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Immunities and Defenses for Allegedly Negligent Inspections

Editor's note: From April 2001 to March 2004, the Journal featured a Legal Briefs column that presented short case studies about legal issues important to environmental health professionals. Vincent Sikora, the author of Legal Briefs during that time, passed away in December 2003. Because his columns were well received by many of our readers and provided practical and relevant legal information, we decided to search for a committed columnist with the appropriate knowledge and experience to restore Legal Briefs. We are happy to announce that we found several insightful and dedicated columnists: Bill Marler, Denis Stearns, Drew Falkenstein, and Patti Waller, all of the law firm Marler Clark. Their columns will appear in every other issue of the Journal.

The attorneys at Seattle-based Marler Clark, LLP, PS (www.marlerclark.com) have developed a nationally known practice in the field of food safety. Marler Clark represents people who have been seriously injured, or the families of those who have died, after becoming ill with foodborne illness during outbreaks traced to restaurants, grocery chains, and other food suppliers. The attorneys have litigated thousands of food contamination cases throughout the United States, many of them high-profile, including the Jack in the Box and Odwalla E. coli outbreaks; the Malt-O-Meal, Sun Orchard, and Chili's Salmonella outbreaks; the Senor Felix Shigella outbreak; and the Subway and Chi-Chi's hepatitis A outbreaks.

R. Drew Falkenstein, the author of this month's installment of our newly restored Legal Briefs column, addresses the liability of environmental health professionals for negligent inspections. Mr. Falkenstein joined Marler Clark as an associate attorney in 2003. His practice focuses on multiple-party complex litigation, most commonly in relation to foodborne-illness outbreaks.

In the first installment of this article, which appeared in the September issue of this *Journal*, I described the basic concept of tort liability: In any personal-injury lawsuit for negligence, regardless of the circumstances giving rise to injury, the plaintiff must prove that 1) the defendant owed the plaintiff a *duty* to act for the plaintiff's benefit, 2) the defendant *breached* that duty, 3) the defendant's breach of duty *caused* the plaintiff's injury, and 4) the plaintiff's injury is one for which the law allows redress, normally in the form of money *damages*. This article goes a step further and explains what defenses may be available for you, the environmental health professionals charged with ensuring the safety of the food supply.

To focus the inquiry a bit, this article will touch on two important legal doctrines, available to varying degrees in different states, that may shield you and your agency from liability even if your negligence, in your capacity as an environmental health professional, causes an injury.¹ The first is called the "public-duty doctrine," and the second is the concept of "immunity." In an instance where either applies, the effect is the same: The environmental health professional is not liable for the plaintiff's injury.²

Judges and lawyers like to explain the public-duty doctrine with the following maxim: "A duty to all is a duty to none." Clear as mud, right? The best way to illustrate, I've found, is by example. Suppose that a regulation or statute in your jurisdiction requires that environmental health professionals inspect every restaurant three times a year. Unfortunately, you were assigned to inspect a restaurant that was the source of an outbreak, and the victims of that outbreak find out that you inspected the restaurant only once. Are you liable?

Remember and apply the concepts discussed in the first installment. The plaintiff would first have to show that you, in your capacity as an environmental health professional, owed him a duty to act for his benefit. In states that follow the public-duty doctrine, courts would hold that your duty to inspect restaurants three times a year was a duty that you owed to the public generally, not to one person specifically, and thus not to the plaintiff. As a result, the plaintiff could not establish the four elements of a civil action, and you would not be liable.

Several exceptions exist to the public-duty doctrine, however, and two of them deserve particular attention. The first is the "special-relationship" exception. This exception would apply if some action that you take creates between you, as an environmental health inspector, and the injured person a nexus that is close enough to create a duty to act reasonably for that person's benefit.

Again, an example will clarify. Suppose that after his inspection, an environmental health professional says to a restaurant customer: "The place is clean as can be. Try the Cobb salad. I inspected the salad prep area, and all their sanitation procedures were top-notch, so there's no risk of cross contamination." By this statement, the inspector has created a sufficiently close nexus, or "special relationship," with this particular customer that the inspector will not be shielded by the public-duty doctrine if his inspection of the salad-prep area was, in fact, negligently done.

The second relevant exception to the public-duty doctrine is the "actual-knowledge" exception. As the name implies, an environmental health professional is not shielded by the public-duty doctrine if he or she has actual knowledge that a violation has occurred, yet fails to act to correct the violation.

Here's an example. Our inspector goes to a sandwich shop and conducts a full inspection, including in the kitchen prep area; he observes that food handlers do not wash their hands after using the bathroom and notes bare-hand contact, by the same food handlers, with ready-to-eat foods; he takes no action to cite or correct the violations; and a hepatitis A outbreak occurs as a result.

The "actual-knowledge" exception is simple and clear, and it plain makes good sense. Not many would argue that the inspector in the foregoing example, or the agency that employs him, should avoid liability given his conduct. And the public-duty doctrine would be of no help to the inspector.

There are other exceptions to the public-duty doctrine, but these two are most likely to arise in the context of a negligent restaurant inspection. Please keep in mind, however, that not all states follow the public-duty doctrine. Thus, for some readers of this article, the following discussion of immunity may be more instructive.

There are different kinds of immunity, but for present purposes it suffices to say that immunity is a legal doctrine that shields certain

government officials from liability, even if the plaintiff can prove every element of his negligence claim.

Once an absolute bar to suit against the government under any circumstances, in many states immunity now exists in only limited circumstances that are specifically enumerated by statute. In certain states, however, the legislature has done just the opposite, *keeping* blanket immunity and expressly enumerating the situations in which immunity does not apply.

New Mexico's scheme is representative. New Mexico Statute (NMS) § 41-4-4 states: "A governmental entity and any public employee while acting within the scope of duty is granted immunity from liability for any tort except as waived by the New Mexico [Statutes]." Then NMS §§ 41-4-5 through 41-4-12 list specific situations in which immunity does not exist.

It is relatively unimportant whether a state grants blanket immunity with certain exceptions or waives immunity altogether except in certain situations; the effect is the same: If the negligent act of a government official is within the purview of the state's immunities, the official cannot be liable.

I strongly urge each reader of this article to consult with the legal department at his or her particular agency. Find out whether your state is a "public-duty-doctrine" state or a pure "immunity" state. Then determine what exceptions apply and for what acts government officials, including environmental health professionals, will be immune. 🚗

¹ Please note, however, that the concepts discussed in this article apply only in your capacity as a government official.

² Keep in mind that most, if not all, states follow the doctrine of "respondent superior," which means that your agency would be responsible for the payment of any money damages award against you in your capacity as an environmental health professional. The money would not come from your bank account.

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