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# Food Safety In-Sight™

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## *Featured Article*

# Foodborne Illness and Tort- Are You Due Diligent?

*By Roy E. Costa, R.S., M.S.*

In a perfect food safety world, operators of food facilities would place the health of the consumer above all else. Science-based foodborne illness prevention systems would be in place from farm to table and government in partnership with industry would effectively monitor the food supply so unsafe conditions could be detected and quickly corrected. In a perfect world, food safety would be a given.

In reality, operators do not adopt food safety systems because of an overarching concern for public health and safety. Think about how and why the Food, Drug and Cosmetic Act of 1906 came into being. As a reminder, it came about as a result of Upton Sinclair's book, "The Jungle". Sinclair's novel depicting horrendous sanitary conditions in Chicago's slaughterhouses galvanized public opinion and forced congress to regulate the food industry. The media is still at work today exposing wrongdoing in the food industry.

Since history and our modern experience prove that we cannot depend upon industry to place the good of society above business interests, we enact laws and rules to protect the health, safety and welfare of consumers. While these laws and rules are well intentioned, they depend for the most part on public agencies for enforcement. When agencies are properly funded and have strong political support they protect the public. When they are weak or lose sight of their mission, the public faces increasing risk.

Our current food safety regulatory system is a patchwork of agencies that for the most part have their roots in the earliest days of public health. While some still say the United States enjoys the safest food supply in the world (or "one of the safest" as our government now says!) our public health infrastructure is deteriorating under the pressure of shifting legislative priorities and dwindling resources. Many health departments are cutting positions, leaving positions vacant, or trying to pass responsibility off to other agencies. While bio-security concerns have refocused the legislative agenda on public health and safety, less and less money is being spent on core public health programs. Many agencies are in serious jeopardy of defaulting on their mission. In Florida, for example, the Division of Hotels and Restaurants has come under attack in the media for failing to meet inspection quotas and failing to enforce basic sanitation and safety laws.

Florida's failures are noteworthy in light of the fact that serious economic impacts on travel and tourism could result from negative publicity. This criticism is not surprising, however, as many health departments around the country have come under intense scrutiny for lax enforcement and poor performance, and our federal agencies have not escaped criticism, either.

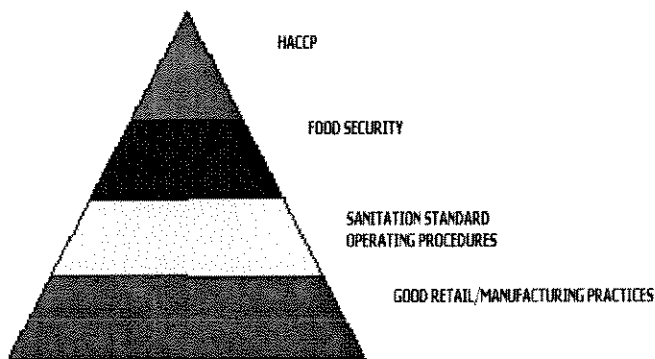
If we cannot depend on the regulatory framework to protect us, consumers can still redress their grievances in our judicial system through tort, derived from the Latin word "tortus" which meant wrong. In French, "tort" means "a wrong". Tort refers to that body of the law allowing an injured person to obtain compensation from the person who caused the injury. The law expects every person to act without hurting others. When they do so, either intentionally or by negligence, they can be required by a court to pay money to the injured party ("damages") so that, ultimately, they will suffer the pain cause by their action. Tort also serves as a deterrent by sending a message to the community as to what is unacceptable conduct.

Tort may be the most effective means of bringing about a proactive mentality in the food industry. While interventions such as media reports, posting of grades, and negative publicity create momentum for change, this type of intervention depends on the public to stop patronizing substandard establishments. Monetary damages on the other hand have a direct if not immediate effect on business. While the willingness of insurance companies to settle claims has given the food industry a good bit of protection until now, this may change. Attorneys are becoming more successful at proving cause and effect thanks to better science, and jurors are growing more sensitive to the pervasive food safety problems they personally experience or see in their community. When attorneys have sound scientific evidence, claims may reach seven-figures, or more. The outbreak of HAV caused last spring by green onions may top \$100,000,000.00 in claims. If attorneys can prove negligence or disregard for known safety risks, awards may mushroom. A jury awarded \$24,000,000.00 to victims of a norovirus outbreak in a hotel after management was shown to have allowed ill employees to work with catered food.

The only real answer for an operator is of course not to cause an outbreak in the first place. But should it occur, it is imperative to show due diligence by having had in place a state of the art food safety system and the highest level of regulatory compliance. If you are a prudent CEO or owner of a food operation ask yourself this question "am I diligent in my efforts to prevent injury to a consumer"? If your answer is not a resounding "YES!" chances are pretty good your business might someday be the subject of nationwide news, and you could find yourself involved in a costly and lengthy legal battle.

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### **Food Safety Tips. Four Components of a Food Safety System**



**2. FOOD SECURITY:** Make an audit of your facility and operation. Ensure your facility, personnel, food production methods and management systems discourage malicious contamination of food.

**3. SSOP:** Establish your sanitation protocols assigning responsibility to specific persons and describe what is done and how the sanitation protocols are carried out.

**1. HACCP:** Identify your most hazardous foods and processes. Create critical controls at key steps of production that minimize, reduce, prevent or eliminate food safety hazards. Apply code standards and your own operating criteria to ensure hazards are being controlled. Monitor your operation and correct any deficiency affecting the safety of the food. Audit your system to verify its effectiveness and keep adequate records.

**4. GRP/GMP** Establish the standards for your structure, water, waste disposal, pest control and other operating conditions that assure a safe operation, and train your employees.

Guest Article:

## Food Claims and Litigation

By Bill Marler, Esq.

The food business is a risky business. To realize just how risky, I invite you to log on to our website listed in this publication. As a trial attorney, I have heard it all: "It's not fair." "People are just suing over a tummy ache." "We shouldn't be blamed." "Although somebody got sick, we did everything right." "Why can you sue me?" To put things in perspective, according to the CDC, microbial pathogens in food cause an estimated 76 million cases of human illness annually in the United States, 325,000 hospitalizations and they cause up to 5,000 deaths.

Since 1993, Marler Clark has represented thousands of food illness victims in over 30 States. Settlements and verdicts in food poisoning cases have been nearly \$200,000,000. However, we only bring forward a fraction of the victims who contact our offices, some examples of what we passed on include:



### Christening the Carpet

"I opened a box of Tyson Buffalo wings and dumped them out on a plate to be cooked in the microwave. An unusually shaped piece caught my eye and I picked it up. When I saw that the "piece" had a beak, I got sick to my stomach. My lunch and diet coke came up and I managed to christen my carpet, bedding and clothing. I want them to at least pay for cleaning my carpet, etc. What do you think?"

### There is a Worm in My Freezer!

"I recently found a whole, 2-cm long worm packaged inside a Lean Cuisine frozen dinner. I have the worm in my freezer. I'm interested in discussing my rights in this matter. Could you please contact me, or refer me to a firm that may be able to give me assistance? Thank you very much for your attention."

Product liability is actually simple to understand. The test for strict liability is: Was the product unsafe and did it cause injury? The test for negligence is: Did they act reasonably? The test for Punitive Damages/Criminal Liability is: Did they act with conscious disregard of a known safety risk?

Many states have strict liability; we call it "strict" because it is a strict interpretation of liability. The only defense is prevention. It does not matter if they took all reasonable precautions. If they sell a product that makes someone sick they are going to pay. Wishful thinking does not help.



There is debate on the effectiveness of litigation. According to USDA "Lawsuits would seem to provide important feedback to these firms about how much they should invest in food safety. Food firms responsible for an illness do not reimburse much of the costs of illness borne by people who become ill. In short, the legal system provides limited incentives for firms to produce safe foods."

But our experience has been that food firms often radically change their behavior after a lawsuit. Especially when the evidence pointed to the prior knowledge of a company about a food safety problem.

In both the Odwalla lawsuit involving E. coli contaminated juice, and the Jack in the Box lawsuit involving E. coli in hamburgers we showed in court that both firms had known about food safety problems but ignored the evidence. Both of these companies are now practicing a very high degree of food safety and sanitation.

Marler Clark gives regular presentations about how to avoid lawsuits. We have a division known as Outbreak that is devoted to consulting to the industry so they can avoid problems. Some of the things we recommend to avoid problems include:

- Identify your food safety hazards through HACCP and hire qualified/committed people to run your food safety program
- Involve vendors in food safety
- Create and implement a plan, do not just say you have a plan
- Enter into indemnity agreements and add "Additional Insured"

Most importantly, think about how a jury would feel and react to your efforts if they knew everything about your operation the way you do. Remember, the jury is composed of 12 consumers.

In the event of a lawsuit, **do not** do the following:

- Do not deny liability and causation
- Do not destroy documents
- Do not claim contributory fault or blame the victim
- Do not point the finger at multiple defendants or fight with each other
- Do not think that you can beat strict liability
- Do not attack the health department investigation
- Do not offer a fraction of the value at mediation

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- *This month's Featured Food Safety Website: [www.marlerclark.com](http://www.marlerclark.com)*
  - ***Food Safety In Sight™** is compiled and edited by Roy E. Costa, R.S., M.S.*
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