grill immediately adjacent to the cooking patties, and it is conceivable that, early in the cooking process, prior to pasteurization, meat juices and blood containing active pathogens might possibly splash onto a nearby bun.

In fact, on six separate occasions spanning three years, the management of the restaurant had been advised of the dangers of cross contamination of the hamburger buns by hamburger juices. The plaintiff's expert also reviewed the prior inspection reports and concluded that the chain's cooking methods presented a high risk of cross contamination. The matter resolved shortly after the presentation of this information.

In another case, a Chinese restaurant in Ohio was the suspected source of an *E. coli* O157:H7 outbreak in the fall of 2002. Again, no contaminated leftover food was found. In addition, the restaurant was buffet style, which complicated the identification of a single contaminated food item. A disproportionate number of the ill patrons were children, and it began to appear that the culprit food might in fact be Jell-O. Obtaining

the health department investigation report provided the answer to the obvious question—how might Jell-O have become the source of an *E. coli* O157:H7 outbreak? The report noted a host of food handling errors in the restaurant, none more important than this one: “raw meat stored above the Jell-O in the refrigerator.” Officials concluded that “the likely source of *E. coli* O157:H7 in the Jell-O was from raw meat juices dripping on the Jell-O while it was solidifying in the refrigerator.” The defendant never seriously contested liability once the report was obtained.

In 2003 a group of people who had attended a banquet hosted by a restaurant in eastern Washington state fell ill in the days following the banquet. Many of the banquet goers tested positive for *Salmonella*, but leftover food items had either been discarded or had tested negative. The health department’s subsequent investigation of the event provided the information necessary to establish liability. The food service establishment had violated state food regulations by “pooling” dozens, if not hundreds, of raw eggs in a single bucket for storage overnight. This process allows bacterial contamination from a single egg to taint exponentially larger amounts of food, and therefore place many more consumers at risk. The establishment subsequently used the raw eggs as a “wash” on a specialty dessert. Then, once again in violation of food code, the food preparers failed to sufficiently ascertain that the raw egg had been sufficiently cooked. When these actions were taken together with the fact that raw eggs are a particularly notorious source of *Salmonella*, the smoking gun was back in the defendant’s hands.

The Defendant’s Dirty Hands: Using a Pattern of Poor Food Handling Practices as a Litigation and Settlement Tool

Even when records of prior inspections and complaints do not generate a silver bullet, they can be extremely useful in positioning the plaintiff's case for success. In some instances, the existence of negative items in the inspection history of a restaurant can assist settlement by combating the defendant's unwillingness to accept responsibility. In others, these same records may discourage the defendant from contesting liability.

For many food service establishments, an outbreak of food poisoning traced to their restaurants is unlikely to prompt an initial response by the implicated establishment of taking responsibility for their customers' illnesses. Rather, operators are likely to view themselves as the victims of bad luck, an act of God, or the failings of another entity in the production chain. Their concern is often more squarely on the damage done to their own establishment's financial viability than on victims' claims. This can be particularly true with so called "mom and pop" operations as opposed to more sophisticated large chains. The refusal of defendants to accept their predicament can fuel insurance company adjusters' and defense attorneys' combative stance towards resolving a particular case. Finding and presenting defendants in this position with a body of evidence that depicts failures in food handling practices in the facility can help erode this resistance, and focus their attention on your clients.

For example, in 2000, a producer and distributor of high-end fresh food items was identified by various health agencies as the source of a large Shigella outbreak across the west coast. The firm was a relative new-comer to the food industry, and operated with a marketing stance and inward belief in the high quality of its products. Health department inspections, however, revealed serious problems at the firm's production facilities, including the lack of fully operational bathrooms for employees, insects near food

production sites, and evidence of rodents in the facility. Through discovery, it was also uncovered that a major commercial purchaser of the firm's product had conducted its own inspection of the facilities, and had refused to purchase any more product from the defendant until a number of significant upgrades were made to the facility. The presentation of this information to high-ranking officials in the corporation at deposition helped wear down opposition to the resolution of the cases.

In some circumstances, damaging inspection documents can also dissuade a defendant from contesting liability in front of the jury. In a case where defending the case from a liability standpoint is a less than certain undertaking, defense counsel may be wary of admission of evidence that will make the defendant less sympathetic in the eyes of the jury.

In 2002, a Seattle area restaurant was suspected by health officials as the source of a medium sized outbreak of food poisoning. Even though one of the patrons experienced an unusually severe acute illness, medical practitioners and health officials were unable to pinpoint the particular pathogen that had sickened the various individuals. The defendant and its insurer were initially unwilling to concede liability in part based on the unidentified causative agent in the outbreak. Acquisition of the prior inspection reports, however, revealed a consistent pattern of poor food handling practices. The repeat occurrences of numerous health code violations had led the health department to close the restaurant and temporarily revoke its license. In the end, the proposition of contesting liability proved too risky for the defendant.

Disregard for Customer Safety: Proving Punitive Damages

Much in the same manner as other products liability cases, evidence of knowledge of prior incidents of improper behavior can be the cornerstone of a punitive damages claim. Inspection reports are particularly useful in this regard because not only do they establish prior violations of regulations, but also the defendant's prior knowledge, as the establishments must sign off on the inspection reports in most instances.

In 1996, fresh juice manufacturer Odwalla was identified as the source of a major outbreak of *E. coli* O157:H7 on the west coast. Through discovery requests, the plaintiffs sought documentation of inspections by governmental agencies, Odwalla itself, and private parties. After considerable motion practice, the plaintiffs uncovered previously undisclosed inspection reports, which included a report from the Department of the Army. The Army had inspected Odwalla's production methods prior to the outbreak and determined not to buy its products. In a letter to Odwalla, it stated:

We reviewed deficiencies noted in the report, which our inspector discussed with you at the time of the inspection. As a result, we determined that your plant sanitation program does not adequately assure product wholesomeness for military consumers. This lack of assurance prevents approval of your establishment as a source of supply for the Armed Forces at this time.

Through further discovery, the plaintiffs recovered internal company emails reacting to the U.S. Army's inspection and subsequent refusal to purchase products from the company. One employee suggested implementing a microbiological testing program to address some of the problems uncovered in the inspection. The following is a portion of an email responding to the suggestion:

...why are we doing it, why now, what do we WANT TO PROVE...IF THE DATA is bad, what do we do about it. Once you create a body of data, it is subpoenaable...you should look at this as though the Fresno Bee has looked into the results and asked a lot of questions...

At the time of the *E. coli* O157:H7 outbreak, the company had not adopted the suggested testing regimen. With the plaintiff's motion to apply California law regarding punitive damages pending, the cases were resolved.

Finding the Documents

Given their importance, it is essential to acquire all documentation of prior inspections, customer complaints, and prior incidents of alleged food contamination. An obvious source of all of this information is the defendant itself. Through interrogatories and requests for production, the defendant should be probed for the following items:

- The defendant's copies of any inspection reports from government agencies.
- Documentation of any inspections by third-parties, consultants, or commercial customers.
- Customer complaint logs, incident reports, internal employee input or suggestion memos.
- Documentation regarding any previous food poisoning litigation.

It is also necessary to acquire documents from governmental agencies that have inspected or overseen the establishment. To do this, it is necessary to research which local, state, and/or federal agencies would have jurisdiction over the defendant in question. At the federal level, this could include the United States Department of Agriculture (USDA) and its “enforcement” branch, the Food Safety Inspection Service (FSIS), as well as the Food and Drug Administration, (FDA). The USDA has jurisdiction over meat and poultry, while the FDA oversees most other food. At the local and state level, there are often city, county and state health departments. There also may be local and state agriculture departments that may have jurisdiction over various facilities. Once the proper repository of public documents is determined; the appropriate freedom of information act statute(s) can be used to access the inspection information.

Leave No Stone Unturned

As with any products liability litigation, intensive discovery and investigation is of the utmost importance to the plaintiff’s case. The food safety history of a potential defendant can be used to establish liability, to encourage settlement, to limit the litigation strategy of the opponent, to diminish jury sympathy for the defendant, and to build a convincing punitive damage case. The documents are likely to be the most important tool in securing fair and reasonable compensation for the injured food customer.

¹ Hoover v. Peters, 18 Mich. 51 (1869); Wideman v. Keller, 49 N.E. 210 (Ill. 1897); Race v. Krum, 118 NE 853 (Ct. Appeals of NY 1918); Jacob E. Decker & Sons, Inc. v. Capps, 164 S.W. 2d 828 (Tex. 1942);

² Id.