

Intentional Contamination: Liability for the Criminal Acts of Employees.

In the excellent book, *Safe Food: Bacteria, Biotechnology, and Bioterrorism*, the author, Marion Nestle, describes several incidents involving intentionally contaminated food. One of the incidents, which occurred during the 2001 December holidays, caused a recall of 300,000 pounds of ham that an angry employee had spiked with nails, screws, and other non-food material. This is an example of what Dr. Nestle calls “food bioterrorism.”

Beyond the political implications of the use of food products as weapons, there is also the legal question of whether a company can be held liable for the criminal acts of an employee who decides, for whatever reason, to contaminate food products that then go on to make a number of people sick. To answer this question, we need first to discuss the rule of vicarious liability, or as it is also known, *respondeat superior*—which is Latin for “let the superior make answer.”

Under this rule, employers are liable for all harm caused by wrongful acts of an employee acting within the scope of his employment. One need not show the employer was negligent or at fault in any way. The employer is *vicariously* liable for the negligence of its employee while on the job, which is to say the law treats the employer as if it committed the act itself. Employees or agents are merely an extension of the employing company, and that acts of one are the acts of the other. Thus, for example, if a delivery-driver kills a person crossing the street while he is making a delivery, the employer is liable. If the driver is no longer on the job, however, and has taken the delivery-truck without permission for personal use, then there may be no liability, because a jury could find the employee was not acting within the scope of his employment.

As a general rule, there is no vicarious liability for intentional or criminal acts. This is so because courts have usually treated such acts as falling outside the scope of employment. We can see why this makes sense, because no employer hires a delivery-driver to use a company truck as a getaway car at a bank robbery. Similarly, no food company hires a person to sprinkle cyanide on its strawberries, or put thumb-tacks in its sausages. Such acts are not part of a job description, at least not for any legitimate (or sane) food business.

But does this mean there could never be liability arising from a case of intentional food contamination? Of course not. Like nearly every general rule in the law, there are exceptions to the rule that an employer is not liable for the criminal acts of its employees.

First, there is the doctrine of strict product liability. Recall that this is liability for the manufacture or sale of a defective product without the need to prove negligence. The focus is on the product, not on how it came to be defective. As a result, a person injured by nail-spiked ham can sue the manufacturer, and the fact that the ham was made defective by the criminal acts of an employee is legally irrelevant to the question of liability. So long as the product was defective at the time it left the manufacturer’s control, it is liable for all damage caused by the product defect.

The flip-side of this is that a manufacturer would not be liable for defects caused after the product left its control, except with proof of negligence. So, if someone working for a distributor intentionally contaminated the product, one would need some strange facts—*e.g.*, a company that

used a distributor it knew hired crazy people—to prove negligence against the manufacturer. The distributor, however, might still be on the hook, even for a criminal act, if it was foreseeable.

Foreseeability is a factual question that is usually resolved by the jury. The easiest way to show that a risk is foreseeable, and therefore must be guarded against, is to show that it happened before. So, for example, if a delivery driver has several prior convictions for drunken driving, a company that hires him without doing a background check is pretty likely to be held liable to a person he runs over after having had several beers with lunch. That is because the company was negligent in its hiring of the employee by failing to do a reasonable background check. Under the rules governing negligence, a company is responsible not only for what it actually knows, but for what it should have known—also know, as you may remember, as constructive knowledge.

A company can also be negligent for retaining (*i.e.*, not firing) an employee, or for being negligent in its supervision. And if such negligence is found by the jury to be the cause of damage, then the company will be held liable for it. Special care should therefore be taken to pay attention to the performance of all employees, keeping in mind that hindsight is 20/20. Something that may have appeared unthinkable at the time may seem as obvious as $1+1=2$ in retrospect. Surely, Tylenol's maker did not suspect in the summer of 1982 that its capsules would be used as a weapon. But it still ended up settling with the families of those killed as a result of someone else's criminal acts, and likely for a substantial amount.

In sum, a prudent food company should operate under the assumption that it will always be deemed liable for the injuries caused by the manufacture or sale of a defective product, even if that defect was caused by the criminal act of another, including an employee. That actually may not end up being the case, but a company will probably exercise greater care acting as if it was.